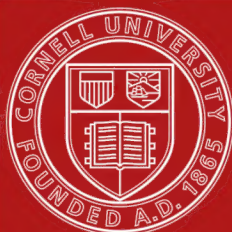


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SELECTED CASES

ON THE

LAW OF PROPERTY IN LAND

EDITED BY

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COLLEGE OF LAW

SECOND EDITION

WITH SUPPLEMENTARY CASES AND NOTES

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PREFACE.

This book contains a classified selection of cases on the topics usually taught in our law schools in the course on "Real Property."

Systematic and complete annotation was of course impossible within such narrow limits. A few notes have, however, been added, mainly at points where additional references or special suggestions seemed particularly necessary.

In the title I have followed Leake, whose "Digest of the Law of Property in Land" has been especially useful to me in the matter of analysis and classification.

W. A. F.

CORNELL UNIVERSITY,

September, 1898.

PREFACE TO SECOND EDITION.

In the former edition of this book certain topics received less attention than their importance and the general plan of the work would seem to demand. The supplementary cases in this edition are intended, to some extent, to remedy this defect.

In the supplementary notes attention has been called to the more important conflicts of opinion on the topics covered. In a number of instances in which the statement of facts in a case in the body of the book has seemed insufficient, it has been supplemented here. Many additional cases have been cited, but no attempt at exhaustive annotation has been made.

Many changes have been made in the plates for this edition, including some corrections and the addition of a number of foot notes.

A table of cases cited in the notes has been added and in this a reference has been given, when possible, to a duplicate report of the case.

W. A. F.

CORNELL UNIVERSITY,

September, 1904.

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SELECTED CASES
ON THE
LAW OF PROPERTY IN LAND.

SELECTED CASES
ON
THE LAW OF PROPERTY IN LAND.

PART I.
OF THE NATURE AND KINDS OF PROPERTY IN LAND.

CHAPTER I.
WHAT IS MEANT BY PROPERTY IN LAND.

EATON *v.* BOSTON, CONCORD AND MONTREAL
RAILROAD.

51 NEW HAMPSHIRE, 504. — 1872.

ACTION on the case, brought by Eaton against the Boston, Concord and Montreal Railroad for damage to his farm during a freshet.

Plaintiff's land lies on Baker river; some distance above the farm was a narrow ridge about twenty-five feet high, extending westerly from the hills on the east to the river, and protecting the meadows below from floods. Defendants in constructing their road made a deep cut through this ridge in consequence of which the waters of the river in time of flood occasionally flow through and carry sand, gravel and stones upon plaintiff's land; this is the damage complained of.

The court below ruled *pro forma* for the plaintiff. Defendants excepted, and now appeal.

SMITH, J. — * * * It is virtually conceded that, if the cut through the ridge had been made by a private landowner, who had acquired no rights from the plaintiff or from the Legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected

occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private landowner above supposed. Such a distinction is attempted upon two grounds, — first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor. [*After considering the first ground and finding that it cannot be sustained, the opinion proceeds as follows :*]

The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tort-feasors for doing what the Legislature authorized them to do. This involves two propositions: First, that the Legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the Legislature have power to confer such authority. * * *

The defendants cannot claim protection under an implied power, where an express power would be invalid; the Legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defense, then, really presents this question: Have the Legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel and stones" upon his farm, without making any provision for his compensation?

Although the Constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made

when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the Legislature cannot constitutionally authorize such a taking without compensation. *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, pp. 66, 70; Perley, C. J., in *Petition of Mount Washington Road Co.*, 35 N. H. 134, pp. 141, 142; Sargent, J., in *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143, p. 160; *State v. Franklin Falls Co.*, 49 N. H. 240, p. 251. The counsel for the defendants have not been understood to question the correctness of this interpretation of the Constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property" as used in the various State constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." Seldon, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence (3d ed.), 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power of

excluding others from using the land. See 2 Austin on Jurisprudence (3d ed.), 836; Wells, J., in *Walker v. O. C. W. R. R.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property," — although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A.'s unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A. than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See, Comstock, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said, — "What is the land but the profits thereof?" Sutherland, J., in *People v. Kerr*, 37 Barb. 357, p. 399; Co. Litt., 4 b. The private injury is thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two

instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 Am. Law Review, 197-198; Lawrence, J., in *Nevins v. City of Peoria*, 41 Ill. 502, p. 511. The explicit language used in one clause of our Constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken. . . ." Constitution of N. H., Bill of Rights, article 12. The opposite construction would practically nullify the Constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases.

First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge, but it is what Sir William Erle calls "consequential damage to the actionable degree." See *Brand v. H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249. These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice

as to the uses to which he will devote it, are materially limited." Brinkerhoff, J., in *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, p. 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. * * *

In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent — that is, usable or used only at times." See Goddard's *Law of Easements*, 125. If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield v. Lonsdale*, Law Reports, 5 Com. Pleas, 657, p. 696); and the weight of that burden is not necessarily dependent upon the source of the water, whether from below or above. See Bell, J., in *Tillotson v. Smith*, 32 N. H. 90, pp. 95-96. In both instances they turn water upon the plaintiff's land "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If

what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See Brinkerhoff, J., *ubi sup.*; Selden, J., in *Williams v. N. Y. Central R. R.*, 16 N. Y. 97, p. 109. An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. *Blake v. Rich*, 34 N. H. 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See Redfield, J., in *Hatch v. Vt. Central R. R.*, 25 Vt. 49, p. 66. What difference does it make in principle whether the plaintiff's land is incumbered with stones, or with iron rails? Whether the defendants run a locomotive over it, or flood it with the waters of Baker's river? See Wilcox, J., in *March v. P. & C. R. R.*, 19 N. H. 372, p. 380; Walworth, Chancellor, in *Canal Com'rs and Canal Appraisers v. The People*, 5 Wendell, 423, p. 452. * * *

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrongdoers; and that the ruling of the court was correct. [*The court then proceeds to consider the prior decisions. This part of the opinion is omitted here.*]¹

Exceptions overruled.

¹ See also *Morrison v. Semple*, p. 514, *infra*. — ED.

CHAPTER II.

REAL AND PERSONAL PROPERTY.

I. What estates and interests in land are real; what are personal.

1. LEASEHOLD INTERESTS IN LAND.

GOODWIN *v.* GOODWIN.

33 CONNECTICUT, 314. — 1866.

SUBMISSION to the Superior Court upon an agreed statement of facts. The widow, executor and heirs-at-law of Horace Goodwin, deceased, are the parties to the submission. The case was reserved for the advice of the Supreme Court of Errors. The facts appear in the opinion.

PARK, J. — Horace Goodwin, late of Hartford, deceased, after devising and bequeathing certain property to his wife, declared his purpose to be that the devise and bequest should not bar her right of dower in his estate.

A part of the property that he died possessed of consisted of an estate for the term of nine hundred and ninety-nine years, with an annual rent of forty-six dollars; and the first question submitted for our consideration is, whether the wife is entitled to dower in this part of his estate.

If an estate for so long a term of years can be regarded as real estate, then dower should be allowed, otherwise not. Revision of 1866, p. 421. The general principle is, that an estate for years is less than a freehold, and is nothing more than a chattel real, and is classed as personal property. 1 Swift Dig. 87, 167. Does a long term of years stand upon different ground in this respect from a short one? Of course the value of the reversionary interest depends upon the length of time the estate for years is to continue, and such value in the present case is exceedingly small, — too small for any substantial benefit; but does the difference in the value of reversionary interests make any difference in principle?

If this estate had been created nine hundred and ninety years ago, it would be conceded that Horace Goodwin would have had only a chattel interest. If then at the commencement it is to be regarded as a fee simple, at what time will it change to a chattel real? The claim of the plaintiff involves the necessity of fixing a

time, and the absurdity of holding that immediately before the time shall arrive the estate will be a fee simple, and immediately after a chattel interest merely. We are unable to discover any difference in principle in this class of estates, whether they are to endure for a short or a long period of time, and we are satisfied that no distinction can be found in the common law. It is true that in the case of *Brainard v. The Town of Colchester*, 31 Conn. 407, Judge Dutton, in giving the opinion of the court, says in regard to an estate like the one under consideration, with the exception that in that case a gross sum was paid as the consideration for the term:—“For all practical purposes it is a fee simple. The reversion becomes a mere imaginary estate.” The learned judge used this language in reference to the extent of the estate, and the fact that substantially it contained all the property, which is obviously true. It is equally obvious that there is some value to the reversionary interest, for it will constantly increase, and at the end of the nine hundred and ninety-nine years will be equal in value to the entire property. The learned judge did not mean to declare that, in the administration of justice between party and party, the law regards such an estate as a fee simple, and that it should be treated as such, which is the question now before us. Judge Swift, in his Digest, vol. 1, page 87, says:—“A lease for a thousand years is considered only as an estate for years, and the lessee has only a chattel interest, which by the common law goes into the hands of his executor or administrator at his decease.” Washburn in his first volume on Real Property, page 153, says:—“If, therefore, the estate of the husband be a term of years, his wife cannot claim dower out of it at common law, no matter how long it is to continue, nor though it be renewable forever.” The cases of *Ware v. Washington*, 6 Smedes & Marsh, 737, and *Spangler v. Stanler*, 1 Maryland Ch. Dec. 36, are to the same effect. See also 4 Kent Com., 35, 40, and Cruise’s Digest, title *Dower*. We are referred to no case where the contrary doctrine has expressly been held, but a case in the second of Root’s Reports, page 15, has been cited, where the levy of an execution upon an estate for the term of nine hundred and ninety-nine years as real estate was held good. But this decision was made on the ground that the case came within the spirit of the statute in regard to the levy of executions on real estate, and that without such construction the property would be exempt from execution.

On the whole we are satisfied that the common law deprives the plaintiff of the right of dower in the Market street property, and so we advise the Superior Court. [*Certain other questions are considered in the opinion; these are omitted here.*]

NORTHERN BANK OF KENTUCKY *v.* ROOSA.

13 OHIO, 335. — 1844.

CERTIORARI to the Superior Court of Cincinnati.

Roosa and each of the other defendants herein obtained judgments against T. B. Coffin at the October term, 1842. Executions were issued on each of these judgments within that term upon lands held by Coffin on lease for ninety-nine years, renewable forever. The Northern Bank of Kentucky recovered a judgment against Coffin at same term, which was levied on the same property in June, 1843. The property was sold on the Roosa execution and the money brought into court for distribution among the judgment creditors. Defendants claim that the surplus fund in court should be appropriated to the satisfaction of their judgments, excluding the Bank, while the Bank, on the other hand, claims a *pro rata* share with them.

The court below held that defendants by priority of levy had obtained priority of lien, and excluded the Bank from any share of the fund.

BIRCHARD, J. — Two questions arise in this case:

1. Are judgments liens upon permanent leasehold estates for one year?
2. Can one judgment, by a levy upon lands within ten days, obtain a preference over other judgments rendered at the same time, and levied within the year?

The solution of the first question depends upon the correctness of an opinion of this court, reported in *Loring v. Melendy*, 11 Ohio, 357. The opinion alluded to, was upon a point not necessary to the determination of the cause, and not considered by all the members of the court at the time. Hence the remark made in the case of *Lessee of Boyd v. Talbert*, 12 Ohio, 213, "the question whether a lease be realty or personalty," is open. This case brings the subject fairly before us, and is the point upon which the decision must turn.

It is not doubted that at common law, leasehold estates were but chattel interests. Upon the death of the owner, they vested in the executor, or administrator, and not in the heir, and were subject to the debts of the decedent as chattels.

Adjudications upon these points had been so frequent that, after the reason of the rule had ceased, courts, whose office is to declare the law, not to create it, felt bound, by the numerous decisions; and the common law, in this respect, was the law of Ohio, until modified by legislative enactment. Thus in *Bisbee's Lessee v. Hall*, 3 Ohio,

449, it was held that a lease for ninety-nine years was liable to execution as a chattel. And in *Reynolds v. Commissioners of Stark County*, 5 Ohio, 204, that a lease for ninety-nine years, renewable forever, was personal property, which, on the owner's decease, went to the executor. If, then, the legislation of the State had not affected the rules of the common law, the determination of the Superior Court was correct, for if the leasehold interest be regarded a chattel, no lien attaches prior to a levy, and the three judgments upon which executions were issued within ten days after the close of the term at which they were rendered, gained priority, and had a right to a *pro rata* division of the proceeds of the sale. The earliest statute to which our attention has been called, is the act of 1818, 2 Chase's Stat. 1040, requiring leasehold estates to be conveyed with the same formality as estates of freehold.

Next came the act of January 29, 1821, which provides that all lands of whatever description, lying within the State, the owners of which hold their titles by the tenure of permanent leases, "shall, in cases of judgment had, and executions levied thereon, be considered as real estate." Chase's Stat. 1185; Swan's Stat. 289. This act has never been repealed, but the act of March 5, 1839, Swan's Stat. 289, has been thought to have superseded it. Section 1 provides, "that permanent leasehold estates, renewable forever, shall be subject to the same law of descent and distribution as estates in fee are; or may be subject to; and sales thereof, upon execution, or by order of the court, shall be governed by the same laws that now, or hereafter may, govern such estates in fee." These statutes effect important changes in the common law.

1. The act of 1821, as to judgments had, makes the leasehold estate real estate — requires courts to consider it, so far as the judgments are concerned, real estate. This is the fair construction of the language, "in all cases of judgments had, and executions levied."

It follows, then, that the lien of a judgment, which is given upon real estate, attaches to such leasehold estates, because, as to the judgment, it is to be considered real estate. So, for all purposes connected with the levy and sale, and of the rights, either of judgment creditor, or judgment debtor, or purchaser, in any way connected with the judgments, executions, and levies.

The language of the act of 1829 is different. It does not direct how liens shall be regarded in reference to "judgments had," and does not, therefore, necessarily supersede the act of 1821. The two are therefore to be regarded as being in force. Both may well stand together. The legislative intention should be gathered from a con-

sideration of the provisions of both. Laws in *pari materia* should be construed together. We hold, then, that for all purposes connected with the laws regulating judgments, executions, sales, and descents, permanent leasehold estates are to be regarded as if they were freeholds, and not chattels.

The case of *Reynolds v. Commissioners of Stark County*, 5 Ohio, 204, above referred to, determined in 1832, was a bill to enforce the specific performance of a contract to make a lease; the heirs were held to be not the proper parties. This decision may well be reconciled with this opinion. In that case no question arose under the act of 1821, or the acts of 1837 and 1839, and it, consequently, can contain nothing conflicting with this decision. In *Murdock et al. v. Ratcliff*, 7 Ohio, 123, the question was, whether the estate in land of the Miami University, held by permanent lease, descended, on the decease of the owner, to the heir, or vested in the administrator. In pronouncing the opinion, the court say: "The only statute we find on this subject was a statute which declared that the tenants, or lessees, shall enjoy all the rights and privileges which they would be entitled to enjoy did they hold their lands in fee simple; a provision designed, in our opinion, to secure to the tenants civil and political privileges, not to change the quality of their estates." To reconcile this decision with our construction of the act of 1821, it is only necessary to observe that the case presented no question concerning judgments and executions, and the cause was decided in 1835, before the other acts referred to were passed.

The next question arises under the act of March 1, 1831. Swan's Stat. 467. The second section of this act gives a lien upon the lands within the county, from the first day of the term at which judgment was rendered. By section 23 of the same act, no judgment, on which execution shall not have been taken out, and levied within a year, shall operate to the prejudice of any other *bona fide* judgment creditor, etc. By section 4, two or more writs issued on judgments, within ten days after their rendition, have no preference to each other; so, if delivered to the officer on the same day. All other writs have preference in the order of their delivery, provided "that nothing herein contained shall be so construed as to affect any preferable lien which a judgment may have upon lands," etc.

These sections refer to liens arising both from judgments and levies. Section 2 gives the judgment a lien on lands within the county. Section 4 gives, or rather recognizes, a lien from the time of the levy, both upon lands and personal property. The latter regulates the lien which it creates, but provides against any interference with older or preferable liens. Section 23 creates no lien;

it merely limits it in the given case. Let us apply the principles of the proviso in section 4 to this case. The defendants each acquired equal liens from the date of the levies made upon their executions; but the plaintiff had a lien from the date of her judgment, which was elder, and therefore a preferable lien. Under the proviso of section 4, it would overreach the right of defendants. They are therefore thrown back, and compelled to rely on their judgment liens created by section 2, and limited by section 23, or lose the proceeds of their sales; relying upon their judgments, they have equal liens with the plaintiff, and no more. The money should have been distributed to each of the parties *pro rata*, in proportion to the amount of their several judgments, and in failing to make this equal distribution the court below erred.

Judgment reversed.

2. ESTATES PUR AUTRE VIE.

REYNOLDS *v.* COLLIN.

3 HILL (N. Y.), 441. — 1842.

Costs against the plaintiff suing as administrator.

The plaintiff's intestate held certain premises under a lease for three lives, one of which lives continued after his death. Subsequent to the intestate's death, the defendant's testator occupied the premises under the plaintiff, and the present action was for that use and occupation of the property. The cause having been referred, there was a report for the defendant on the ground that the claim was barred by the statute of limitations. The defendant now moved that the plaintiff be ordered to pay the costs of the action.

By the court, BRONSON, J. — On the death of the owner, an estate *pur autre vie* becomes a chattel real, and goes as assets to the executor or administrator to be applied and distributed as part of the personal estate of the testator or intestate. 1 R. S. 722, sec. 6; 2 Id. 82, sec. 6¹. The cause of action accrued after the death of the intestate, and the plaintiff did not necessarily sue in his representative character. In such cases it is well settled that an executor or administrator must pay costs if his suit fails.

Motion granted.

¹ New York Real Property Law, § 24. See also New York Code Civ. Pro., § 2712, subd. 1. — ED.

3. SHARES OF STOCK IN LAND-HOLDING CORPORATIONS.

JOHNS *v.* JOHNS.

1 OHIO STATE, 350. — 1853.

PETITION by the widow of Benjamin Johns to have dower set off to her in certain shares of railway stock owned by said Johns at his decease. The executor answers alleging that such shares are personal and not real estate.

THURMAN, J. — The Ohio and Pennsylvania R. R. Co. was incorporated February 24, 1848. 46 Ohio Local Laws, 261. The fifth section of its charter provides that the company "shall have all the powers and privileges, and be subject to all the restrictions and provisions of the act regulating railroad companies," passed February 11, 1848. 46 Ohio Laws, 40. The third section of this latter act declares that the shares of stock in the companies that may be subject to its provisions, "shall be regarded as personal property, and shall be subject to execution at law." It is therefore manifest, that the petitioner is not entitled to dower in the ten shares of the stock of the Ohio and Pennsylvania R. R. Co., for they are clearly personalty. But the question in respect to the stock in the Mansfield and Sandusky City R. R. Co. is not so easily disposed of. For that company is not, so far as the case shows, subject to the provisions of said act of February 11, 1848. It was previously chartered and organized, and that act does not interfere with companies created before its passage. Turning then to the charter of the company, we find in it no provision declaring whether its stock is realty or personalty. We are thus brought to the general question, whether railroad shares in Ohio are, in the absence of express legislative enactment, to be considered as real, or personal estate. This question must be determined by a reference to the principle of the common law, and the general statutes of the State, that have a bearing upon it. And its solution is not without difficulty; for as to the common law the adjudicated cases are directly conflicting, and when we resort to our statutes, the chief aid we derive is from analogies and inference. * * *

By a statute of 10 Anne, the mayor, aldermen and common council of the city of Bath, their successors or assigns, or such persons as they should appoint, were authorized to improve the navigation of the river Avon, and to charge tolls on persons and property transported thereon. * * *

In *Buckeridge v. Ingram*, decided in 1795, 2 Ves. Jr., 651, the question was directly made, whether these shares were personal or real

estate, and it was decided that they were real estate and subject to dower. The master of the rolls held that the right to take the tolls was an incorporeal hereditament arising out of realty and was therefore a "tenement."

And he remarked: ¶ "I have no difficulty in saying, that wherever a perpetual inheritance is granted, which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exercisable within it, it is that sort of property the law denominates real. ¶

The principle of these cases was followed, and possibly extended, by the Supreme Court of Connecticut, in 1818, in the case of *Welles v. Cowles*, 2 Conn. 567, in which it was held that shares of an *incorporated* turnpike company are real estate. The right to the tolls, said the Court, "is a right issuing out of real property, annexed to and exercisable within it and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the *New River*, in canal navigations, and tolls of fairs and markets;" citing *Drybutter v. Bartholomew*, 2 Peere Williams, 127, *Habergham v. Vincent*, 2 Ves. Jr. 232; and *The King v. The Inhabitants Chipping Norton*, 5 East, 239.

And in answer to the argument that the individual stockholders had only a claim on the company, and not upon the realty, and that this must be of a personal nature, the Court said: "But the stockholders, as members of the company, are owners of the turnpike road; and it is in virtue of this interest, that they have their claims for the dividends, or their respective shares of the toll. It is not a mere claim on the corporation." This decision was recognized as law, in 1822, in a suit between the same parties, 4 Conn. 182, though the question was not expressly made.

In 1835, the Supreme Court of Pennsylvania held that "a toll-bridge erected by two individuals across a river between their lands, by legislative authority, is real estate." The court said that the right was "not only a right arising out of the soil, but so far as the abutments of the bridge are concerned, it is the soil itself." *Hurst v. Meason*, 4 Watts, 346. It is to be observed, however, that it does not appear that the builders were incorporated.

In *Price v. Price's Heirs*, 6 Dana, 107, the Court of Appeals of Kentucky, in 1838, held that the stock in the Lexington and Ohio Railroad Company is real estate. Without citing any adjudicated case, the Court came to a conclusion which is thus expressed: "The right conferred on each shareholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and though it springs out of the use of personalty, as well as lands and

houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament."

On the other hand, the Supreme Court of Massachusetts, in 1798, in *Russell et al. v. Temple and Others*, 3 Dana's Abr. 108, held that shares in incorporated bridge and canal companies are personalty. The case was between the widow and heirs of Thomas Russell, the former contending that the shares were personal property, and that consequently she was entitled to a distributive portion of them, and the latter insisting that they were realty, and that therefore she had but a dower estate. The question was very fully discussed and was decided (says Professor Greenleaf in his edition of Cruise), "upon great consideration."

For the heirs it was urged that these shares were real estate; because, it was said, "the estates were real in the corporations; and that if the estates in the corporations were real, the estates of the individual members in them followed their nature, and were real; and that the frequent declaration of the Legislature declaring such shares personal estates, at least show a doubt, that when one has a right to receive rent, he has only a right to receive a sum of money, yet it does not follow that his estate is not real estate out of which his rent issues."

For the widow it was argued that the shares were personalty, because the estate (in the bridges, canals, towing-paths, wharves, and lands), "can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns. The estates can never vest in, or be divided among the individual members, to hold as tenants in common, etc., in their private capacities. Only the corporation can possess the estate, and that only by possessing the charter; and only the corporation can be taxed for it on common-law principles; and on these can it alone be taken in execution for the debts of the corporation."

"That the share is personal estate though the corporation hold real estate; for the individual member has no estate, but only a right to such dividends as the corporation from time to time assigns to him. He is unknown in the grants made to it, and he cannot grant any part of the estate; nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend is case in assumpsit, or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits."

The judgment of the court was, as I have stated, that the shares were personal estate. [“The principal reason of the decision,” says Dane, “appears to be, because the court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits or dividends.”] And so the law has been held to be since this decision was made.”

In his edition of Cruise, Greenleaf says: “Shares in the property of a *corporation* are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect water-works, and the like, as was the case of the New River water, the navigation of the river Avon and some others, and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll-bridge, canal and turnpike corporations by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. [But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated; in modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate.]” 1 Greenleaf’s Cr. Dig. 39, 40.

In support of this statement, Mr. Greenleaf cites the cases we have already noticed, and some others that require consideration. One of the most important of these is *Blight v. Brent*, 2 Y. & C. Exch. Rep. 268, 294. It involved the question whether the shares in the Chelsea Water-works Company were realty, or personalty. The act of incorporation left the question open, as it contained no declaration upon the subject. The court reviewed the cases bearing upon it, and came to the conclusion that the shares were personalty. [*The cases of Bradley v. Holdsworth* 3 M. & W. 422, and *Duncuft v. Albrecht*, 12 S. & S. 189, are next considered.]

A careful examination of the adjudications upon the subject has brought us to the conclusion that, according to the weight of authority, the shares in question are personal property. In the early English cases the distinction, now well understood, between

the property of a corporation and the rights of its members, does not seem to have been taken, and it appears to have been assumed that each shareholder had an estate in the corporate property, and that, consequently, if that property was real, his share was also realty. But the cases we have cited abundantly show that the distinction above mentioned is now fully recognized in England, and that the property of a corporation may be mainly, if not wholly, real, and yet the shares of its members be personalty. This may, possibly, be an innovation upon the ancient principles of the common law, but it is not more so than has taken place in the case of ordinary partnerships. Thus, the old doctrine seems to have been that there could be no partnership, properly so called, in land, but the contrary doctrine is now universally held; and that a widow of a deceased partner is not dowable in lands which the firm owned and regarded as partnership stock, is settled by numerous decisions, among which are the cases in 1 Ohio Rep. 535, and 8 Ohio Rep. 328. As to the Connecticut case, *Welles v. Cowles*, there is, possibly, no necessary conflict between it and the view we take of the present case. There the right to tolls may be said to have arisen wholly out of realty, the turnpike road; but in the case at bar, the profits of the company accrue from real and personal property, and personal services. The turnpike company did not carry either goods or persons. It furnished no vehicles for the transportation of either, and had no care of, or responsibility for, either. It merely allowed a transit over its road upon the payment of a toll. But a railway company is a common carrier. It furnishes not simply a road, but also the conveyances that pass over it; it undertakes the transportation of passengers and freight, and incurs the responsibility of a common carrier as to both.

It was, therefore, justly said by Parke, B., in the quotation before given, that the interest of each individual shareholder is a share of the net produce of both real and personal property (and he might have added, of personal services), when brought into one fund. But we would not be understood as approving the decision in *Welles v. Cowles*, for we are of opinion the shares in an incorporated turnpike company as well as in a railway corporation, are personal property. The same distinction we have drawn between a turnpike and railroad company may be drawn between the latter and the Avon navigation case, and the cases of tolls upon fairs and markets, and rents issuing out of realty. And this distinction seems to be taken by Greenleaf in the quotation hereinbefore made. As to the case in 4 Watts, it is enough to say that it does not appear that the bridge builders were a corporation, or that they intended to convert

the bridge and right of taking tolls into a stock. The decision in 6 Dana, 107, is certainly directly opposed to our views. The court, in that case, seems to have wholly overlooked the distinction between the right of the company and the right of the shareholder, and to have concluded that if the company's franchise of taking toll was an incorporeal hereditament, springing even in part from the realty, the shareholder's interest could not be personalty. Indeed, the court call the shareholder's right a franchise. Now, I imagine that it is the artificial being, the corporation, and not the individual shareholder, that has the franchise, and possibly it is not immaterial whether the toll arises wholly out of realty, or partly out of realty and partly out of personalty. "An annuity," says the court, "though only chargeable upon the person of the grantor, is an incorporeal hereditament, and though the owner's security is merely personal, yet he may have a real estate in it," citing 2 Bla. Comm. 40. True, such an annuity is realty so far as descent is concerned, or, more properly speaking, though personal in itself, it descends as if it were realty, the reason of which is that it is limited by the grant to the heir, otherwise, it would not be a hereditament. The authorities, cited by the defendant, show conclusively that it is only as regards descent that it is considered as realty. But unless there is some provision in the charter of the Lexington and Ohio R. R. Co., limiting the stock to the *heirs* of the stockholder, the illustration put by the court is not in point.

It must be admitted, however, that the definition of Lord Coke, cited with approbation in *Buckeridge v. Ingram*, sustains the position that the franchise was a tenement savoring of the realty; for, in the language of Coke, it was "exercisable within lands." And, as before stated, we prefer to place our decision upon the distinction between the estate of the corporation and the individual rights of its members, rather than upon a distinction between the cases in which the profit arises wholly out of realty, and those in which it springs partly from realty and partly from personalty, though this latter distinction seems to receive much support from both reason and authority. [*The court next shows that the general policy of the Legislature is in favor of the view which holds such shares personal*].

The act regulating dower provides: "That the widow of any person dying shall be endowed of one full and equal third part of lands, tenements and real estate of which her husband was seized, as an estate of inheritance, at any time during the coverture." Swan's Stat. 296. It follows, that if turnpike and railroad shares are real estate, every widow whose husband was, at any time during the coverture, the owner of such shares, is entitled to dower therein,

although he may have sold or transferred the same; unless the transfer was by deed of the husband and wife, duly executed, attested and acknowledged. We cannot imagine that the Legislature ever intended any such thing. * * *

In whatever way we view the case, whether upon adjudication, reason or our statute laws, we arrive at the conclusion that the shares in question are personal property. The bill must therefore be dismissed.

Bill dismissed.

4. LAND TREATED AS MONEY BY "EQUITABLE CONVERSION."

CRAIG *v.* LESLIE.

3 WHEATON (U. S.), 563. — 1818.

[*Reported herein at p. 71.*]

II. Leading differences in the law as between real and personal property.

I. IN THE "LAW OF SUCCESSION" TO ESTATES OF DECEASED PERSONS.

OVERTURF *v.* DUGAN.

29 OHIO STATE, 230. — 1876.

PETITION in the Court of Common Pleas to compel the widow and heirs-at-law of Thomas Dugan, deceased, to pay to Overturf, as administrator, rents accrued since Dugan's death; also to enjoin them from collecting any further rents, and the tenants from paying such rents to them. Decree in favor of the petitioner. On appeal to the District Court such decree was reversed and the injunctions were dissolved. The administrator now moves for leave to file petition in error.

GILMORE, J. — There is no controversy as to the facts in the case; they are admitted to be as stated in the pleadings.

The intestate having died in the month of November, 1873, there is no question made as to the right of the administrator to take, as assets, the emblements or crops growing upon the lands for the then current year, viz., from March 1, 1873, to March 1, 1874.

But the real estate of the intestate not having been sold, the controversy relates to the accruing rents for the succeeding year, *i. e.*, from March 1, 1874, to March 1, 1875.

On the part of the administrator, it is claimed that on the admitted facts in the case, he, as trustee for the creditors, is entitled to these rents. On the other hand, the heirs claim that, being the owners and in possession of the lands, they are entitled to these rents in their own right, subject to the widow's interest therein.

Upon the facts admitted, which of these respective claims will the law recognize as valid?

1. By an unbroken line of decisions in our State it is conclusively settled: That the real estate of an intestate descends at once to his legal heirs; and the legal title is vested in them, subject only to the right of the administrator to sell the same for the payment of the debts, in the manner prescribed by law.

From this it is at once apparent that the administrator of an intestate has no interest whatever in the lands of which his intestate died seized, except the right of sale for the purpose specified. Not having the title, he cannot, in the absence of statutory authority, take possession of the lands, and no such authority is given to him. The only power over the lands with which he is clothed is a power to sell the same to pay the debts of his intestate, and this power can only be exercised and executed under the sanction of a court of competent jurisdiction, in pursuance of statutory authority, and a sale of his intestate's lands, made without such sanction, would be void. The special case provided for by the 120th section of the administration law (S. & C. 590) forms no exception to the general rule, for there the intestate having transferred his land to defraud his creditors, the title could not descend to his heirs. It is the proceeds of the sale of the land alone, and not the land itself, that the administrator can take as against the heirs to whom the land descended.

2. The title to the real estate, which the heir takes by descent, entitles him to the possession of his ancestor; and this draws to it the right to receive, as against the administrator, the rents and profits of the land (emblemments excepted) during the continuance of his possession, which may be from the death of the ancestor until the actual sale of the land by the administrator for the payment of the debts of his intestate.

The above propositions are perfectly consistent with the decisions of this court in reference to the debts of the intestate being a charge or lien on the land; and that this charge or lien is paramount to the rights of the heir-at-law, and that it can only be removed by

the payment of the debts, or by the lapse of time. *Stiver v. Stiver*, 8 Ohio, 221; *Ramsdall v. Craighill*, 9 Ohio, 197; *Shelden v. Newton*, 3 Ohio St. 504.

This charge or lien is a legal incident to the ownership of the intestate, and operates in favor of his creditors and for their security. The administrator has no power over this lien or charge; he cannot by his individual act either release the land from it, in favor of the heir, or enlarge its operations in favor of the creditors of the estate. As has been said, he can only obtain the proceeds of the land by an authorized sale.

Neither the filing of the petition to sell the lands, before the rents in question commenced accruing; nor the order of sale granted by the court shortly after they began to accrue; nor the declaring of the estate probably insolvent by the proper court, had the effect of enlarging the rights of the administrator in reference to the accruing rents. The heirs were still legally in possession as owners of the land, and entitled to the rents; and as has been said, the lien in favor of the creditors was upon the land itself, and not upon the rents accruing during the time intervening between the death of the intestate and the sale by the administrator. Rents thus accruing are not and cannot be said to be assets belonging to the administrator of the intestate's estate, for they were not in existence at his death, and the creditors of the intestate cannot claim them for the payment of his debts, for they never belonged to him. They therefore must belong to the owners of the land who are the widow and heirs.

The fact that an administrator may be ordered by the court to include in the inventory and appraisement, the real estate of the intestate, as provided in sections 3 and 29 of the administration act (S. & C. 567, 572), does not affect the question. The object of this legislation was not to enlarge the powers of the administrator over the real estate, but to put the court in possession of the information, with a view of enabling it to more intelligently discharge its duties in supervising the conduct of the administrator.

Sections 57 and 113 of the act (S. & C. 576, 587) require the administrator to account for after-acquired assets; but the rents of the real estate that descended to the heirs, accruing after the descent was cast, not being assets of the estate, these sections impose no duties upon the administrator in reference to them.

The lands in question were all incumbered by mortgages executed by the intestate, the conditions of which respectively were broken at the time of his death. None of the mortgagees had commenced proceedings in foreclosure, or asked the appointment of a receiver

to take charge of the lands and rents. Other debts to large amounts are unsecured.

The plaintiff in error claims that: "Upon general equity principles an administrator who stands as trustee for creditors may come into court for instructions without reference to the statute, and from his showing, if it appears that the estate is insolvent, and that the naked land with the other assets will not pay the debts, the accruing rents can be appropriated for this purpose."

There are no authorities cited in support of this proposition. While it may be conceded that the mortgagees, or any of them, might go into a court of equity and assert their rights under their mortgages, after condition broken, and have a receiver appointed to take charge of the lands and collect accruing rents for their benefit, yet the right to this relief would rest upon the fact that they were the owners of the legal title, but not having the right to the possession under our present practice, equity would give them that which is usually an incident to possession — that is, the rents and profits until foreclosure and sale. But general creditors would have no such equitable right by reason of the fact that their debts are a charge or lien upon the lands of the intestate in the hands of the heirs. They cannot proceed directly against the lands. Their rights must be wrought out through the administrator, and, as we have seen, his rights, powers, and duties are all strictly statutory, and no statute exists giving the administrator a right to go into a court of equity and compel the heirs to give up rents that legally belong to them, for the benefit of the creditors of their ancestor.

Motion overruled.

WEBSTER *v.* PARKER.

42 MISSISSIPPI, 465. — 1869.

[*Reported herein at p. 42.*]¹

2. IN THE LAW OF DOWER AND CURTESY.

GOODWIN *v.* GOODWIN.

33 CONNECTICUT, 314. — 1886.

[*Reported herein at p. 8.*]

¹ See also abstract of case of *Murdock v. Ratcliff*, 7 Ohio, 119, in *Northern Bank of Kentucky v. Roosa*, at p. 12, *supra*. — ED.

HOUGHTON *v.* HAPGOOD.

13 PICKERING, (MASS.), 154. — 1832.

APPEAL from a decree of the judge of probate ordering distribution of the balance in the hands of Hapgood as executor of the will of Jonathan Grout.

The following clause is contained in the will: — “The rest and residue of my estate I give, after paying my debts, to my daughters Sarah Brooks, Betsey Hapgood, Lydia Houghton, Dolly Hapgood, and Sukey Grout, always providing that if this residue shall exceed one thousand dollars in value to each daughter, then the overplus shall be divided among all my children, after first taking from such overplus enough to clear the homestead farm for John, if not otherwise done.”

The executor represented the estate as insolvent and took proper steps to have the real estate sold to pay the debts, but as a result of the sales he obtained title to it himself personally. The estate was not in fact insolvent, and a considerable sum, the proceeds of the real estate sales, remains to be divided.

Lydia Houghton died some time after her father's decease, leaving, her surviving, her husband, the appellant, and two children. Further facts appear in the opinion.

WILDE, J., delivered the opinion of the court. The questions arising upon this appeal depend upon the construction of a clause in the last will and testament of the late Jonathan Grout, which is deemed doubtful, and upon the proceedings of the executor in administering the estate, which for many years past have proved such a never-failing fountain of controversy in the courts of this commonwealth, and in those of an adjoining State, where a considerable portion of the estate of the testator was situate.

Upon the facts in the case the counsel for the appellant has endeavored to maintain two positions: — 1. That the residuary clause, at least to the extent of \$1,000, is to be construed as a pecuniary legacy, and so vested in the appellant. 2. If it is not so construed, but is considered as a residuary devise of real estate, then that the land devised was converted into money, with the consent of Lydia Houghton, and that it thereupon vested in her husband, the appellant.

Neither of these positions can, we think, be maintained.

The testator's property consisted principally of real estate, the personal estate being insufficient to pay his debts. The residuary clause, therefore, is in express language a disposition and devise of

real estate, and there is nothing to indicate an intention of giving a pecuniary legacy.

It has been said, that if the lands had not been sold, it would be difficult, if not impossible, to execute the will, construing the residuary clause as a devise of lands; but we can perceive no impossibility, nor, indeed, the slightest difficulty in making a distribution of the property according to the terms of the will. The lands might be appraised, and if the appraised value should not exceed the sum of \$5,000, or \$1,000 to each daughter, then the whole would vest in them in equal shares. If the value should exceed that amount, then so much of the land as would be of that value might be set off to them, leaving the residue to be divided among all the children.

As to the second question, whether Lydia Houghton assented to the sales made by the executor—The evidence appears to us not satisfactory. Courts should be slow to sanction the assent of a wife to the conversion of real estate into money, without convincing proof that she assented understandingly, and with a full knowledge of the legal effect of such a conversion upon her rights and interests, and without any undue influence on the part of her husband. The loose conversations of the wife, such as are proved by the deposition of Polly G. Brooks and George A. Houghton, unsupported as they are by any circumstance to show that she understood the legal effect of such a change, and did not act under the influence of her husband, ought not, we think, to be binding upon her or her heirs. Upon her death, therefore, her share of the real estate descended to her heirs, the sales of the executor being void. But the heirs have since elected to confirm the sales, as they had a right to do, and are, therefore, entitled to an equivalent in their distributive shares of the fund produced by the sales.

They are, however, not entitled to the whole share belonging to Lydia Houghton. The husband, during the life of his wife, was entitled to the profits and income of her real estate; and he continues entitled to receive the same as tenant by the curtesy. The interest of the money for which the lands sold, consequently, belongs to him, he relinquishing his claim to the lands. We are aware that this may probably exceed the profits or income of the estates sold, and so probably the amount of sales exceed the present value of the estates sold. But to these advantages, if any there be, the parties are respectively entitled. The appellant's distributive share will, upon these principles, be the amount of the past interest, and the present value of his life-right in the future interest or income of his deceased wife's share of the fund arising from the sales.

The expectation of life is to be determined by Dr. Wigglesworth's Table of Mortality, and the value of the life-right may be ascertained by computation, or by Dr. Bowditch's life-annuity tables.

The decree of the judges of probate is to be reversed, and a new decree entered up in conformity to these principles, and the papers are to be remitted to the Probate Court for further proceedings.

3. IN HUSBAND'S COMMON-LAW RIGHT TO WIFE'S REAL AND PERSONAL PROPERTY.

HOUGHTON *v.* HAPGOOD.

13 PICKERING (MASS.), 154. — 1832.

[*Reported herein at p. 24.*]

RILEY'S ADMINISTRATOR *v.* RILEY.

19 NEW JERSEY EQUITY, 229. — 1868.

THE CHANCELLOR. — The complainant, as administrator of the estate of Ann Riley, calls upon the defendant to account for the rents of certain leasehold property in Jersey City, held by Ann Riley at her death, and which the defendant has received; he claims to have received them in his own right, and that they are legally his own, by a bequest in the will of Miles Riley, the husband of Ann. Ann Riley became entitled to the leasehold estate by the will of her former husband, James Cummings, who bequeathed to her one-third of it, and a right of support out of the other two-thirds. After Cummings' death, she was married to Miles Riley, who died in her lifetime, without having in any way aliened or disposed of the leasehold estate, but by his will gave it to his brother Owen Riley, the defendant.

The defendant claims that Miles Riley in his lifetime had erected buildings upon this property, and collected the rents, and by this he had shown his intention to appropriate this leasehold, which, as a chattel real of his wife, he had a right to reduce into possession, and appropriate.

The evidence shows, that in the life of Miles Riley and after his marriage with Ann Cummings, buildings were erected on the premises, but the clear weight of evidence is that they were erected by his wife, and paid for out of the rents of the whole premises, which the

executors of Cummings permitted her to receive and collect for that purpose. Miles Riley appears to have aided by performing some work in the erection of the buildings, and to have contributed a few dollars towards the erection.

The only question that arises is, whether these leasehold premises were disposed of, or appropriated by Miles Riley in his life, so as to vest the property in him, and take away the right of his wife after his death. Miles Riley died in 1848, and this question must be decided by the law as it stood then. By that law, the personal property of a woman, upon her marriage, vested in her husband; her goods and chattels absolutely; he had the right to the possession of her choses in action, and of her chattels real, and could at any time dispose of, collect, or sell them, and by this the proceeds of them became his absolutely; but if he did not reduce them to possession by disposing of them, or some equivalent act, they survived to her, and would not pass by his will, which did not take effect until his death, when the title had become vested in her by the survivorship.

Taking possession, collecting rents, interest, or dividends, has never been held to be a disposition of the property, or a reduction into possession, so as to take away the wife's right of survivorship. Nor has it ever been held that the erection of buildings by the husband on the leasehold lands of the wife was such disposition of them as to take away her right. An actual disposition by sale, lease, or mortgage, or contract for such object, has always been required to take away the wife's right of survivorship. A mortgage or a sale of part, or a lease of part, or for a less term, only bars the wife *pro tanto*; her right of survivorship remains in the equity of redemption, and the residue of the premises or term.

In this case no interest in the premises passed by the will of Miles Riley; the whole survived to Ann Riley, and her administrator is entitled to the fund.

BABB *v.* PERLEY. ✓

1 MAINE, 6. — 1820.

TRESPASS on the case. Verdict for defendant, subject to the opinion of the Court.

MELLEN, C. J. — The facts in this case present some questions, respecting which judges and counselors have taken different views. They appear somewhat novel and we do not find that they have received any express judicial decision. We have examined the cause

with much attention, and after some vibration of opinion have at length arrived at a result with which we are all satisfied.

The facts reported by the judge who sat in the trial of the cause led the counsel, in the argument, to the consideration of two questions; and it may be convenient for us to pursue the same course.

The first inquiry is, "What were the rights and liabilities of Babb in virtue of his acquiring a freehold estate in right of his wife in the land in question, and in consequence of his destroying or selling and disposing of the wood or timber growing on the land?"

The second inquiry, is, "What are the rights and liabilities of Perley, as assignee of said Babb and owner of his former interest in the land, in virtue of his ownership and consequent upon his destroying or selling and disposing of said wood and timber?"

With respect to the first question, it may now be observed that the land on which the trees were cut by Perley is admitted to be a wood lot, uncultivated, and in a state of nature.

When a man marries a woman who is seized in fee of lands, he thereby gains a freehold in her right. He acquires a life estate. It will be an estate for the life of the wife only, (unless he be tenant by the curtesy) in case he should survive her; or an estate for his own life, in case she should survive him; because the law presumes that the coverture will continue until the death of one of the parties.

"He does not become, by the marriage, absolute proprietor of the inheritance; but as the governor of the family, is so far the master of it, as to receive the profits of it during her life." Co. Lit. 351; 2 Bl. Com. 433; *Barber v. Root*, 10 Mass. 261. These profits, this *usufruct* of the wife's lands, the husband may dispose of according to his pleasure, without or against her consent.

For any injury to the annual profits, or for taking away the emblements, the husband may maintain an action against the wrongdoer, in his own name, without joining the wife. But for an injury to the inheritance, as for cutting down the timber growing on the wife's land, he cannot maintain such action without joining the wife; for the damages will survive to her. 3 Lev. 403; Vern. 82; Reeves' Dom. Rel. 130, 133.

These cases mark the distinction between the rights of the husband and those of the wife in relation to the lands of which they are seized in her right. If, then, the husband has a right only to the *usufruct* or profits of his wife's lands, the question is, what were the rights which Babb had in the land above-mentioned, and what control over it? Could this land yield any profits, according to the legal signification of the term? Some light may be thrown upon this point, by considering the principles of the decision in the case

of *Conner v. Sheppard*, 15 Mass. 164. In this case the court decided that a widow could not by law be endowed of lands in a wild and uncultivated state; and the reason assigned by the court is, that "of a lot of wild land, unconnected with a cultivated farm, there are no rents and profits." Again, they say, "In many instances the inheritance would be prejudiced without any actual advantage to the widow to whom the dower might be assigned. For according to the principles of the common-law, her estate would be forfeited, if she were to cut down any of the trees valuable as timber. It would seem too, that the mere change of the property from wilderness to arable land, or pasture, might be considered as waste." "The very clearing of the land would be actually, as well as technically, waste of the inheritance."

In the case of *Sargeant et al. v. Towne*, 10 Mass. 303, the court determined that a devise of wild and uncultivated land carried a fee without any words of inheritance; because a life estate would be of no use to the devisee. He would not, even if he could without committing waste, undertake the cultivation of the land devised.

It would seem from the authorities above cited, that the plaintiff, Babb, prior to the extent of Perley's execution, had no right to cut down the timber on his wife's land, or to do those acts which, in the case of a tenant for life, or years, would be waste. It is true Babb had the power to do it: and so he had the power to pull down a house, had there been one on the land; or to beat and wound his wife; — but not the right to do this; because, in the last case, he would be indictable for the offense: — and, we believe that a Court of Chancery would prohibit a husband from a wanton destruction of the wife's house or property. The wife, in all these cases, is destitute of the usual remedy by action for damages against the husband for this or any other injury to her inheritance; because a wife can in no case sue her husband. The agreement to marry, and the consequent marriage, amount to a waiver of this right of action against each other. This principle is founded on reasons of sound policy. But it does by no means follow that because the husband has the power of doing many acts prejudicial to the interest or inheritance of his wife with impunity, that he can assign and transfer this power to a third person, and give him this privilege of impunity. In this situation of parties policy does not require that this impunity should exist; and, therefore, it does not exist.

As to the second question, we would observe that whatever were the rights and liabilities of Babb as husband, those of Perley, the assignee, seem to be more defined and better explained; and if any doubt remain as to Babb's rights before the extent of Perley's

execution, the cause may be decided on this second point by the application of principles well settled and understood.

It is admitted that the extent of Perley's execution against Babb, upon his estate in the land in question, operated to transfer and convey to Perley all Babb's interest or estate in such land. It certainly could not convey any more, though it might place the estate in a different situation in respect to other persons. Let us then suppose that, instead of this extent, Babb had by his deed conveyed to Perley all his right, title and interest in and to the land belonging to his wife. The facts would then present to us no other than the common case of the division of a fee simple estate into a freehold and a reversion. The freehold or life estate would be in Perley; and the reversion would be in Babb's wife; because Babb, her husband, had not, and could not have any control over this reversion. Nothing short of a deed signed by her as well as by him could operate to convey it to Perley. The extent has not affected, in any degree, her reversionary interest. Perley, then, being only tenant for life of the land in virtue of the extent of his execution, he could not lawfully commit waste. It would be inconsistent with his estate.

The act complained of is the cutting and carrying away and selling about forty cords of wood. Of course, it was an act which a tenant for life has no right to do; it was not for fire wood nor fences; it was neither for building nor repairing.

In the case before us Mrs. Babb, the reversioner, sues Perley for committing this waste on her inheritance. Her husband is joined in the action, not because he has any interest; for that has already been legally conveyed to Perley; but because a *feme covert* can never sue alone, unless in two or three special cases, forming exceptions to the general rule. And now, we may ask, why should not the action be maintained? If it should be urged that it will be prejudicial to the rights of the husband's creditors, by depriving them of the power of converting the lands levied upon to any profitable use, the answer is, the creditors of the husband cannot have any more control of the wife's land than the husband himself had. The creditors may avail themselves of the profits of the wife's land in satisfaction of their demands against the husband; but if there are no profits, it is nothing more than the common misfortune of those creditors whose debtors are insolvent.

The law is consistent and just. It subjects the land to the payment of the wife's debts, and the profits, to the payment of the debts of the husband. After mature deliberation, we perceive no other mode of deciding this cause without changing the nature of legal

estates, and disturbing those principles by which such estates are created and protected.

We are unanimously of opinion that the verdict must be set aside and a new trial granted.

MARCH *v.* BERRIER.

6 IREDELL'S EQUITY (N. C.), 524. — 1850.

[*Reported herein at p. 70.*]

4. IN MODES OF TRANSFER.

AUSTIN *v.* SAWYER.

9 COWEN (N. Y.), 39. — 1827.

Curia, per SAVAGE, CH. J. — From the whole case the facts appear to be as follows: The plaintiff Austin, and one Orrin Wilcox, were in possession of farms in Orleans county, and each had sowed a crop of wheat on the farm by him occupied. After sowing, and in October, 1825, they agreed to exchange farms, each reserving his own crop of wheat. On the 13th of October, 1825, they executed quit-claim deeds containing no reservations whatever. Austin fenced the wheat, on the farm he had left, in the spring of 1826. Wilcox did the same as to the wheat he had sowed, and at harvest time he cut and carried it away. Wilcox did not take possession of the farm which he had of the plaintiff; but some time after contracted to assign his interest in the farm to the defendant. Wilcox then stated to the defendant, that the wheat was reserved, and belonged to Austin, the plaintiff. Some time elapsed after this parol agreement before the assignment was in fact executed. The conveyance to Wilcox was without seal, and so was the assignment, which was as follows: "In consideration of one hundred and seventy dollars, I assign over all my right, title and interest to within contract. Orrin Wilcox." Wilcox wished to reserve some trees as well as the wheat; but the defendant objected to this, as he did not wish to have them cut. It does not appear from the case when the assignment was executed; but the agreement by parol was three or four weeks before, when the wheat was reserved. The same thing was repeated when the writing was signed. The defendant's son testified that he thought he heard his father say that the wheat was

reserved, and that it was Austin's. The defendant cut the wheat and put it in his own barn. There were 104 bushels.

The parol evidence of the contract between Austin and Wilcox, and of the reservation of the wheat, and also between Wilcox and the defendant, was objected to, and received subject to all legal exceptions.

From the whole case, if properly before us, the justice of it is strongly with the plaintiff. But the plaintiff's right of recovery depends on the validity of his reservation of the wheat. The defendant shows an absolute conveyance, which is a complete answer to the action unless it can be obviated.

1. As to the evidence of the reservation. The contract was first made by parol, reserving the wheat; and when the quit-claim was executed, the same parol agreement reserving the wheat was again repeated. But there is no direct evidence of a contract respecting the wheat, subsequent to that conveyance.

"There is no rule of evidence better settled," says Chancellor Kent, 1 John. Ch. Rep. 429, "than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Such evidence is not only contrary to the statute of frauds, but to the maxims of the common-law."

The written instrument must be considered as containing the true agreement between the parties; and as furnishing better evidence than any which can be supplied by parol. 1 Ph. Ev. 495. 5 Cowen, 508. The testimony in the case respecting the reservation between Austin and Wilcox, relates to conversations antecedent to, and at the time of executing the quit-claim conveyance. That must, of course, be rejected, and expunged from the case. All that remains relates to similar conversations between Wilcox and the defendant, and the acts of the defendant. Before Wilcox assigned to the defendant he frequently admitted that the wheat belonged to the plaintiff. Had he sold it by parol to the plaintiff, and afterwards conveyed it to the defendant, would not the plaintiff be entitled to it, on the ground that grain growing may be sold by parol; and that having been sold by a valid contract, Wilcox's assignment to the defendant, being subsequent to the sale to the plaintiff, could convey to the defendant no greater right than Wilcox had.

In *Whipple v. Foot*, 2 John. 422, it was decided by this court that wheat growing is a chattel, and may be sold as such on execution. The same doctrine was held by this court in *Stewart v. Doughty*, 9 John. 112, where it added that the purchaser became entitled to the right of ingress, etc., to gather the crop. On this question the English cases seem to me not quite consistent. In *Poulter v*

Killingbeck, 1 B. & P. 398, Buller, Justice, in speaking of a parol transfer of half the growing crops, says, with respect to the point made at the trial on the statute of frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops. In *Crosby v. Wadsworth*, 6 East, 611, Lord Ellenborough, speaking of a parol contract for the sale of a crop of growing grass, says, "I think that the agreement stated, conferring as it professes to do an exclusive right to the vesture of the land during a limited time, and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands." But, subsequently, in *Parker v. Staniland*, 11 East, 363, the same learned judge held that a parol contract for a crop of potatoes in the ground was valid; and the distinction he took was, that the one was growing, and the other had come to maturity; and also, that the one was not delivered, being not yet in a fit state for delivery; but the other was, by the agreement itself, delivered as far as they were capable of delivery.

The distinction taken by the Supreme Court of Errors in Connecticut, 3 Day, 484, is this: When there is a sale of property which would pass by a deed of land as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute.

Whatever may be the rule of construction elsewhere, we are not at liberty here to question the validity of a parol contract for the sale of growing crops. Was there any evidence of such a contract?

Rejecting all that passed anterior to, and at the time of executing the written contract, the proof is that Wilcox, when treating with the defendant as to the sale of the farm, declared the wheat to belong to the plaintiff. This is sufficient in my judgment to authorize a jury to presume a formal and valid contract for the sale of the wheat.

The title to the wheat, then, being in the plaintiff, it was not in the power of Wilcox to convey it to the defendant. Suppose Wilcox had leased this wheat-field for three years by parol, the lease would have been valid. Any absolute conveyance by him, subsequently, could not divest the rights of the lessee by parol. For the same reason, the assignment by Wilcox to the defendant, though absolute in its terms, conveyed no more than Wilcox had a right to convey. The crop of wheat, therefore, I consider legally shown to be the property of the plaintiff.

2. Could he, then, maintain this action? In answer to this question, I say, in the language of Lord Ellenborough, 6 East, 610, "As the plaintiff appears to have been entitled to the exclusive enjoy-

ment of the crop growing on the land, during the proper period of its full growth, and until it was cut and carried away, he might, in respect of such exclusive right, maintain trespass against any persons doing the acts complained of." He cites *Co. Litt.* 4 b., and 3 Bur. 1824; in the first of which it is laid down, that whoever hath the vesture of the land, as the crops, shall have an action of trespass *quare clausum fregit*. In the latter (the case of *Wilson v. Mackreth*), it was objected that trespass would not lie. Lord Mansfield said there wants nothing to answer the objection but to state the case, which he summed up thus: "The plaintiff's right is in a several piece of ground, butted and bounded; a separate right of property to take the profit of the turf, and to dig it for that purpose. The plaintiff has this right exclusive of all others, and the defendant has disturbed him in it; therefore, trespass lies though he has not the absolute right to the soil." Mr. Justice Yates said, whenever there is an exclusive right, trespass lies. In this case there was an exclusive right, necessarily, to the close, until the harvesting of the wheat. And in *Stewart v. Doughty*, 9 John. 113, Kent, Ch. Justice, says, "The general language of the authorities is to this effect: That the grantee *vesturæ terræ*, or *herbagii terræ*, may maintain trespass, though he has not the soil."

I am, therefore, of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

HIRTH *v.* GRAHAM.

50 OHIO STATE, 57. — 1893.

BRADBURY, J. — The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber.

The defendant attempted to secure the dismissal of the action on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for

the defendant;" which instruction the justice refused to give, but on the contrary gave to them the following instructions on the subject: "This is an action for damage, not on the contract nor to enforce the same, and if you find that a contract was made, verbal or otherwise, and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such non-compliance."

The defendant in error, who was also the defendant in the Justice's Court, excepted, both to the charge as given and to the refusal to charge as requested; the verdict and judgment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the Court of Common Pleas on error, where the judgment of the justice of the peace was affirmed; he thereupon brought error to the Circuit Court, where the judgment of the Court of Common Pleas and that of the justice were both reversed, and it is to reverse this judgment of the Circuit Court and reinstate and affirm those of the Court of Common Pleas and justice of the peace that this proceeding is pending.

Counsel for plaintiff in error contends that the record contains nothing to show that the trees which were the subject of the contract were standing or growing, and that, therefore, it does not appear that the defendant was injured by the instructions given and refused. The record does not support this contention. During the trial three separate bills of exceptions were taken, and when all of them are considered together, it clearly appears that evidence was given tending to prove that the trees, the subject of the contract, were growing on the land at the time it was made, and that the contract was not evidenced by any note or memorandum in writing. The instruction refused was, therefore, pertinent, and if it contained a sound legal proposition the refusal to give it in charge to the jury was prejudicial to the defendant. The court, however, not only refused to give the instructions requested by the defendant, but told the jury in substance, that no written memorandum was necessary. * * *

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England as well as in the courts of the several States of the Union. The question has been differently decided in different jurisdictions and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject.

Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. *Emmerson v. Heelis*, 2 Taunt. 38,

following the case of *Waddington et al. v. Bristow et al., etc.*, 2 Bos. & Pul. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in *Crosby v. Wadsworth*, 6 East, 601, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them), "I think that the agreement statèd, conferring, as it professes to do, an exclusive right to the vestures of the land during a limited time and for given purposes, is a contract or sale of an interest in, or, at least, an interest concerning lands. Id. 610.

Afterwards, in *Teal v. Auty*, 2 B. & B. 99, the Court of Common Pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the Statute of Frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in *Marshall v. Green*, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the Statute of Frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benjamin on Sales, sec. 126, ed. of 1892), it cannot be considered as finally settling the law of England on this subject.

The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky and Connecticut, sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the Statute of Frauds. *Claflin et al. v. Car-*

penter, 4 Metc. (Mass.) 580; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Bostwick v. Leach*, 3 Day, (Conn.) 476; *Erschine v. Plummer*, 7 Me. 447; *Cutler v. Pope*, 13 Me. 377; *Cain v. McGuire*, etc., 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Smith v. Bryan*, 5 Md. 141. In none of these cases except 4 Met. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract, before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited, *Marshall v. Green*, 1 C. P. Div. 35, the vendee had also entered upon the work of felling the trees and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendor, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, *Giles v. Simonds*, 15 Gray, 441, holds that, "The owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser may at any time revoke the license which he thereby gives to the purchaser to enter on his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation."

The courts of most of the American States, however, that have considered the question, hold, expressly, that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the Statute of Frauds. *Green v. Armstrong*, 1 Denio, 550; *Bishop v. Bishop*, 1 Kernan, 123; *Westbrook v. Eager*, 1 Harr. (N. J.) 81; *Buck v. Pickwell*, 27 Vt. 157; *Cool v. Box and Lumber Co.*, 87 Ind. 531; *Terrell v. Frazier*, 79 Ind. 473; *Owens v. Lewis*, 46 Ind. 488; *Armstrong v. Lawson*, 73 Ind. 498; *Jackson v. Evans*, 44 Mich. 510; *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Howe v. Batchelder*, 49 N. H. 204; *Putney v. Day*, 6 N. H. 430; *Bowers v. Bowers*, 95 Pa. St. 477; *Daniels v. Bailey*, 43 Wis. 566; *Lillie v. Dunbar*, 62 Wis. 198; *Knox v. Haralson*, 2 Tenn. Ch. 232.

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject, most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution, as chattel property; it descends with the land to the heir, and passes to the vendee with the soil. *Jones v. Timmons*, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances

constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that the sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands, should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty.

This rule has the additional merit of being clear, simple and of easy application, qualities entitled to substantial weight in choosing between conflicting principles.

Whether circumstances of part performance might require a modification of this rule, is not before the court and has not been considered.

Judgment affirmed.

5. IN FORM OF CONTRACT FOR A SALE.

GREEN *v.* ARMSTRONG.

1 DENIO (N. Y.), 550. — 1845.

By the Court, BEARDSLEY, J. — A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the Justice's Court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by certiorari to the Court of Common Pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the Statute of Frauds. [*The opinion next disposes of certain technical questions and then proceeds as follows.*]

The revised statutes¹ declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every

¹ See § 224 of the New York Real Property Law of 1896. — ED.

contract for the sale of "any interest in lands" shall be void unless in writing. (2 R. S. 134, secs. 6, 8.) Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none of which touch the question now before the court: and so far as respects this question the former statute of New York, and the English statute of 29 Charles 2, ch. 3, contain similar provisions. (1 R. L. of 1813, p. 78; Chit. on Cont. 299.)

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land. If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the common pleas, reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this State. It has, however, arisen in the English courts, and in some of those of our sister States; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. Greenleaf's Ev. (2d ed.) sec. 271, and notes; Chit. on Cont. 299 to 302; 4 Kent's Com. (5th ed.) 450-1. We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "any interest in lands" is void unless in writing. The word land is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees, and the like; for all these may be conveyed by the general designation of land. 1 Shep. Touch. by Preston, 91; 1 Inst. 4; 1 Preston on Estates, 8; 2 Black. Com. 17, 18; 1 R. S. 387, sec. 2; 2 Id. 137, sec. 6. Standing trees are, therefore, part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. Toller's Law of Executors, 193-5; 2 Black. Com. by Chitty, 122, note; Rob. on Frauds, 365-6; Richard Liford's Case, 11 Rep. 46; Com. Dig. Biens, (H.) And being strictly real property, they cannot be sold on an execution against chattels only. *Scorell v. Boxall*, 1 Younge & Jer. 396; *Evans v. Roberts*, 5 Barn. & Cress. 829.

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. Toller, 150, 194; 2 Black. Com. 404. They may also

be sold on execution like other personal chattels. *Whipple v. Foot*, 2 John. 418; *Jones v. Flint*, 10 Adol. & Ellis, 753; *Peacock v. Purvis*, 2 Brod. & Bing. 362; *Hartwell v. Bissell*, 17 John. 128.

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land can only be created by deed or written conveyance; and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land, and not his personal chattels. The contract for their sale and transfer, being by parol, was, therefore, void.

The opinion of the court in the case of *Dunne v. Ferguson*, 1 Hayes Irish R. 542, contains one of the best illustrations of this question. That case is thus stated in Stephen's N. P. 1971: "The facts of the case were, that in October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than ten pounds. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the Statute of Frauds. Upon the foregoing facts Chief Baron Joy observed, (Barons Smith, Pennefeather and Foster, concurring,): "The general question for our decision is, whether there has been a contract for an interest concerning lands within the second section of the Statute of Frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case, the distinction turned upon the hand that was to dig them, so that if dug by A. B., they were potatoes, and if by C. D., they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At

common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, etc. The Statute of Frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of *Evans v. Roberts*, 5 Barn. & Cress. 829; *Smith v. Surman*, 9 Id. 561; and *Scorell v. Boxall*, 1 Young & Jer. 396, have been decided. And as we think that growing crops have all the consequences of chattels, and are like them, liable to be taken in execution, we must rule the points saved for the plaintiff."

Various other decisions have proceeded on the same principle, although it has nowhere been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grain and vegetables, *fructus industriales*, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. *Carrington v. Roots*, 2 Mees. & Wels. 248; *Sainsbury v. Mathews*, 4 Id. 343; *Randall v. Ramer*, 2 John. 421, note; *Mumford v. Whitney*, 15 Wend. 387; *Austin v. Sawyer*, 9 Cowen, 39; *Jones v. Flint*, 10 Adol. & Ellis, 753; *Warwick v. Bruce*, 2 Maule & Selw. 205; *Graves v. Weld*, 5 Barn. & Adol. 105.

But where the subject-matter of a contract of sale is growing trees, fruit, or grass, the natural produce of the earth, and not annual production raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing. *Teal v. Auty*, 2 Brod. & Bing. 99; *Putney v. Day*, 6 N. Hamp. R. 430; *Olmstead v. Niles*, 7 Id. 522; *Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 Mees. & Wels. 501; *Jones v. Flint*, 10 Adol. & Ellis, 753.

The contract in this case was within the statute, and being by parol was void. The judgment of the common pleas must be affirmed.

Judgment affirmed.

6. IN THE ORDER IN WHICH PROPERTY MAY BE REACHED FOR THE SATISFACTION OF DEBTS OF ITS OWNER.

WEBSTER *v.* PARKER.

42 MISSISSIPPI, 465. — 1869.

SHACKELFORD, C. J., delivered the opinion of the Court.

This was a bill filed in the Chancery Court of Holmes county, by Ann H. Webster and her husband, against the defendants in error, to enjoin the sale of the southeast quarter of section 16, town 13; of range No. 2, east, levied upon by virtue of certain writs of *fiery facias*, issued upon judgments obtained against J. M. Stigler, sheriff, and administrator *de bonis non* of the estate of Robert Howard, deceased.

The bill shows that the complainant, Ann H. Webster, is the daughter and one of the heirs-at-law of Robert Howard, deceased; that said Howard died seized and possessed of a large real and personal estate, and left a will devising his estate to his widow Sarah and her three children; that in the distribution of the estate the land levied upon was assigned to her as a portion of the real estate of her deceased father; that she was in possession of it at the time of filing her bill. It is further alleged that the said Sarah was appointed executrix of the estate of her husband, by his last will, etc., and that she qualified and gave bond, and took possession of the entire estate; that she died in 1862, and that J. M. Stigler, the sheriff of Holmes county, administered upon her estate, and rendered a final account of her administration of the estate of Robert Howard, deceased, at the August term, 1867, of the said Probate Court, showing a balance unadministered or unaccounted for by said executrix of \$9,443.21 for money, cotton, and other effects received by her.

It is further alleged that the personal estate of Robert Howard, deceased, was more than sufficient to pay the debts of the estate, aside from that which has been distributed to the heirs-at-law, or that may now be on hand; and that whatever insufficiency of assets there may be to pay the debts of the estate is in consequence of a *devastavit*, as shown by the final account of J. M. Stigler as administrator of Sarah Howard, the executrix of her deceased husband's estate.

It appears further from the record that said J. M. Stigler, sheriff, was appointed by said Probate Court administrator *de bonis non* of the estate of Robert Howard, and that during his administration of said estate the judgments were obtained against him, upon which

the executions of *fi fa.* were issued and levied upon the land in question.

An injunction was issued, stopping the sale of the said tract of land.

A demurrer was filed to the bill of plaintiffs in error, assigning various grounds; the demurrer was sustained, and the bill dismissed.

To reverse this decree the plaintiffs in error prosecute this writ of error.

The action of the court below in sustaining the demurrer of defendants in error is made the only ground for error in this court, which is, that "the court erred in sustaining the demurrer to the said bill, because the lands of plaintiffs in error are not chargeable with the debts of their ancestor, and cannot be subjected to payment thereof until the personal estate is exhausted."

"The protection of lands and tenements and hereditaments from sale, for payment of debts of decedents, until the personal estate is exhausted, will protect a leasehold estate in lands until the final disposition of the personal estate."

It is insisted in behalf of the plaintiffs in error that the lands levied upon, under the executions issued upon the judgments obtained against J. M. Stigler, the administrator *de bonis non* of the estate of Robert Howard, in favor of defendants in error, are not subject to sale, because there was a much larger amount of personal estate left by Robert Howard than was sufficient to pay all his debts, which passed into the hands of his executrix, Sarah Howard, and that before they can subject the land in question to sale under their judgments they must pursue the sureties on the official bond of Sarah Howard, as executrix upon said estate.

This position of counsel would be tenable if the lands in question were not a leasehold estate; as by the demurrer it is admitted that there was at the time of the death of Robert Howard three times as much personal estate as was sufficient to pay all the debts of the estate, and that a large amount of this property has been wasted by the executrix, Sarah Howard, deceased.

This court has held, that when personal assets largely in excess of the amount of the claims against an estate had passed into the hands of an administrator, and had never been administered or accounted for, the lands of a decedent would not be decreed to be sold to pay his debts unless the creditor had exhausted all remedy in due legal form against the administrator and his sureties. *Paine v. Pendleton et al.*, 32 Miss. Rep. p. 320; *Evans v. Fisher*, 40 Miss.

It is admitted in the argument of counsel, and shown by the record, that the interest of plaintiffs in error in the land in question is only a leasehold interest.

Any estate less than a freehold, such as estates for years, are chattel interests, and if they continue for a longer period than the life of the tenant, they go to his personal representatives, his executors or administrators. 1 Prest. on Est., p. 203; 1 Wash. on Real Prop., p. 60.

This court has adjudicated upon the precise question involved in the case under consideration — the interest vested in lessees of *sixteenth sections* in this State, where the lease is for ninety-nine years, as was the case of the lease to the ancestor of the plaintiff in error, Mrs. Ann H. Webster — holding that such leases are of no higher dignity than a lease or term for one year, and that the leased premises go into the hands of the administrator or executor of the lessee, to be administered as any other chattel and not to the heir. *Dillingham v. Jenkins*, 7 S. & M. Rep. p. 479.

In many of the States of the Union, by statute, these leasehold estates for ninety-nine years are made descendible to the heirs of the lessees. It is to be regretted that there is not a similar statute in this State, as many of the homes of widowed families are upon such estates.

We shall adhere to the doctrine laid down in the foregoing authorities, and affirm the decision of the chancellor sustaining the demurrer, and dismissing the bill of plaintiffs in error.

The only remedy for the plaintiffs in error is to pursue the estate of the defaulting executrix and the sureties upon her official bond for the loss they will have to sustain by the sale of the leasehold estate in question.

Let the decree be affirmed.

7. WHAT LAW GOVERNS IN CASE OF CONFLICT OF LAWS.

DESPARD *v.* CHURCHILL.

53 NEW YORK, 192. — 1873.

ACTION for the construction of a will.

FOLGER, J. — The testator had his domicile in the State of California. He made his will there. No question is made but that it is in all of its provisions valid by the law of that State. It, however, by its terms, disposes of certain property in this State, and by provisions which are invalid here, inasmuch as they run counter to our statute law. 1 R. S. 723, sec. 15; Id. 773, sec. 1. The statute law here referred to embodies the policy of this State in

relation to perpetuities and accumulations. As this sovereignty will not uphold a devise or a bequest by one of its citizens in contravention of that policy, it will not give its direct aid to sustain, enforce or administer here such a devise or bequest made by a citizen of another sovereignty. See *Chamberlain v. Chamberlain*, 43 N. Y. 424. Yet it is no part of the policy of this State to interdict perpetuities or accumulation in another State. Id. 434.

The property in this State affected by this will is leasehold estates held by leases for a short term of years. This is, at common-law, personal property. 3 Kent, 401; 2 Id. 342; *Merry v. Hallett*, 2 Cow. 497; *Brewster v. Hill*, 1 N. H. 350. The statutes of this State have, for some purposes, modified its character. Estates for years are denominated estates in lands. 1 R. S. 722, sec. 1; Id. 750, sec. 10; Id. 762, sec. 33. They are still chattels real (Id. 722, sec. 5), and are not classed as real estate in the chapter of "title to property by descent." Id. 754, sec. 27. A judgment binds and is a charge upon them (2 Id. 359, sec. 4), yet they go to the personal representatives as assets for distribution. Id. 82, sec. 6; and see *Pugsley v. Aikin*, 11 N. Y. 498. They vest in the executors as a part of the testator's personal estate. These leasehold estates must, for the purposes of this case, be treated as personal property.

Personal property is subject to the law which governs the person of its owner as to transmission by last will and testament; and this principle, though arising in the exercise of international comity, has become obligatory as a rule of decision by the courts. *Parsons v. Lyman*, 20 N. Y. 103. And, as a general rule, the distribution of personal property, wherever made, must be according to the law of the place of the testator's domicile. *Harvey v. Richards*, 1 Mason, 381-407.

The cases are not uncommon in which a testamentary disposition made in a foreign jurisdiction has controlled the transmission of personal property in this. Usually the administration of the estate has been committed by the will to citizens of that jurisdiction. They have acquired the possession and control of the property through voluntary payment or surrender, or, by making probate of the will here, have obtained auxiliary letters testamentary, and under these have enforced collection or surrender. In such case, those charged with the administration are liable to account here for the assets collected by the authority granted here. It seems to have been generally held, that where there are domestic creditors of the estate, payment of the debts may be decreed out of the assets. *Dawes v. Boylston*, 9 Mass. 337; *Richards v. Dutch*, 8 Id. 506; *Harvey v. Richards*, *supra*. For other purposes, such as the payment of

legacies and the distribution of the surplus to the next of kin, the courts in Massachusetts have held that the assets must be remitted to the place of the domicile. See cases above cited. But this has been questioned with great force and reason. See *Harvey v. Richards, supra*. And the better rule is, that whether the courts of one State are to decree distribution of the assets collected in it under auxiliary letters granted by them, or to remit the disposition thereof to the courts of the testator's domicile, is not a question of jurisdiction, but of judicial discretion under the circumstances of the particular case. *Harvey v. Richards, supra*; *Parsons v. Lyman, supra*. Nor does the fact that, by the will in this case, the testator appointed citizens of this State as executors, as well as citizens of the State of his domicile, and charged those here with the care and administration of the property here, alter the rule. In *Mason v. Richards*, above cited, the defendant was appointed, in this country, administrator, with the will annexed of a testator domiciled in the East Indies, where the executors resided.

The question then arises, under the particular circumstances of this case, whether the assets in this State should not be remitted to the executors in the State of California to be administered, as they may be, in accordance with the directions of the will, under the laws of that State.

As has been stated, the courts of this State may not directly aid in carrying out here, a bequest which is in violation of its statute law, and contrary to a policy of which it is tenacious. And yet they may not hold the bequest void, when it is valid by the law of the State by which the disposition of the property is to be governed. The one would be to transgress the written law of this State; the other would be to disregard an unwritten rule of law, well settled, and of extensive and frequent application.

There are certain legacies appointed by the will which are valid under our law; they are to persons residing in the Atlantic States. The will directs the executors here to use from the assets here to pay those legacies. There is no obstacle of law, economy or convenience in the way of this provision of the will being carried out to its letter. The residue of the assets should be remitted to the executors in California to be administered there. This residue will be much less in amount than the assets there. They are leasehold estates of terms not long, and will soon cease (if they have not already) to be continuously available for any purpose of the will. There are no creditors of the estate in this State to be protected. The legatees here are protected by the payment of the legacies to them from the assets. The next of kin of the testator are also the

annuitants under the provision of the will, which is void by our law. As annuitants, they must soon rely mainly upon the fund, the executors and the courts, in California. If to them as next of kin were adjudged here a distribution of the property here, it might not prevent them from claiming there as annuitants. Thus, by conflict of laws and adjudication, there would be a measureable thwarting of the testamentary intention, and the giving to them of more than the testator designed. It seems, then, that the rule of law above mentioned and the circumstances of the case indicate that the judgment of the Special Term directing a distribution of the assets in this State among the next of kin was not well advised, and that the judgment of the General Term reversing that of the Special Term in that respect was proper.

Certain other questions are raised by the complaint and passed upon by the Special Term, but not noticed by the General Term; and perhaps it was not needed that they should be. Having concluded that the assets here should be remitted to the State of California to be distributed in accordance with the law there, the solution of those questions for the practical guidance of those interested, is of necessity to be left to the courts of that State.

The order of the General Term should be affirmed and final judgment for respondents in pursuance of stipulation.

Order affirmed, and judgment accordingly.

WHITE *v.* HOWARD.

46 NEW YORK, 144. — 1871.

ACTION for the construction of a will.

GROVER, J. — The testator, William Bostwick, at the time of his death, in April, 1863, was a resident of the State of Connecticut, and had been for a number of years prior thereto. The validity of the bequests of his personal property, and all questions of succession thereto, or rights therein, must be determined under the laws of that State, and by the courts of that State, when the property, or those having the possession and control thereof, are within its jurisdiction. *Parson v. Lyman*, 20 N. Y. 103; *Moultrie v. Hunt*, 23 Id. 394; Story on Conflict of Laws, sec. 468. In addition to his personal property and real estate situated in Connecticut, the testator, at the time of his decease, was seized of real estate situated in the city of New York, of great value. The validity of the devise of the latter property, and all questions relating to the title, must be determined by

the laws and courts of New York, irrespective of the domicile of the testator. *Hosford v. Nichols*, 1 Paige, 220; Story, Conflict of Laws, secs. 424, 428, 445; 4 Kent's Com. 513. The testator, after giving several legacies by the previous clauses of his will, by the seventh clause gave all the rest, residue and remainder of his property, both real and personal, wherever situated, to Henry White, John P. Crosby, and Pelatiah Perit and the survivor of them, as joint tenants, in fee simple, upon certain specified trusts in favor of his daughter Frances, an infant, and her children, should she leave any her surviving, and the descendants of any child, if any, whose parent died during the life of his daughter and her husband, if any, surviving her; and upon the further trust, in case of the death of his daughter, leaving no child or descendant of any child, or husband, her surviving (an event which has actually happened), to pay certain specified legacies to various charitable societies, and then divide whatever remained of the trust estate equally between the following six societies, namely: The Southern Aid Society; the American Tract Society; the American and Foreign Christian Union; the American Colonization Society; the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church of the United States; and the Board of Foreign Missions of the same church. The personal estate was more than sufficient to pay all the specific legacies given by the will. The first question to be determined is, whether any or all of these societies had capacity to take real estate in New York by devise. As several of the societies claim a capacity so to take, upon grounds and principles different from others, it will be necessary to examine the question as to several separately. As the Southern Aid Society differs in this respect materially from all the others, it will be proper to consider the question as to that society first. This was a voluntary, unincorporated charitable association, engaged in aiding indigent evangelical churches and ministers in the southern section of the Union, prior to 1861. Whether it continued in existence as a society after that period, and to the time of the death of the testator, and until its incorporation under the general statute of the State, was a controverted question upon the trial; but the justice who tried the cause found, in substance, that it did so continue. That finding is conclusive upon this court. A voluntary association for charitable purposes cannot, under the law of this State, take a legacy given to it. *Sherwood v. American Bible Society and Others*, 1 Keyes, 561. If incapable of taking a legacy, it is clear that it has no capacity to take by devise. * * *

The American Colonization Society claims the one-sixth of the

property under the will. This society was incorporated in 1836, by an act of the Legislature of Maryland, by which it was authorized to take lands by devise, and to sell and dispose of such lands as the society should determine to be most conducive to the objects of the society, namely, the colonizing of the free people of color of this country in Africa.

The principal question to be determined in regard to this society is, whether it can take land in this State by devise. We have already seen that this question must be determined solely by the law of this State. That it can take personal property by bequest has been determined by this court. *Sherwood v. The American Bible Society and Others*, 1 Keyes, 561. By the statute of this State concerning wills, passed in 1813 (1 R. L. 364), all persons (other than bodies politic and corporate) were permitted to take lands by devise and might take to or for any lawful purpose whatsoever, without restraint. The exclusion of bodies politic and corporate from taking lands by devise was the law of the State until the Revised Statutes took effect, and applied to all corporations of our own and other States and countries, unless the Legislature, for special reasons, authorized a particular corporation so to take. This was the settled policy of the State. Such being the law and policy of the State at the time of the passage of the Revised Statutes, we find, that by the first section of the statute of wills, therein contained (2 R. S. 57), all persons, with the exceptions therein specified, were empowered to dispose of their real estate by will. Section two of the act defines real estate for this purpose. Section three provides, that such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise. What modification of the law is herein indicated? By the act of 1813, bodies politic and corporate are excepted from the persons who may take by devise. By section three of the present statute of wills, all persons capable by law to hold real estate are authorized so to take, but providing that no devise to a corporation shall be valid, unless such corporation, by its charter or by statute, be expressly authorized so to take. Had the Legislature, while the act of 1813 was in force, granted a charter to a corporation and had therein enacted that such corporation might take real estate by devise, can there be a doubt that such a provision would have effected a repeal of the act as to such corporation? Or had the Legislature, by a subsequent statute, enacted that one or any number of designated existing corporations, might take land by devise, such act would, as to such corporation, have

repealed the exception in the act of 1813 by implication. Section three of the present statute has the same effect precisely upon all corporations not expressly authorized by charter or statute to take by devise, as the exception in the act of 1813 had upon all existing corporations, and all thereafter created, unless the latter were expressly authorized by their charter to take; and we have seen that, as to both classes, a subsequent statute, expressly authorizing any designated corporations to take land under a will, would, by implication, have repealed the section as to them. The only modification of the law intended by the change in section three was to save the right of existing corporations, authorized by their charter or statute, to take by devise, if any such there were; for those incorporated subsequent to its passage were as effectually deprived thereby of the capacity to take by devise as those incorporated subsequent to the act of 1813 were by the exception. Neither could take, unless expressly authorized by statute or charter, in which event both could take, unless some distinction exists between a statute and charter of a corporation in this respect, as used in the section. That the authority conferred by statute referred to in section three means a statute of this State only is clear. That a statute of another State, conferring power upon a New York corporation to take land by devise, would be effectual to enable it so to take in the State passing it, is clear; but it is equally plain, that it could not affect its capacity to take land located in New York by devise. This shows that the word statute as used in section three means a statute of New York. It will hardly be insisted that a statute of another State, conferring power upon a corporation created by itself, to take land by devise in New York, will enable it so to take, while a similar statute conferring the same power upon a New York corporation will have no such effect. But it is claimed that, by the true construction of section 3, power is given to all corporations, whose charters authorize them to take, by devise, to take in that manner in this State, irrespective of the government from which the charter is obtained. In other words, that section 3 authorizes all corporations to take lands in this State under a will, whose charters confer a capacity so to take. Creating or chartering corporations involves an exercise of the legislative power. They may be created by a particular statute, granting the charter or organized by virtue of general statute prescribing the mode, specifying the powers and privileges to be enjoyed. In either mode the corporation is, in a legal sense created by statute; and where section three provides that no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise, it is

equally clear that such charters only were intended as were granted by a statute of this State, or organized under a general statute of the State, as it is that by the words, by statute, a statute of the State was intended. Any other construction would work a complete revolution of the policy of the State. That policy, as indicated by its whole legislation, is to exclude corporations generally from taking by devise. The Legislature at all times have possessed the power to except such corporations as it deemed proper from its operations; and of late years have exercised it with great liberality in favor of corporations organized for charitable purposes. But there is no indication of a design to abandon the general policy of the State by permitting other governments to determine what corporations might take and hold lands in this State by devise, under the construction contended for by the counsel for the colonization society. Any corporation, to which the privilege of taking land by devise was refused by our Legislature, might acquire that privilege by procuring and accepting a charter from another State conferring it. This would defeat the plain intention of section 3, which was to exclude all corporations from that right, except such as our Legislature permitted for special reasons to enjoy it. It follows that the colonization society can take no interest in the New York real estate under the will of the testator. * * *

The judgment appealed from must be affirmed. * * *

8. IN THE METHOD AND MEANS OF VINDICATING PROPERTY RIGHTS.

a. Kinds of Action.

(I.) FOR THE RECOVERY OF PROPERTY.

RICKETTS *v.* DORREL.

55 INDIANA, 470. — 1876.

REPLEVIN by Dorrel for a quantity of rails and stakes which Ricketts had seized and built into a fence. Judgment below for Dorrel. On appeal the judgment was reversed. This is a petition for a rehearing.

BIDDLE, J. — The earnestness of the petition for a rehearing in this case convinces us of the sincerity of the petitioner, but it seems to us that he has misconceived the scope of the opinion pronounced. He labors to convince us that when a tree is wrongfully converted

into rails, they may be replevied; and when timber is wrongfully cut and converted into coal, the coal may be replevied; and cites other similar cases. The opinion nowhere controverts these propositions. When an article is made personal property by being severed from the realty to which it first belonged, it may be replevied as long as its separate identity can be ascertained, whatever shape it may take; but when an article of personal property, though wrongfully taken, has become real estate by being attached to the realty, it cannot be replevied, because it has lost its separate identity, and its character as personal property. To apply these principles to the present case: — If rails are wrongfully taken from a fence, they become personal property and may be replevied by the owner; but if rails are wrongfully taken and put into a fence, and thus made a part of the realty, they cannot be replevied, because they have lost their separate identity, and cannot be delivered without detaching them from the realty, of which they have become a part. And this is precisely the case we are considering. We have examined the authorities cited by the petitioner, and, as we read them, all the cases in replevin are against the petitioner. In *Davies v. Easley*, 13 Ill. 192, it is held, that a party may maintain replevin for boards made from trees wrongfully cut on his land; and also held that the owner of personal property, wrongfully taken, may replevy it so long as it can be identified, unless it is annexed to or made a part of some other thing which is the principal, as timber converted into a house, grain converted into malt, or coin converted into a cup.

The appellee also labors hard, and cites many authorities, to show us that a wrongdoer cannot obtain any title in the property he wrongfully takes, as against the owner — a proposition nowhere disputed; but it does not follow that the action of replevin will lie in all cases, merely because the owner has not lost the title to his property. Nor will our statute abolishing the distinction between the forms of actions aid the appellee. The Legislature cannot abolish the distinction between personal and real actions, nor between actions to enforce a specific performance of a contract or recover a specific article, and those which seek merely a money judgment; nor between actions arising out of tort, and those founded upon contract; because the distinction exists in fact, and not in mere form. The distinction between the actions of debt, covenant, assumpsit, trover, trespass, trespass on the case, and suits in equity to recover money directly, may be and is abolished by the code, because the remedy sought in all these cases is the same, namely, a money judgment. The appellee, therefore, cannot bring his action in replevin to recover his specific rails and, failing in that, maintain his case to

recover a money judgment for their value, merely because he has not lost his property in the rails. The law affords him ample remedy if he rightly chooses it; but it is no part of the duty of this court to instruct him as to what that remedy is.

The petition is overruled.

BREWSTER *v* HILL.

1 NEW HAMPSHIRE, 350. — 1818.

TRESPASS in ejectment to recover a term of years. Wheelock owned the premises in question in 1796 and leased them to O. for 985 years. O. entered on the premises and then died bequeathing all his "personal estate" to A. P. and wife, who, in 1807, conveyed their interest to plaintiff. Verdict for plaintiff subject to opinion of this court.

WOODBURY, J. — delivered the opinion of the Court.

In this case the sole question is, whether the term mentioned in the plaintiff's writ would pass under a devise of "personal estate."

The boundaries between real and personal estate are, in certain instances, scarcely distinguishable; and, indeed, some species of property exist which have been deemed real or personal, according to the character of the claimants, and the purpose for which they claim. Vide, *autho. cited, post; Mills v. Pierce*, Rock. Feb. 1819.

But we are not aware of any established principles or precedents, which would make leases for years anything more than "personal estate." The law in relation to them was settled before the land itself could be conveyed. *Bac. Leas. Co. Litt.* 456. They were then for short terms, and with an exclusive view to aid great landholders in the cultivation of the soil. Hence the lease passed to the lessee no interest in the premises; but was a mere contract, for a breach of which a recovery in damages against the lessor was the only remedy. *Vaugh. 127; Hayes v. Bickerstaff.*

As the custom altered and leases for longer terms became common, the remedy of the lessee was by statute extended, and he was enabled to protect himself in the occupation of the land itself. 21 Hen. 8, ch. 15.

Yet all the incidents of a mere chattel were still attached to the term whether its continuance was for one or for a hundred years. *Bac. Leas.* Livery of seizin was not necessary to pass the interest as it was to pass real estate. *Litt. sec. 59.* The lessee could not sustain a real action; but when ousted was obliged, as this plaintiff has been in this instance, to resort to trespass in ejectment. 3 Bl.

C. 199. Nor could a real action be maintained against him; because he was not the owner of the realty and could plead non tenure. Booth. His interest could be devised, though at common-law, no real estate would pass by a will. Bac. Leg. B. 3; 1 Roll. A. B. 609. It has always been held, too, that after the decease of the lessee, the term belonged to his executors or administrators, and not to his heirs. 1 Leon. 312; *Gillam, Adm. v. Lovelace*, 5 Ma. R. 419; Pet. of Gay, Adm. 2 John. C. 376.

Under statutes creating a lien upon the real estate of a debtor from the time of judgment rendered, leases for years have been decided not to be embraced. 8 Co. 171; *Fleetwood's Case*, 1 John. C. 223; *Wedenbergh v. Morris*, 3 Atk. 739; *Bunder v. Kennedy*. In wills, too, as in the present case, they have always passed under the expression "goods and chattels," and in some instances under that of "goods" alone. Shep. Y. 97 Cro. El. 386; *Boardman v. Willis*, 1 D. & E. 597; Bac. Leg. B. Nor is it necessary that leases should be acknowledged and attested; as deeds must be that convey "lands and tenements."—Stat. 191.

But we are well aware of a common impression, that long terms are "to all imaginable purposes a fee simple estate;" (13 Mass. R. 403), that a power "to sell land," has been held to be duly executed by leasing it for 999 years: (*Cilley v. Cayford Hills*, Ap. 1806); that our statute of Feb. 10, 1791, (Stat. 191) requires all leases for more than seven years to be recorded, and that according to *Denn v. Barnard* (Cow. 597), an adverse possession by the lessee, under a long term, might in time enable him to claim a fee.

On principle, however, it is impossible to define at what number of years a lease shall become real estate. Its character cannot be changed by the length of the term. Nor does our statute, or the decisions last cited, appear upon examination to conflict with the idea that a lease for any number of years is not, as to the lessee's heirs, anything more than "personal estate."

Let judgment be entered on the verdict.

NASE *v.* PECK.

3 JOHNSON'S CASES (N. Y.), 128. — 1802.

WRIT of right for the recovery of lands in Dutchess county. The judge directed the assize that if they believed the boundaries of the "Great Nine Partners" patent included the premises in question, they should find for the tenant, Peck, and they found a verdict accordingly.

Per Curiam. — Upon the issue in this action the mere right was in question between the parties. This principle we must not lose sight of. It is clearly and firmly established, as, the leading point of inquiry in the writ of right. The evidence requisite to establish this right is under the same rules and regulations as in other cases.

The possession of the tenant for thirty-eight years was, in the first instance, evidence of this right. This presumption of right was, however, repelled by the prior possession of the ancestor of the demandant, and which was attended with circumstances that rendered it very high evidence of right. It existed thirteen years prior to the tenant's possession. It continued till a descent was cast in favor of the demandant; it was destroyed by a possession commencing on the part of the tenant, by abatement at least, if not by disseizin.

To encounter the conclusion resulting from the demandant's proof, the tenant produced the patent of the Great Nine Partners, dated upwards of a century ago, not to deduce a title from it to himself, but to show a title out of the demandant.

This was, however, a departure from the true question between the parties, to wit, which of them had the better right. If it lay with the tenant to show it, still the direction of the judge was wrong. The assize might well have presumed a title in the demandant, derived from the patent, since his ancestor was the occupant, and apparent owner, fifty one years ago, and thirteen years prior to the commencement of the tenant's tortious possession. This, at least, ought to have been left to the assize for them to presume.

We are of the opinion, therefore, that the direction was wrong, and that the finding of the assize was against evidence, and that a new trial ought to be awarded.

SUTHERLAND, J., IN BRADSTREET *v.* CLARKE.

12 WENDELL (N. Y.), 602, 659. — 1834.

A WRIT of right is the highest writ in the law, and lies not for the recovery of any estate less than a fee simple. 3 Bl. Com. 193; Booth, Real Act. 84. It regards the legal estate only, and has nothing to do with mere equitable interests. Even in the possessory action of ejectment the legal title always prevails; much more in this action (which is brought after the ordinary possessory remedies are lost by lapse of time or otherwise), in which the right of possession can be established only by showing a full and absolute right of property.

Our inquiry, then, is for the legal title. If the demandant never acquired that, however strong and persuasive her equities may be, or may have been, she cannot succeed in this action or the former.¹

KIRKPATRICK, C. J., IN DEN EX DEM. JOHNSON *v.* MORRIS.

7 NEW JERSEY LAW, 7. — 1822.

THIS is an ejectment for lands in Salem. At the trial of the cause, it was moved for a nonsuit by the defendant's counsel, because the lessors of the plaintiff had not shown a title by deed or other conveyance, nor a possession in themselves and those under whom they claimed *for the term of twenty years*, and the plaintiff was called accordingly.

The ground of the nonsuit, as thus presented by the counsel and taken by the court, is not quite so precisely stated as could have been wished. From the manner in which it is expressed, it is left doubtful whether it was intended to say, that the lessors² of the plaintiff had not shown a possession of *twenty complete years*, and, therefore, not a sufficient one to maintain an action of ejectment, or that they had not shown a possession *within twenty years* before action brought, and, therefore, were barred by the statute.

It will be necessary, therefore, to look into the case, and see how far the motion is supported in point of fact, upon either the one or the other of those grounds.

But before I proceed to this, I feel myself constrained, from the course which the argument at the bar has taken, rather than from anything in the case itself, to make a few observations respecting the action of ejectment, as it has been used in this State, from the earliest settlement of the country down to this time. I say I feel myself constrained to do this from the course of the argument, for it has been insisted that the plaintiff in ejectment always has been, and still is obliged, in order to maintain his suit, to show, what the counsel call a complete, substantive, impregnable title, that is, as it has been explained, a regular deduction of title, by deed from Charles II. down to himself, or an exclusive and uninterrupted possession in himself and those under whom he claims, formerly for sixty years, then for thirty, and now for twenty, according as the successive statutes of limitation prevailed; or, in other words, such

¹ The writ of right has been abolished in New York and is practically obsolete in nearly all jurisdictions. The possessory actions are now used for the trial of titles. — ED.

a title as might be disputed, indeed, in point of fact, but could never be overcome by one superior to it. And by way of fortifying this position, reference is made to former practice, in which it is said such deduction was uniformly made, and always required.

Let us examine this position a little. By the common law, estates of freehold in lands passed by livery of seisin only, that is, by a delivery over of the actual possession. He, therefore, who was in the actual possession of land, was, *prima facie*, the tenant of the freehold, and had in him the heritable *sesina facit stipitem*. If he were ousted or dispossessed of this freehold, by one who had no right, he might, without process of law, make a peaceable entry, or, if deterred from that, he might make claim from year to year, which was called *continual claim*, as near the land as he could, and such entry or claim restored him to his lawful seisin, and made him capable again of conveying, either by descent or purchase. This right of entry, though it might be *toll*ed or taken away by a descent cast, and so, generally speaking, must be pursued during the life of him that made the ouster, or be forever lost, yet it was limited to no particular period or number of years; so that if it was not actually lost by descent or otherwise, the lawful owner might, at all times, restore himself by entering upon the wrongdoer, in a peaceable manner, and turning him out; but if he suffered it to be once lost, he could no longer restore himself by his own act, but must have recourse to his action at law. And, indeed, even where it was not lost, as it but seldom happened that the wrongdoer would tamely submit to be turned out without force, the owner, if his object was to gain the actual possession and enjoyment of the land, and not merely to put himself in a capacity to make a lawful conveyance, was generally obliged to have recourse to such action, and to call to his aid the process of the law, to restore to him that right which he could not obtain by peaceable means without it; so that, in most cases, it may be said he was put to his action, even when his right of entry was not *toll*ed or taken away.

This action might be, in the first place, by writ of entry, in which he undertook to prove his own former possession, and that the defendant, or some one under whom he held, had dispossessed him; to which the defendant might answer by denying the fact of the dispossession, or by showing in himself an older and a better possession; and then, upon the trial, it was adjudged for him who had the clearest right, or it might be, in the second place, after the reign of Henry II. by writ of assize, which went upon the suggestion that the demandant's ancestor had died in possession, and that he was the next heir; and, therefore, directed the sheriff to inquire, by a

jury, whether this were so, and, if it found for the demandant, the land was immediately restored. But still, even if the demandant prevailed in these actions, it only restored to him his former possession, it decided nothing with respect to the right of property; all that he had to show, in order to maintain his suit, was the possession of himself or his ancestor, and this might be overcome by the defendant showing an older and a better possession; for it never was pretended that the demandant's must be such a possession as established the ultimate right; for this either party might afterwards resort to his writ of right. In these possessory actions, therefore, neither the deed of feoffment by which the estate was created, nor the actual livery of seizin upon such deed, were necessarily given in evidence, but the mere possession only. And so, also, after the 29 Car. II., which directed that all conveyances of land should be in writing, and not otherwise, it was not necessary, upon the same principle, to give the writing in evidence, and the reason was that the deed of feoffment and livery of seizin thereupon, in ancient times, and the written conveyance under the statute, related to, and were evidence of, the commencement of the estate, and of the ultimate right only, which was not at all in question; but that they could be no proof of the actual and subsequent possession upon which the ouster was alleged to have been committed, and which was the foundation of those possessory actions, and the only thing to be proved in them, or recovered by them. It is true that those might be given in evidence, and might greatly strengthen the proof of possession, but they were not essential to the maintenance of the action; that depended upon the mere possession.

To these real actions for the recovery of the possession of lands, succeeded, in common use, the action of ejectment. This was not originally devised as a remedy for injuries done to real estate, that is, to estates of freehold in lands, but as a remedy for injuries done to chattels real, such as terms for years, which were considered as mere chattel interests. But then, as one who came into a court of justice to complain that he had been ousted of his term, must necessarily show that such term existed, and that the lease under which he claimed was a good and valid lease, and, of course, that the lessor had a right to make it, the title of the lessor was thereby brought into question as fully and upon the same principles as it would have been in the real action; so that though the action of ejectment got clear of all the intricacy and perplexity of the real action, and so became an easy and expeditious method of trying the title to land, yet it required precisely the same proof of title in substance as the real action did. For though the form of the action

may have been changed, yet the great principles of right have not been changed, nor can they be without a total subversion of the whole system of property in land. In a real action, the demandant must show his possession, his ouster, and his right to re-enter; in an ejectment, the lessor of the plaintiff must show the very same thing; — he must show that he has been in possession of the land; that it is now withholden from him, which is an ouster; and that he had a right to re-enter and make the lease in question. I say he must show those things, for the lease, entry and ouster, which are confessed, are the mere form of the action, and having nothing to do with the substantial right. The title, therefore, which lessor of the plaintiff, by the consent rule, is bound to rest upon, and which he is obliged to make out at the trial, is his right of entry (for if he had this right, it is always confessed that he had a right to make, and did make, the lease), a right which, upon the principles of the common law, necessarily results from his having had an anterior and peaceable possession of the lands in question, and their being now withholden from him by the defendant; a right too which cannot be overcome by any subsequent possession, unless it has been *toll'd* or taken away in the manner before mentioned, *or is restrained by the statutes of limitation.* * * *

The right of the lawful owner, therefore, to enter upon the wrong-doer in this extra-judicial manner, and so to restore himself to his possession and make leases, etc., from the first settlement of the province till the act of 1727, was wholly unlimited in point of time; from that time till the act of 1787 it was limited to sixty years; after that, in some cases, to thirty years; and since the act of 1798, in all cases, with the usual savings, to twenty years; and as this right of entry is the foundation of the action of ejectment, that action, of course, was limited in the same manner, and not otherwise. But that limitation is merely a limitation of the time within which the entry must be made, and by no possible construction, a designation of the time during which the possession must have continued. Can any book case be found in which, since the 21 Jac. 1, a possession of twenty complete years has been holden necessary to maintain an ejectment? None such can be found. One comes into a court of justice and says he has been in possession of lands for five, ten, or fifteen years, and that the defendant has turned him out, and holds him out, shall he be told he has no redress because he has not been in twenty complete years? And shall the defendant be justified in withholding from him his peaceable possession, thus tortiously and forcibly gained? Suppose another should enter and turn him out, and another him, shall the last always hold? To what

would all this lead but a mere trial of strength, in defiance of law; for it is directly in the tooth of that universally acknowledged principle, that peaceable possession itself is a title which shall never be disturbed but by one who has a better right, and which, therefore, the law will carefully protect until that right be shown in a judicial manner. And whether that possession had lasted five years, or ten years, or twenty years, the law sees no difference. Upon what ground, then, is this notion of possession of twenty complete years founded? Certainly the 21 Jac. 1, says no such thing — our act of 1798 says no such thing; they merely limit the time of entry but require no possession of twenty complete years, for this or any other purpose. Well, if those statutes do not require it, what is it that does require it? Is it the common law? Let us, then, lay the statutes of limitation out of the question, and then let us inquire what length of possession did the common law require. Does it say anything about twenty years, or thirty, or fifty, or even three score years? No. Time immemorial was its only limitation — time whereof the memory of man runneth not to the contrary, and beyond which, of course, no proof could possibly reach. But will any one say, that a possession for time immemorial was necessary to support an ejectment or other possessory action? No one will say so. It is true that in early times it was customary, in actions of ejectment, to deduce title from the general proprietors, and thereby to cut off all pretensions of the defendants at once, and that this continued to be the custom up till the Revolutionary War, and for some time afterwards; and it is true, too, that this is done even till this day, when it can conveniently be done, because it is by far the shortest and safest course, for it stops the mouth of the defendant in *limine*. But the conclusion that is drawn from this, to wit, that the ejectment was put upon the same footing as the writ of right, and required the same proof and had the same consequences, is not true. It never was put upon the footing of the writ of right; it never was conclusive upon the right of property; it never did necessarily require such deduction of title; but, on the contrary, always depended upon, and was governed by, its own proper principles; and, except in the cases I have mentioned, kept within its own proper bounds. I never heard of a nonsuit or a decision made against the plaintiff, upon the grounds that he had not made such deduction of title, except in one case from Sussex, I think, in the Court of Errors at Perth Amboy, and in that, probably, there might have been intermingled other operative reasons, not much connected with the case, and not now easy to be traced.

There has been cited from one of the books, Espinasse (I think),

a passage to this effect, that proof of possession within twenty years is not only necessary to support the title of the lessor of the plaintiff, but such possession for twenty years, without interruption, shall be a good title in itself to recover in ejectment without any other; and from this it has been argued that a possession of twenty years, at least, without interruption, is necessary to maintain this action. But a little attention to the author, and to these cases from which he deduces his position, will show satisfactorily that this is not the meaning. He means to say, and does say, that a possession within twenty years is sufficient to maintain an ejectment, unless an older and a better possession be shown, but that a possession *for twenty years*, without interruption, under the 21 Jac. 1, gives a right of possession, than which no better can be shown, and which cannot be overcome in this action, for that the statute cuts off the right of entry from the defendant as well as from the plaintiff, and, therefore, if he has suffered his right to sleep for twenty years it is gone, and he could have had no right to make the entry which is the commencement of his present possession. The truth is, that all possessory actions are founded upon a peaceable possession in the demandant or plaintiff, and those under whom he claims; and such possession, without regard to the length of time it may have continued, is sufficient to maintain such action, and can only be overcome by an older or better right.

I conclude, then, that the lessor of the plaintiff, in an action of ejectment, must always count upon and show a possession of the land within the time to which the right of entry is limited, and under our act of 1798, within twenty years next before the action brought, otherwise he is barred; but that he need not show a possession of twenty complete years, or of any other number of years, further than is necessary to constitute a full and peaceable possession; and that this being merely a possessory action and the possession to be proved not being intended to establish the ultimate right, and not depending for its validity upon the manner in which it commenced, but being a mere matter *in pais*, it may be shown as well without deed as with it, though, when without it, it will always be looked upon with greater jealousy and be overcome with great ease. * * *

Let the rule for a new trial be made absolute.

(2.) FOR THE RECOVERY OF DAMAGES FOR WRONGS TO PROPERTY. TRESPASS, TROVER, WASTE.

MCGONIGLE *v.* ATCHISON.

33 KANSAS, 726. — 1885.

[*Reported herein at p. 65.*]BABB *v.* PERLEY.

1 MAINE, 6. — 1820.

[*Reported herein at p. 27.*]

(3.) FOR THE PREVENTION OF THREATENED WRONGS TO PROPERTY.

WATSON *v.* HUNTER.

5 JOHNSON'S CHANCERY (N. Y.), 169. — 1821.

SUIT for an injunction to restrain defendants, lessees for a term of years, from cutting down any more timber, and from removing that already cut down and not sawed and that which was converted into boards or plank. Plaintiff holds the fee to the land upon certain trusts.

THE CHANCELLOR. — Injunctions to the extent prayed for may have been granted; but as I am not satisfied as to the propriety of such extensive and summary interference, I have been led to look into the course of the English authorities and practice on the point. After timber is cut, it ceases to be part of the realty, and is converted into personal property, and trover will lie for it. The question is, whether this court ought to interfere, in the first instance, to control the disposition of that personal property; and that, too, without any special or extraordinary necessity stated for such interference.

The practice of granting injunctions, in cases of waste, is to prevent or stay the future commission of waste; and the remedy for waste already committed is merely incidental to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law. Thus, in the case of *Jesus College v. Bloom*, 3 Atk. 262; Amb. 54, a bill was filed for an account and satisfaction for waste in cutting down trees, and

no injunction was prayed for, and the tenant's estate had been assigned and determined. Lord Hardwicke held that the bill was improper, and would not lie merely for satisfaction for timber cut down, and that an action of trover was the remedy. Where the bill was for injunction to prevent waste and for waste already committed, the court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. The ground for coming into chancery was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort and the remedy lay at law. But to prevent multiplicity of suits, the court, on bills for injunction to stay waste, and where waste had already been committed, would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to another action at law. The bill, in that case, was consequently dismissed. In the subsequent case of *Smith v. Cooke*, 3 Atk. 381, Lord Hardwicke observed that if the estate of the lessee was determined, and he had quit, a party could not come into equity merely for an account of timber cut wrongfully; but where he continued in possession, and in a condition to commit more waste, the party might come into equity to stay future waste, and also be entitled to an account for the waste committed. So, again, in the case of *Lee v. Alston*, 1 Ves. Jr. 78, the same doctrine was declared by Lord Thurlow. A bill was filed by a remainderman in fee against a tenant for life, for an account of timber cut, and for an injunction. The answer admitted the cutting of the timber wrongfully, as charged, and an account was decreed. It was observed that the plaintiff, on the discovery by the answer, might have resorted to trover at law, but he was not obliged to do so, and might have an account under the admission in the answer. The chancellor referred to the case of *Whitfield v. Bewit*, 2 P. Wms. 240, which was a bill for an injunction to stay waste, and for an account of timber cut, and in which it seemed to be held that the right to the timber cut might be pursued in chancery, as well as by trover at law.

The same doctrine was declared by Lord Hardwicke, in *Grath v. Cotton*, 1 Ves. 528, and that the decree for an account of the waste already committed was "an incident" to the injunction to stay waste. It would seem, then, to be a stretch of jurisdiction to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this court much beyond the remedy at law, and if it had been the established English practice, we should not have been without the most clear and explicit cases in proof of it. The

recovery in this court is not the timber itself, *in specie*, but damages for the value of it; and why should the personal chattel be bound by injunction in this case more than in any other case, where the remedy is for a tort sounding in damages? This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendant, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste, already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law.

In the case of *The Bishop of London v. Webb*, 1 P. Wms. 527, an injunction was called for against a lessee for years, to prevent digging the ground for brick, as it was destroying the field and carrying away the soil. The Lord Chancellor said: "Let the defendant carry off the brick he has dug, but be enjoined from further digging." In *Packington's Case*, 3 Atk. 213, the bill stated, that the defendant had cut down a great number of trees, and had threatened to cut down and destroy them all; but the injunction only went to restrain him "from cutting down timber trees growing."

The only case I have met with, applicable to the very point, is a very loose note of an anonymous case of 1 Ves. Jr. 93, in which the solicitor-general moved for an order to prevent the removal of timber wrongfully cut down. In what stage of the cause, or upon what state of pleadings and proofs, this motion was made, does not appear. Lord Thurlow is said to have observed: "I have no doubt about the interference of this court to prevent waste. The only difficulty I have is as to what shall be done with the timber cut. Trover might be brought for it; but, as the register says many orders of this kind have been made, take the order."

Such a case is not a sufficient authority to extend the injunction to the timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under the shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do

not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process.

Order accordingly.

b. Where the action must be brought.

McGONIGLE *v.* ATCHISON.

33 KANSAS, 726. — 1885.

VALENTINE, J. — This case has been brought to this court upon a "case-made," which is a model of brevity and clearness, and reflects great credit upon the able counsel who prepared it. The case has also been very ably presented to this court by counsel on both sides, and if we should err in its decision, it will not be their fault. The amount involved in this controversy seems to be small and trifling, but the principles involved are supposed to be of vital importance, and counsel for plaintiff in error, defendant below, says that the decision of the case involves the possible liability for not only many dollars, but many hundreds of thousands of dollars. We have, therefore, given the case a very careful consideration.

The record of the case, as presented to this court, shows that on October 4, 1883, David Atchison filed his petition in the District Court of Leavenworth county, in which petition he alleged, among other things, that he was then and had been for more than five years the legal and equitable owner of a certain piece of land, describing it, situated in Platte county, State of Missouri, and being on what is commonly known as "Leavenworth Island;" that the defendant, George McGonigle, did, on or about March 1, 1883, unlawfully and wrongfully enter upon said premises and dig sand thereon, and remove, take and carry away to the city of Leavenworth, and convert and appropriate the same to his own use, to wit, 200,000 bushels, of the value of one cent per bushel, to the damage of the plaintiff in the sum of \$2,000, and prayed judgment for the sum of \$2,000 and costs. To this petition the defendant answered, the answer being a general denial. Upon the issues as thus made, the cause came on for trial before the court and a jury; whereupon the defendant objected to the introduction of any testimony, upon the ground that the petition did not state facts sufficient to constitute a cause of action of which the District Court had jurisdiction. This objection was overruled by the court, and the trial proceeded, and

resulted in a verdict of \$1 for the plaintiff. The defendant moved for a new trial upon the ground of error of law occurring at the trial and duly excepted to, which motion was overruled, and the defendant excepted. Judgment was then rendered in favor of the plaintiff and against the defendant for \$1 and costs, to which judgment the defendant excepted, and now brings the case to this court for review.

Counsel for plaintiff in error, defendant below, states in his brief that the question involved in this case is as follows: "Is this a local or a transitory action? Is it trespass *quare clausum fregit*, or trespass *de bonis asportatis*?" We think the question may be more properly stated as follows: Do the facts of this case show a cause of action that is transitory, or one that is purely local? Or, in other words, do the facts of this case show a cause of action in the nature of trespass *de bonis asportatis*, or trover, on the one side, or trespass *quare clausum fregit*, on the other side? If the facts show a cause of action in the nature of trespass *de bonis asportatis*, or trover, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit*, then the action is admittedly local. The distinction between transitory and local actions, both at common law and under the code, is generally and substantially as follows: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it is one that could only have arisen in one place, then it is local. Hence, actions for injuries to real estate are generally local, and can be brought only where the real estate is situated; while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found. These propositions, we suppose, are conceded. But the real contention between the parties to this action is, whether the real and substantial grievance set forth by the plaintiff as the foundation for his action is one which relates merely to real estate, or one which may be considered as fairly relating to personal property. The petition states wrongs relating both to real estate and to personal property. It states that the defendant unlawfully and wrongfully entered upon the plaintiff's premises, in Missouri, and dug sand thereon. This, of course, was a wrong relating to real estate only; but the petition also states that after the sand was severed from the real estate the defendant then removed the same to Leavenworth city, Kansas, and there converted and appropriated the same to his own use; and these last-mentioned wrongs certainly relate to personal property only; for as soon as the sand was severed from the real estate it became personal property.

This principle, of things becoming personal property when severed from the realty, is universally recognized by all courts and by all law-writers. Besides, the plaintiff in this case, after alleging the above-mentioned wrongs, then asks for damages only for the wrongful conversion of the sand, which was personal property, and does not ask for damages for injuries done to his real estate. He seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the *value* of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit*; but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis* and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory; although it must be conceded that he cannot recover upon the former cause of action, for it is admittedly local in its character, and because the plaintiff has brought his action in a jurisdiction foreign to the one where this local cause of action arose. But as the plaintiff asks no relief pertaining specially to the local cause of action, but only such as may be given upon the facts of the transitory cause of action, we think he may recover.

All the old forms of action are abolished in Kansas. We now have no action of trespass *quare clausum fregit*, nor of trespass *de bonis asportatis*, nor of trover; but only one form of action, called a civil action. (Civil Code, sec. 10.) And under such form of action all civil actions must be prosecuted; and all that is necessary in order to state a good cause of action under this form is to state the facts of the case in ordinary and concise language, without repetition. (Civil Code, sec. 87.) And when the plaintiff has stated the facts of his case, he will be entitled to recover thereon just what such fact will authorize. *Fitzpatrick v. Gebhart*, 7 Kans. 42, 43; *Kunz v. Ward*, 28 Id. 132. We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election. And if one kind of relief is beyond the jurisdiction of the court, and the other within such jurisdiction, the plaintiff may elect to receive that kind of relief which is within the jurisdiction of the court.

. We think the plaintiff may maintain his present action as an action in the nature of trespass *de bonis asportatis*, or trover. When the sand was severed from the real estate it became personal property, but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand, and had the right to follow it and reclaim it, in to whatever jurisdiction it might be taken. He could recover it in an action of replevin, *Richardson v. York*, 14 Me. 216; *Harlan v. Harlan*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574. Or he could maintain an action in the nature of trespass *de bonis asportatis*, for damages for its unlawful removal, *Wadleigh v. Janvrin*, 41 N. H. 503, 520; *Bulkley v. Dolbeare*, 7 Conn. 232; or he could maintain an action in the nature of trover for damages for its conversion, if it were in fact converted, *Tyson v. McGuineas*, 25 Wis. 656; *Whidden v. Seelye*, 40 Me. 247, 255, 256; *Riley v. Boston W. P. Co.*, 65 Mass. 11; *Nelson v. Burt*, 15 Mass. 204; *Forsyth v. Wells*, 41 Pa. St. 291; *Wright v. Guier*, 9 Watts, 172; *Mooers v. Wait*, 3 Wend. 104; or he could maintain an action in the nature of assumpsit, for damages for money had and received, if the trespasser sold the property and received money therefor, *Powell v. Rees*, 7 Ad. & L. 426; *Whidden v. Seelye*, 40 Me. 255; *Halleck v. Mixer*, 16 Cal. 574; see also in this connection the case of *Fanson v. Linsley*, 20 Kans. 235.

In all cases of wrong, the tort or a portion thereof may be waived by the party injured, and he may recover on the remaining portion of the tort or on an implied contract, provided the remaining facts will authorize such a recovery. Mr. Waterman, in his work on Trespass, uses the following language:

"Section 1102. Although as standing trees are part of the inheritance and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of the timber only thus severed and carried away. In the one case, the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case, the action is transitory, and not local." See also *Nelson v. Burt*, 15 Mass. 204; *Halleck v. Mixer*, 16 Cal. 574.

The plaintiff in error, defendant below, has cited a large number of authorities, but under our code of practice and procedure they hardly apply to the facts of this case. Those nearest applicable are the following: *Am. Un. Tel. Co. v. Middleton*, 80 N. Y. 408; *Frost v. Duncan*, 19 Barb. 560; *Howe v. Wilson*, 1 Denio, 181; *Sturgis v. Warren*, 11 Vt. 433; *Baker v. Howell*, 6 Serg. & R. 476; *Powell v. Smith*, 2 Watts, 126; *Uttendorffer v. Saegers*, 50 Cal. 496. The case

of *The Telegraph Company v. Middleton*, *supra*, was where the defendant committed a trespass by cutting down telegraph poles in a highway, and throwing them in the ditches and on the fences on the sides of the highway, and leaving them there. There was no asportation from the premises, no conversion, and no intended asportation or conversion; and the court held that the action was, therefore, trespass *quare clausum fregit*, and not trover, and that the action was, therefore, local in its character and not transitory. The case of *Frost v. Duncan*, *supra*, was not decided by a court of last resort; and the main question decided was that two causes of action were improperly joined in one count. Besides, in that case the defendants were in the actual possession of the land, claiming the same as their own under a deed. The next four cases were not decided under any reformed code of procedure, and we do not think that the seventh and last case cited conflicts with the views that we have expressed. The fact that the question of title to real estate was incidentally raised in this case makes no difference. See the cases heretofore cited, and especially *Harlen v. Harlen*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574. The plaintiff was in possession, claiming to own the property, while the defendant was a mere wrongdoer, with no claim of interest in the land.

We have so far considered this case as though it made no difference whether the sand was severed from the real estate and carried away by one act only, or by two or more; nor do we think that it can make any difference. Under any circumstances, the sand remains the property of the owner of the land until he chooses to abandon the same. We suppose that if the sand were severed from the real estate by one act, and then carried away by another, this proposition would not be questioned, and probably it will not be questioned even if the sand was severed and carried away by a single act; and if the sand remains the property of the owner of the real estate, as we think it does, there can be no good reason why he should not be entitled to all the remedies for its recovery, or for loss or damages for its injury, or detention or conversion, which he might have with respect to any other personal property.

The judgment of the court below will be affirmed.¹

¹ Compare *Am. Union Tel. Co. v. Middleton*, 80 N. Y. 408, explained in *Radway v. Duffy*, 79 App. Div. (N. Y.) 116. The jurisdictional question must be raised before judgment. *Sentenis v. Ladew*, 140 N. Y. 463 — Ed.

III. Interests in things the subject of property may change from real to personal, and vice versa.

1. IN VIEW OF A COURT OF LAW.

MCGONIGLE *v.* ATCHISON.

33 KANSAS, 726. — 1885.

[*Reported herein at p. 65.*]

RICKETTS *v.* DORREL.

55 INDIANA, 470. — 1876.

[*Reported herein at p. 51.*]

2. IN VIEW OF A COURT OF EQUITY.

MARCH *v.* BERRIER.

6 IREDELL'S EQUITY (N. C.), 524. — 1850.

SARAH ANN WILSON, an infant, inherited several tracts of land from her father. By due process of law one tract was sold for the purpose of procuring money to pay decedent's debts; the surplus of the proceeds of the sale was paid to defendant, Perry, as guardian of the infant. Sarah Ann died intestate, while still an infant, leaving no issue, parent, brother or sister, but leaving a grandmother, who is her next of kin, and certain paternal uncles and aunts who are her heirs-at-law. The heirs-at-law bring this bill against the guardian and against Berrier, the grandmother's husband, who claims the fund as personalty, in right of his wife.

RUFFIN, C. J. — When a court of equity orders a sale of the real estate of an infant, in order to raise money for a particular purpose, it would not, upon its own principles and independent of any provision by statute, allow its decree to affect the right of succession to a surplus remaining after answering that purpose. The money stands for the land, of which it was the proceeds. That principle, however, has been rendered yet more obligatory by the legislative sanction in the acts of 1812, 1818, and 1827. Rev. Stat. ch. 54, secs. 26, 27, and ch. 85, secs. 7, 8. Accordingly, it has been held that, when the owner died without having capacity to dispose of the fund,

it was to be regarded as land, in respect to the right of succession. *Scull v. Jernigan*, 2 Dev. & Bat. Eq. 144; *Gillespie v. Foy*, 5 Ired. Eq. 280. Those cases show also, that the receipt of the money by the infant's guardian makes no difference. The acts of that person, or the dealings between him and the infant's administrator, cannot change the equitable nature of the fund, so as to disturb the rights of the heir-at-law. The interest, indeed, which accrued during the infant's life, is personalty, as the profits of the land during that period would have been. But the capital and the interest thereon since her death belong to the heirs-at-law.

Decree accordingly.

CRAIG *v.* LESLIE.

3 WHEATON (U. S.), 563. — 1818.

MR. JUSTICE WASHINGTON delivered the opinion of Court. — The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the State of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case as a bequest to Thomas Craig of personal property, or as a devise of the land itself?

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, 1 Bro. Ch. Cas. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which

they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, Id. 358; *Trelawney v. Booth*, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, consider things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of *Kirkman v. Mills*, 13 Ves., which was a devise of real estate to trustees upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A., B. and C., the estate was, upon the death of A., B. and C., considered and treated as personal property, notwithstanding the *cestui que trusts*, after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken

by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases.

The same doctrine is laid down and maintained in the case of *Edwards v. The Countess of Warwick*, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in *tail male*, remainder to the husband in fee. The only son of his marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir-at-law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any further investigation of it useless, were it not for the case of *Roper v. Radcliff*, which was cited, and mainly relied upon by the counsel for the State of Virginia. [*The discussion of this case is omitted. The court disapprove of it and decide further that it is not an authority in point.*]

As to the idea that the character of the estate is affected by this *right of election*, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition, it should be shown that this right or privilege of election is so indissolubly united with the devise as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the State of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true that equity will extend this privilege in all cases to the *cestui que trust*. It will be refused if he be an infant.

In the case of *Seeley v. Jago*, 1 P. Wms. 389, where money was devised to be laid out in land in fee, to be settled on A., B. and C., and their heirs, equally to be divided: on the death of A., his infant heir, together with B. and C., filed their bill claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was *incapable of making an election*, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foon v. Blount*, Cowp, 467, Lord Mansfield, who is compelled to acknowledge the authority of *Roper v. Radcliffe* in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that, therefore, a court of equity would, in such a case, decree that he should take the property as money.

The case of *Walker v. Denne*, 2 Ves. Jr. 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, *or on long terms*, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts*, though a *feme covert*, was held a sufficient indication of her intention that it should continue personal against her heir, claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land

beneficially, the right of election does not exist, and, consequently, that the property is to be considered as being of that species into which it is directed to be converted. [*Some further discussion of Roper v. Radcliff is omitted here.*]

Now, what is the situation of an alien? He can not only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received. *Vide Jackson ex dem. State of New York v. Clarke*, 3 Wheat. 12, n. c. In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the State is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could, upon the principles of a court of equity, have elected to take the land instead of the money. * * *

Upon the whole, we are unanimously of opinion that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.¹

¹ See also *Lockman v. Reilly*, 95 N. Y. 64, and *Greenland v. Waddell*, 116 N. Y. 234. — ED.

CHAPTER III.

CORPOREAL AND INCORPOREAL PROPERTY IN LAND.

HUFF *v.* McCAULEY.

53 PENNSYLVANIA STATE 206. — 1866.

STRONG, J. — In the court below the defendants relied for their defense upon an arrangement alleged by them to have been made between the plaintiff, McCauley, and George Huff, by which the latter was authorized to take as much coal from McCauley's land as he wanted for the use of his salt-works, and to take it as long as he wished, in consideration of his agreement that McCauley might use his drift and scaffold to take out coal for himself. Under the instructions given to the jury, they must have found either that no such arrangement had been made, or, that if it had, Huff had made no expenditure upon the faith of it. To which of these conclusions they came it is impossible to tell. If there had been no such arrangements made, what the court declared would have been its legal effect, if made, is of no importance. The jury may, however, have found that the parties had entered into such mutual agreements; but that Huff had made no expenditure of money in reliance upon them, and hence that he was not in a condition to set up an estoppel *in pais* against the plaintiff. It becomes necessary, therefore, to consider, whether the defendants were injured by the instruction given to the jury, respecting the rights of the parties to such an arrangement. It was a case of verbal agreement, and the charge of the court was, in effect, that if made, it was a revocable license and no more. In this it is insisted there was error, and it is argued that there having been a consideration given for the privilege accorded to Huff, in the allowance to McCauley to use Huff's drift and scaffold, that which otherwise might have been only a license became an irrevocable contract. It is manifest that if Huff took anything under the agreement, it must have been a license, or an easement, or an interest in land, or an incorporeal right arising out of it. It is observable that the case is unlike that class in which it has been held by the courts of this State, that a license to do something on the licensor's land, when followed by the expenditure of money on the faith of it, is

irrevocable, and is to be treated as a binding contract. Of this class *Lefevre v. Lefevre*, 4 S. & R. 241, is the leading case. It was followed by *Rerick v. Kern*, 14 S. & R. 267; by *Swartz v. Swartz*, 4 Barr. 353; by *Ebner v. Stichter*, 7 Harris, 19, and perhaps by others. All these decisions rest upon the principle of estoppel. The parties cannot be placed *in statu quo* after the license has been executed, and work done, or money expended on the faith of it, and hence such a case is regarded as presenting a sufficient reason for a chancellor's interference to restrain any action of the licensor which would deprive the licensee of the benefit of the expenditure he was encouraged to make by the very party who seeks to make it fruitless. Equity treats the license thus executed as a contract giving absolute rights, and protects the licensee in the enjoyment of them. In doing so, however, the courts of this State have gone beyond the common law, and beyond the rulings of courts of equity elsewhere. But where there has not been expenditure on the faith of a license, as in the present case, there is no foundation for an estoppel, and the same reason does not exist for holding it irrevocable. Even if there has been a consideration paid, there is nothing in the way of restoring the parties to their original condition. No case in this State has gone to the length of ruling, that it is converted into a contract giving irrevocable interests in or out of lands, by the mere fact that a consideration was agreed to be paid or allowed for it. Such was not either of the cases that have been cited. In all of them something had been done in reliance upon the license, and it was impossible to restore the licensees to the position they occupied before the license was given. Revocation, therefore, would have been a fraud.

We do not propose, however, to decide that the arrangement alleged to have been made between the plaintiff and George Huff, if made at all, was a revocable license. As already said, it was that, or the creation of an easement in lands, or the assurance of an interest either in or out of lands. If it was a revocable license, the instruction given by the court to the jury was confessedly right. If it was a contract, it was *in parol*, and the defendants could not defend under it. In neither aspect of the case have they been injured by the charge of the court. Let it be assumed that it was what they claim it to have been, it was still an attempted parol grant of a right or an easement upon the plaintiff's land. The right which it purported to give was a right of "*profit à prendre*," the privilege of taking minerals from the plaintiff's land for the defendants' salt works. Perhaps it was not technically an easement; if not, it was more. Some modern decisions have called it an easement, though

it was a privilege on another's land with a profit. In *Ritger v. Parker*, 8 Cush. 145, the Supreme Court of Massachusetts defined an easement or servitude to be "a right which one proprietor has to some profit, benefit or lawful use out of or over the estate of another proprietor." And in *Post v. Pearsall*, 22 Wend. 425, Chancellor Walworth, in speaking of rights of *profit-à-prendre*, said, that "such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands, as the dominant tenant; for a *profit-à-prendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement but an interest or estate in the land itself."

In *Doe v. Wood*, 2 B. & Ald. 724, a grant of a right to search for metals in another's land, and to raise and dispose of the same when found, was called "an incorporeal privilege." It matters not, however, whether the right claimed by the defendants be an easement or an incorporeal privilege in the land. It is incorporeal, as all easements and *profits-à-prendre* are. Whether one or the other, it is incapable of creation in any other way than by grant or prescription. It is well settled that an easement cannot exist in parol. Professor Washburne has collected a large number of cases to that effect in his work on Easements, page 18, note. It is equally true that an interest in land or arising out of it, whether corporeal or incorporeal, must be in grant. It can pass only by deed. The Statute of Frauds is applicable to all such interests, and with especial reason when they are incorporeal. Its language is very comprehensive. It applies to all estates, interests of freehold, or terms of years (excepting leases not exceeding three years), or any uncertain interest of, in or out of any messuages, manors, lands, etc., without regard to any consideration that may have passed. In *Yeakle v. Jacob et al.*, 9 Casey, 376, a right to cut timber on a tract of land to make rails for the repair of fences on another's tract, was held to be an interest in land within the Statute of Frauds. The agreement in that case having been by parol, it was said to be nothing but a license at will, though there was a consideration for it. It was not an agreement made with a view to immediate severance, and not, therefore, a mere sale of growing timber. There is no distinction to be made between that case and this, founded in the fact that it was a perpetual right. All easements and *profits-à-prendre* may be held for life in fee, or for years, and the right was no more perpetual in that case than it is in this. All agreements for the sale of growing timber, not made with a view to immediate severance, are contracts for the

sale of interests in land, and therefore within the statute. Addison on Cont. 31; *Crosby v. Wadsworth*, 6 East, 610.

Without prosecuting the subject further, enough has been said to show that the defendants have no protection in the agreement they set up.

It is clear, therefore, that no error was committed in the court below of which they can complain.

Judgment affirmed.¹

¹ The rents reserved in *Ingersoll v. Sergeant* and *Van Rensselaer v. Hays*, pp. 86 and 81, *infra*, are incorporeal hereditaments. See in particular p. 84. Compare *Caldwell v. Fulton*, p. 102, *infra*, and *Genet v. D. & H. Co.*, 136 N. Y. 593. — ED.

CHAPTER IV.

ABSOLUTE AND SPECIAL OR LIMITED PROPERTY IN LAND.

GOODWIN *v.* GOODWIN.

33 CONNECTICUT, 314. — 1866.

[Reported herein at p. 8.]

EATON *v.* BOSTON, CONCORD AND MONTREAL RAILROAD.

51 NEW HAMPSHIRE, 504. — 1872.

[Reported herein at p. 1.]

CHAPTER V.

ALLODIAL AND FEUDAL PROPERTY IN LAND.

VAN RENSSELAER *v.* HAYS.

19 NEW YORK, 68. — 1859.

ACTION to recover rent in arrear. Plaintiff is a devisee of Stephen Van Rensselaer, deceased. Further facts appear in opinion.

DENIO, J. — The defendant's position is, that the covenant for the payment of the rent is, in law, personal between the grantor and grantee, or what is sometimes called in the books a covenant in gross, and, consequently, that after the death of the original parties no action to recover rent can be maintained in favor of or against any persons except their respective executors or administrators. As the law contemplates that the estates of deceased persons shall be speedily settled, and in the natural course of things the personal representatives of a man disappear with the generation to which they belong, the intention of the parties to the indenture to create a perpetual rent issuing out of the premises will, if that position can be maintained, be entirely disappointed; and the argument is, in effect, that the law does not permit arrangements by which a rent shall be reserved upon a conveyance in fee, and that where it is attempted the reservation does not affect the title to the land, but the conveyance is absolute and unconditional. The design of the parties to create relations which should survive them, and continue to exist in perpetuity by being annexed to the ownership of the estate of the grantee of the land on the one hand, and of the rent on the other, is manifest from the language of the instrument. They were careful to declare that the obligation to pay the rent should attach to those who should succeed the grantee as his heirs and assigns, and should run in favor of the heirs and assigns of the grantor; and the nature of a perpetually recurring payment requires that there should be an endless succession of parties to receive and to pay it. We have a legislative declaration, in an act of 1805, passed about ten years after this conveyance, that grants in fee reserving rents had then long been in use in this State (ch. 98); and the design of the Legislature by that enactment was not only to

render such grants thereafter available according to their intention, but to resolve, in favor of such transactions, the doubts which it is recited had been entertained respecting their validity. Still, if, by a stubborn principle of law, a burden in the form of an annual payment cannot be attached to the ownership of land held in fee simple, or if the right to enforce such payment cannot be made transferable by the party in whom it is vested, effect must be given to the rule, though it may have been unknown to the parties and to the Legislature; unless, indeed, the interposition of the latter, by the statute which has been mentioned, can lawfully operate retrospectively upon the conveyance under consideration. It is not denied but that, by the early common law of England, conveyances in all respects like the present would have created the precise rights and obligations claimed by the plaintiff; but it is insisted that the act respecting tenures, called the statute of *quia emptores*, enacted in the eighteenth year of King Edward I., and which has been adopted in this country, rendered such transaction no longer possible. The principles of that statute have, in my opinion, always been the law of this country, as well during its colonial condition as after it became an independent State. A little attention to the pre-existing state of the law will show that this must necessarily have been so. In the early vigor of the feudal system, a tenant in fee could not alienate the feud without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, which consisted in the tenant enfeoffing another to hold of himself by fealty and such services as might be reserved by the act of feoffment. Thus a new tenure was created upon every alienation, and thence there arose a series of lords of the same lands, the first, called the chief lords, holding immediately of the sovereign; the next grade holding of them; and so on, each alienation creating another lord and another tenant. This practice was considered detrimental to the great lords, as it deprived them, to a certain extent, of the fruits of the tenure, such as escheats, marriages, wardships, and the like, which, when due from the terre-tenants, accrued to the next immediate superior. This was attempted to be remedied by the 32d chapter of the Great Charter of Henry III. (A. D. 1225), which declared that no freeman should thenceforth give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him which belonged to the fee. 1 Ruffhead's Statutes at Large, 8. The next important change was the statute of *quia emptores*, enacted in 1290, which, after reciting that "forasmuch as purchasers of lands and tenements (*quia emptores terrarum et tene-*

mentorum), of the fees of great men and other lords had many times entered into their fees to the prejudice of the lords," to be holden of the feoffors and not of the chief lords, by means of which these chief lords many times lost their escheats, etc., "Which things seemed very hard and extreme unto these lords and other great men," etc., enacted that from henceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffor held before. *Id.* 122. The effect of this important enactment was, that henceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffor before occupied; that is, he held of the same superior lord by the same services, and not of his feoffor. The system of tenures then existing was left untouched, but the progress of expansion under the practice of subinfeudation was arrested. Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation; 1 Kent, 473, and cases cited in note *a* to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178; and when the first constitution of this State came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this State, subject, of course, to alteration by the Legislature. Art. 35. The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the Colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the crown, and as the king was not within the statute *quia emptores*, a certain tenure, which, after the act of 12 Charles II. (ch. 24), abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I. *The People v. Van Rensselaer*, 5 Seld. 334. But with the exception

of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his Treatise upon Tenures. * * *

We are, then, to ascertain the effect of a conveyance in fee reserving rent, upon the assumption that the statute of *quia emptores* applies to such transactions. In the first place, no reversion, in the sense of the law of tenures, is created in favor of the grantor; and as the right to distrain is incident to the reversion, and without one it cannot exist of common right, the relation created by this conveyance did not itself authorize a distress. The fiction of fealty did not exist. The rent in terms reserved was not a rent-service. Litt., secs. 214, 215. It was, however, a valid rent-charge. According to the language of Littleton, "if a man, by deed indented at this day, maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, etc., such a rent is a rent-charge, because such lands or tenements are charged with such distress by force of the writing only, and not of common right." Id., secs. 217, 218. And the law is the same where the conveyance is by deed of bargain and sale under the statute of uses. Co. Litt. 143 b. Mr. Hargrave, in his note to this part of the commentaries, expresses the opinion that a proper fee farm rent cannot be reserved upon a conveyance in fee, since the statute of *quia emptores*; but he concedes that where a conveyance in fee contains a power to distrain and to re-enter, the rent would be good as a rent-charge. Note 235 to Co. Litt. 143 b. Blackstone says that upon such a conveyance the land is liable to distress, not of common right, but by virtue of the clause in the deed. 2 Bl. Com., 42. * * *

These authorities establish the position that upon the conveyance under consideration a valid rent was reserved, available to the

grantor by means of the clause of distress. This rent, though not strictly an estate in the land, *Payne v. Beal*, 4 Denio, 405, is nevertheless a hereditament, and in the absence of a valid alienation by the person in whose favor it is reserved, it descends to his heirs. Its nature, in respect to the law of descents, is explained by Lord Coke, who at the same time points out the distinction between such a rent as we are considering and a rent-service reserved upon a feoffment which created a tenure. He says that if a man seized of a manor, as heir on the part of his mother, before the statute of *quia emptores*, had made a feoffment in fee of parcel, to hold of him by rent and service, albeit they (the services) are newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir on the part of the mother. If a man so seized, that is by inheritance from his mother, maketh [now] a feoffment in fee, reserving a rent to him and his heirs, this rent shall go to the heirs on the part of the father. Co. Litt. 12, b. The reason is given in a case in Hobart, thus: "If, upon a feoffment of lands which I have on the part of the mother, or in Borough English (where the youngest son is the heir) I reserve a rent to me and to my heirs, it shall go to my heirs at common law, for it is not within the custom, *but it is a new thing divided from the land itself.*" *Counden v. Clerk*, 31, b. The distinction is this: A rent-service, such as arose upon an alienation of a fee at common law, was incident to the reversion, and, therefore, a part of the estate remaining in the feoffor; and upon his death it passed in the same channel of descent as the estate would have done if there had been no alienation. But where there is no reversion, as in the case of a conveyance in fee since the statute, the rent reserved is an inheritable estate newly created, and descends according to the general law of inheritance, to the heirs of the person dying seized, without regard to the heritable quality of the estate, the conveyance of which formed the consideration of the rent. Preston states the principle thus: "A rent incident to the reversion will descend with the reversion as a part thereof; but a rent reserved on a grant in fee, or limited by way of use in a conveyance to uses, will be descendible as a new purchase from the person to whom it is reserved or limited." 3 Essay on Abstracts of Title, 54. Further on he says that in such cases "the instruments amount to, first, a grant of the land from the owner of the same; and, secondly, a grant of the rent on the part of the grantee." Id. 55. To the same purpose see 3 Cruise, 313 (N. Y. ed. of 1834). The descendible quality of these rents was early established in this State in the case of *The Executors of Van Rensselaer v. The Executors of Platner*, decided in the year 1800. * * *

But the plaintiff in this case sues as devisee of the grantor and must establish the position that he is entitled in that character to sue upon the covenant. * * * In England, it is perhaps a debatable question at this day, whether the assignee of the grantor can maintain the action. [*Some English cases are considered at this point.*] [*Sir Edward Sugden*] says the rent-charge is an incorporeal hereditament, and issues out of the land and the land is bound by it. The covenant, therefore, he adds, may well run with the rent in the hands of an assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal. [*After considering certain New York cases and statutes it is decided that the devisee of Van Rensselaer can sue, upon the covenant, any one upon whom the covenant is binding, and that it is binding upon the defendant.*]

Judgment affirmed.¹

INGERSOLL v. SERGEANT.

1 WHARTON (Pa.), 336. — 1836.

REPLEVIN by Ingersoll against Mrs. Sergeant to recover chattels distrained for rent. Defendant avowed for rent in arrear and a verdict was found in her favor, subject to the opinion of this court.

Plaintiff insists that the release of a portion of the premises from the burden of the rent extinguished the whole rent.

KENNEDY, J. — The plaintiff alleges that the rent in question is in its nature strictly a rent-charge, and that the defendant, therefore, by releasing to Jonathan Smith a part of the ground upon which, according to his own phrase, it was *charged*, released the whole rent. It becomes material, therefore, to inquire and see whether it be a *rent-charge* or not; and if not, whether it is not a *rent-service*; because if it be a *rent-service*, the defense set up against the payment of it cannot avail, at most, beyond what shall be considered a proportional part, according to the value of the land released.

According to Littleton, there are three sorts of rent, which he specifies in section 213; namely, rent-service, rent-charge, and rent-seck. "A rent-service," he says, "is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage, fealty and

¹ Feudal tenures under the old crown grants continued in New York until the R. S. of 1830. Grants under the State government were allodial from the first. In 1830 all holdings of land in New York were made allodial. See R. S. 718, §§ 1 and 3. See also const. of 1894, art. I, §§ 11 and 12. 110

certain rent, or by other services and certain rent. [And if rent-service at any day, that ought to be paid, be behind, the lord may distrain for that of common right."] And in section 218, he also shows how a rent-charge and a rent-seck were created before the passage of the statute *quia emptores terrarum*, (18th Edw. 1, stat. 1, c. 1). He there says, "if a man seized of certain land, grant by deed poll, or his indenture, a yearly rent, to be issuing out of the same land to another in fee, or fee tail, or for term of life, etc., with a clause of distress, etc., then this is a *rent-charge*; and if the grant be without clause of distress, then it is a *rent-seck*; and *idem est quod redditus siccus*, for that no distress is incident unto it." And in the 217th section, he lays it down that "if a man by deed indented at this day (which was after the statute *quia emptores* had come into operation,) maketh a gift in fee tail, the remainder over in fee, or a lease for life, the remainder over in fee, or a feoffment in fee; and by the same indenture, he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, etc., such a rent is a *rent-charge*; because such lands or tenements are charged with such distress by force of the writing only, and not of common right." But before the passage of the statute *quia emptores*, it was clearly otherwise; for in the 216th section, he says, "before that statute, if a man had made a feoffment in fee simple by deed or without deed, yielding to him and to his heirs a certain rent, this was a *rent-service*, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffer did hold over of his lord next paramount." [Hence it is evident that the ground rent in question cannot be considered a rent-charge, unless it be so by the force of the statute *quia emptores*; but if it shall appear, upon examination, that this statute is not and never has been in force in Pennsylvania, then it would seem to be equally evident, that it must be held to be a *rent-service*.] King Charles the 2d, in granting the province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage and by fealty only, for all services; (see section 3 of the charter.) And by the 17th section thereof, William Penn, his heirs and assigns, had full and absolute power given to them, at all times thereafter, and forever, to assign, alien, grant, demise or enfeoff such parts and parcels thereof, to such persons as might be willing to purchase the same, their heirs and assigns, in fee simple, fee tail, for term of life, lives, or years to be held of the said William Penn, his heirs and assigns, as of the seigniori or Windsor by such services, customs and rents as should seem fit,

to the said William Penn, his heirs and assigns, and not immediately of the said King Charles, his heirs or successors. And again by the 18th section, it was further provided, that the purchasers from William Penn, his heirs or assigns, should hold such estates as might be granted to them, either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns should seem expedient, the statute of *quia emptores terrarum* in anywise notwithstanding. From these provisions, it appears most clearly, that it was the intention of King Charles to grant the lands of the province to William Penn, his heirs and assigns, so as to enable them to hold and dispose of the same as if the statute *quia emptores* had not been in existence. That it has been ever so understood may be seen and fairly inferred from both our legislative and judicial proceedings. * * *

Then an act of the assembly for ascertaining the descent of lands, and better disposition of the estates of persons dying intestate was passed; [app. to Hall & Sellers, vol. Pro. L. p. 4]. This act, after making all the lands as well as the personal estate of the intestate, liable to be seized and sold by his administrators for the payment of his debts, directed, by the second section thereof, that in case he should leave no known kindred, then all his lands, tenements and hereditaments should descend and go to the immediate landlord, of whom such lands were held, his heirs and assigns; and if held immediately of the proprietary, then to the proprietary, his heirs and assigns; and all goods, chattels, and personal estate to the proprietary and governor, his heirs and assigns. Now, here we have the right of escheat established upon and regulated according to the right of subinfeudation, and the principle of tenure, between the last feoffee or terre-tenant and his immediate feoffor or vendor. The same provision in regard to the right of escheat was introduced into a new intestate law passed in 1705 (Hall & Sellers, vol. Pro. L. 35), which continued in force till after the Revolution. This regulation of the right of escheat was in direct contravention to the statute *quia emptores*; which was enacted expressly for the purpose of securing it to the lord paramount, instead of the immediate landlord or feoffor or vendor, in every case of the terre-tenant's dying without heirs; together with the right of marriage and of wardship, which were also claimed as the fruits of the feudal system. The two last of these rights, however, were taken away by 12 Car. 2, c. 34, some six years before the granting of the province to William Penn; so that the door seems to have been completely closed from the first in the province, against the introduction of the only remaining right that existed under the authority of the statute *quia emptores terrarum*. As to judicial evidence of the non-existence of this

statute here, I refer first to the case of *Dunbar, Heir of Dunbar v. Jumper, Assignee of Thompson*, 2 Yeates, 74, where upon a mutual deed executed by the vendor and the vendee, by which the vendor sold and conveyed an acre of land to the vendee in fee, it being necessary for a grist-mill of the vendee, in consideration of the vendee's yielding and paying to the vendor and the lawful heir of his body, the privilege of grinding such grain as might be used or consumed by the vendor in his private family, on the plantation which he then occupied, or the heir of his body, on the said plantation after his decease, free of toll, as long as the mill should be in order to grind, it was held by Shippen and Yeates, Justices, at Nisi Prius, at Carlisle, in 1796, that an action of covenant was maintainable by the heirs-at-law of the vendor against Jumper, the assignee of Thompson, the vendee, for refusing to grind grain toll free for the plaintiff, according to the terms of the deed. Now, under the statute *quia emptores*, if it had been in force here when this case was decided, and our lands, considered as held under feudal tenures, the grinding of the grain ought to have been regarded as a *rent-charge*, and perhaps more properly so, than a ground-rent reserved on a deed poll. But a covenant to pay a *rent-charge* is merely personal and collateral to the land, and therefore will not render the assignee liable to an action of covenant for the non-performance of it. *Brewster v. Kitchen, Kitchell or Kidgell*, 1 Ld. Raymond, 322, s. c., Holt, 175; 5 Mod. 374; 1 Salk. 198; 12 Mod. 170-1; *Cook v. Earl of Arundel*, Hardr. 87; Platt on Co. 65, 475. Hence, we may very fairly conclude, that the court in *Dunbar* and *Jumper* did not consider the statute of *quia emptores* in force here, otherwise they would not have held, as they did, that the covenant of the vendee to grind toll free ran with the land, and that the assignee or terre-tenant thereof became liable to an action of covenant for not fulfilling it. * * *

This statute then being out of the way, we have seen that, according to the principles of the common law (Littleton, sec. 216), the rent in question is clearly a rent-service. And Lord Coke, in his commentary upon this section (Co. Litt. 143 a), adds "at the common-law, if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heirs, because it was a *rent-service* and a tenure thereby created." It was called a *rent-service*, because it was a compensation for the services to which the land was originally liable; 3 Cruise, Dig. Rents, tit. 28, c. 1, sec. 6. And at this day, the tenant (says Chief Baron Gilbert), does the corporeal service of fealty; Gilb. on Rents, 9; and therefore it is still called a rent-service, because it hath always

some corporeal service incident to it, which at the least is fealty Gilb. on Distress, 5; 1 Inst. 142 a.

The rent in question then being a rent-service and not a rent charge, the doctrine contended for, as well as the authorities cited by the plaintiff's counsel on the argument, showing what in law will amount to an extinguishment of the whole rent, where it is a rent charge, and that it is not in its nature apportionable by the act of the parties, will be found to be wholly inapplicable to a rent-service. A rent-charge was considered repugnant to the principles of the feudal policy, inasmuch as it created an incumbrance upon the land of the tenant, and rendered him the less able to perform the services incident to his tenure; and being looked on as against common right, the law did not attach the remedy by distress for its recovery when in arrear, so that it is only given by virtue of the clause to that effect in the deed creating it. Gilb. on Rents, 155; Littleton, sec. 217; 3 Cruise, Dig. tit. 28, Rents, ch. 1 sec. 9. In short it was regarded with disfavor by the law, and any act, therefore, on the part of the owner of it, which could in any way be construed to be incompatible with the future assertion of right to the same, was held to amount to a release or an extinguishment of it, without regard to the intention; as, for instance, if he purchased or released a part of the land from the rent, upon which it was charged; this was held to be an entire extinguishment of his right to the whole rent; Littleton, sec. 222; 1 Inst. 147 b; Gilb. on Rents, 152; 18 Vin. Abr. 504; Bro. tit. Apportionment, pl. 17; 3 Cruise Dig. tit. 28, Rents, ch. 3, secs. 13, 16. But a rent-service being given as a compensation for the services to which the land was originally liable under the feudal system (3 Cruise Dig. tit. 28, ch. 1, sec. 6), must, therefore, be judged of by the rules which regulated the performance of those services. Accordingly, Littleton lays it down expressly in section 222, "If a man which hath a rent-service, purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but for parcel; for a rent-service in such case may be apportioned according to the value of the land." If the rent, however, in such case should be indivisible, as if it consist of a horse, hawk, etc., it would be taken away; Bruerton's Case, 6 Co. 1 b; Co. Litt. 149 a; 8 Co. 155 a; Mo. 203; Gilb. on Rents, 151, 165. So if the lord purchase a part of the tenancy in fee, a proportional part only of the rent becomes extinct, and the residue will continue *in esse*, because of the enjoyment of the remaining part of the land by the tenant, which is the consideration for the payment of the rent. *Ascough's Case*, 9 Co. 135; Co. Litt. 148 b. Lord Hale, Chief Justice, in *Hodgkins v. Robson*, 1 Ventr. 276, may possibly be thought to

go still further, when he lays it down that if a lessee assign part of the land which he holds on lease, to a stranger without reserving any rent, and the stranger assigns it to the lessor, there shall be no apportionment or suspension of any part of the rent, because the tenant, by assigning part, made himself answerable for the whole rent; and the lessor claiming under a stranger, is entitled to the benefit of his contract. This proposition is also repeated with seeming approbation, by Lord Chief Justice Baron Gilbert, in his treatise on Rents, 181. The reason of the difference mentioned between rent-charge and rent-service is stated by Lord Chief Baron Gilbert to be this: In case of rent-service, the tenant is under obligation of the oath of fealty, to bear faith to his lord, and to perform the services for the land which he holds of him; and this obligation has its force, while the tenure of the lord continues, and the tenure could not be discharged by purchase of part of the tenancy; for that construction would not only be attended with this absurdity, that the part remaining in the tenant's hands would be held of nobody, and in consequence would produce this public inconvenience, that the remainder of the tenancy would be free of all feudal duties; which in the height of the feudal tenures must have been a detriment to the public; wherefore, since for this reason, the tenure between the lord and the tenant, continued for so much of the land as remained unpurchased, the tenant, by his oath of fealty, was obliged to perform the services of it. But as it would have been unreasonable to have compelled him to perform the whole services that were reserved upon the old donation, when the lord had wilfully resumed part of the land, which was the consideration upon which the obligation to make the annual return of services was founded, the medium between the two extremes was adopted; that as the enjoyment of the land was the consideration for the services, the return ought always to be made according to the proportion of the land, which the tenant continued in the possession and enjoyment of. But in the case of a *rent-charge*, when the grantee purchases parcel of the land, the whole rent is extinguished, because there is no feudal dependency between the grantor and the grantee by the deed of grant, which created the rent-charge, as there was by the feudal donation which created the rent-service. And, therefore, as these grants were of no benefit to the public, and afforded no addition of strength or protection to the kingdom, the law carries them into execution only so far as the rent could take effect, according to the original intention of it; and, therefore, if the grantee had wilfully, by his own act prevented the operation of the grant according to the original intention of it, the whole grant was to determine. And as a rent-charge

issues out of every part of the land, and consequently every part of the land is subject to a distress for the whole rent, therefore, when the grantee purchases part of the land, it is become impossible by his own act, that the grant should operate in that manner, because it is absurd that the grantee should distrain his own lands, or bring an assize against himself. Gilbert on Rents, 152-3-4, 3 Cruise Dig. tit. 28, Rents, ch. 3, sec. 14. But *rent-service* being something given by way of *retribution*, to the landlord for the land demised by him to the tenant, and the obligation of the latter to pay the rent arising from his having enjoyed the land under a contract with his landlord, it is reasonable that the extent of his obligation to pay should be regulated by the extent of his enjoyment; and, therefore, it is that if he be legally deprived of the enjoyment of part of the land demised, he shall be released from the rent only in proportion to the value of the land evicted. And in no case will an eviction of part of the demised premises, where the tenant continues to enjoy the residue thereof, discharge him from the payment of the whole rent, unless it be by the tortious act of the landlord himself, who shall forfeit all right to receive it in such case, as long as he prevents the tenant against his will, from occupying and enjoying any part of the land. Gilb. on Rents, 147; 10 Co. 128 a; 1 Roll. Abr. 235; Dyer, 56; Co. Litt. 148 b; 1 Vent. 277; Gilb. on Rents, 178-9. * * *

I have now presented my views in regard to the questions involved in this case; and the reasons which have determined me in coming to the decision adopted by the court, to wit, that the release is only an extinguishment of so much of the rent as may be equal to the comparative value of the ground bought by Mr. Smith of the plaintiff, at the time of the sale thereof; and the defendant is entitled to recover the residue of the rent due at the time of the distress. This apportionment, however, can only be made by a jury; *Hodgkins v. Robson*, 1 Vent. 276, s. c. Pollex, 141; *Fish v. Campion*, 1 Roll. Abr. 237; and as the verdict found by the jury does not provide for it, the matter will have to be submitted to another jury unless the parties will agree to take the price mentioned in the deed from Mr. Reed to Mr. Ingersoll, as the value of the whole of ground subject to the ground-rent, at the time the release was given, and the price mentioned in the deed from Mr. Ingersoll to Mr. Smith, as the value of the part released from the rent. If this be agreed to, the whole case can be settled now; otherwise the verdict must be set aside and a

Venire de novo awarded.¹

¹ As to the present existence of tenure in Pennsylvania see *Wallace v. Harmstad*, 44 Pa. 492 (1863), and the comment thereon in Gray's "Rule Against Perpetuities" § 26. — ED.

CHAPTER VI.

LEGAL AND EQUITABLE PROPERTY IN LAND.

JAQUES *v.* TRUSTEES OF M. E. CHURCH.

17 JOHNSON (N. Y.), 548. — 1820.

APPEAL from the Court of Chancery. Mary Jaques, deceased, was the wife of appellant, John D. Jaques. Prior to her marriage, being the owner of a large amount of property, a marriage-settlement was made, by which the said Mary conveyed all her real and personal estate to one Cruger to the use of said Mary, until the marriage should take place and after the marriage for her sole and separate use, free from the control of her husband and at her absolute disposal. Mrs. Jaques afterwards conveyed her interest to Robert Jaques upon certain trusts — among other things to pay over one-third after her decease to the Trustees of the M. E. Church. This is a bill for an accounting against John D. Jaques who is alleged to have obtained for his own use a considerable part of his wife's property, real and personal, during her life, with her consent and for his own use.

SPENCER, Ch. J. * * * It appears that Mrs. Jaques was the owner of considerable real and personal estate; and it does not admit of a doubt that her object in making the deed of settlement, was to guard against the legal effects of a marriage, which, by operation of law, would divest her absolutely of her personal estate, and take from her, during the coverture, all control over her real estate. Her motives could not be to guard against herself, but to retain dominion over her estate, and to prevent her intended husband from intermeddling with her estate any further than she was pleased to allow.

The deed of settlement is upon the trust, that the trustee should permit her to hold, enjoy and let the premises conveyed, and receive and take the rents and profits, and that her receipts should alone be sufficient discharges; so that the same should not be subject to the debts, control or intermeddling of her intended husband, but should be to the only use, benefit and disposal of her, during her natural life, and then to the use of those to whom she should grant or devise the same, by her last will and testament, lawfully executed. The question is, whether Mrs.

Jaques, with respect to her estate, is not to be regarded in a court of equity as a *feme sole*, and may not dispose of it as she pleases, without regard to her trustee; there being nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition of the estate by her.

I have examined this case with the unfeigned respect which I always feel for the learned chancellor who has denied the right of Mrs. Jaques to dispose of her estate without the consent or concurrence of her trustee; and I am compelled to dissent from his opinion and conclusions. From the year 1740 until 1793 (with the single exception of the opinion of Lord Bathurst in *Hulme v. Tenant*, which occurred in 1778, and in which case a rehearing was granted by Lord Thurlow and the opinion reversed), there is an unbroken current of decisions, that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. * * *

The mistake into which I think the chancellor has fallen consists in considering Mrs. Jaques restrained from disposing of her estate in any other way than that mentioned in the deed of settlement. The cases, in my apprehension, are clearly opposed to this distinction; and I am entirely satisfied that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement and sufficiently indicates her intention to affect by it her separate estate, when there is no fraud or unfair advantage taken of her, a court of equity will apply it to the satisfaction of such engagement. * * *

This is the first case in which the power of a married woman having separate property, to dispose of it at her will and pleasure, when not expressly restrained in the mode of exercising that will, has arisen in our courts. I confess that my partialities in favor of marriage settlements are not so strong as to induce my desire to see the law altered. Generally speaking, the rules of the common-law, which give to the husband all the wife's personal property, and the rents and profits of her real estate during coverture, are better calculated, in my judgment, to secure domestic tranquility and happiness, than settlements securing to the wife a property separate from and independent of the control of the husband. An improvident and dissipated husband may squander his wife's property, and reduce both of them to penury and distress. On the other hand, the possession by the wife of property, independent of and beyond the control of the husband, would be likely to produce perpetual

feuds and contention. Marriage is a union of persons and interests, *pro bono et malo*, and the ancient provisions of the common law show forth, in our own country, decisive proof of its benign and salutary influence. I have all along intended to be understood that the disposition by the wife must be free, neither the result of flattery, nor of force, or harsh and cruel treatment; and in the present case there is no evidence that Jaques treated his wife with unkindness, or employed any censurable means to induce her to bestow her bounty on him; on the contrary, the evidence is that he uniformly treated her with kindness and affection.

It necessarily results from the power which I suppose Mrs. Jaques to have had over her property, that she might give it away, without any formal act, in the same manner as though she had been *sole*; and her agreement that the family expenses were to be borne out of her estate, especially when executed by her, was a valid act. She was well situated as regards property, while her husband was in quite moderate circumstances. She chose, after the marriage, to maintain her former equipage, and the husband acquiesced in her wishes. It would be extremely hard and unjust to throw upon him the charge of her establishment, when it is clear that she meant to defray the expense of it herself. My opinion, accordingly, is that the agreement is valid, and that the husband is not only not to be charged with any sums of money expended for the maintenance of the family, but that he is to be allowed for all advances for that object; and also for moneys advanced for necessary reparations to her estate. * * *

Decree reversed.

KENNEDY, J., IN PULLEN *v.* RIANHARD.

1 WHARTON (PA.), 514. — 1836.

THE chief question here is settled by the principles laid down in the case of *Lancaster v. Dolan*, 1 Rawle, 231. In that case, the conveyance to the trustees was upon trust "to permit the party, (who at the time was *feme sole*, but contemplated being married), to use, improve, occupy, possess and enjoy; and to receive all and singular, the rents, issues and profits," and it was considered that the trustees took the estate with the use executed. The Chief Justice who delivered the opinion of the Court, says, "a use thus limited to any other than a married woman or *feme* in contemplation of marriage, would be executed; but it is immaterial whether the trust be to pay a married woman the profits, or to permit her to receive them,

it being necessary to a separate provision, that the legal estate should remain in the trustees, to prevent the husband from taking the profits, and defeating the very object of the conveyance." It is certainly true, that a distinction has been made between a devise to a person to *pay* over the rents and profits to another, and a devise in trust to *permit* another to receive the rents and profits. In the first case it has been held that the legal estate should continue in the first devisee, so that he might perform the trust, because without having the control of the estate he could not receive the rents and pay them over as directed. *Neville v. Saunders*, 1 Vern. 415. But in the second case, it has been adjudged that the legal estate is vested by the statute of uses in the person who is to receive the rents. *Boughton v. Langley*, 2 Ld. Raym. 873. This distinction, however, as the Chief Justice has said in *Lancaster v. Dolan*, does not exist in the case of a *feme covert*, where the estate is conveyed or devised to trustees for her separate use. The courts in such case will, if possible, construe the grant or devise, so as to vest the legal estate in the trustees, for the purpose of carrying into execution, in the most effectual manner practicable, the intention of the donor. *Harton v. Harton*, 7 Term. Rep. 648; 1 Cruise's Dig. tit. 12, Trust, ch. 1, pl. 15, page 456, and pl. 19, page 457. As to the intention of donor in this case, there can be but one opinion respecting it. It is the most unequivocally declared to be to give the wife the separate use and benefit of the estate during her natural life, without subjecting it to the control of her husband, or to liability in any way whatever, for the payment of his debts. This being the intention expressed in the deed, it is manifest that it would be entirely defeated, if it were to be held that the use was executed in the wife; for this would be putting the estate under the control and direction of her husband, so as to enable him to take the rents in despite of her, and to dispose of them as he pleased. The design, therefore, of the donor can only be carried into effect by considering the legal estate as vested under the deed in the trustee. That this was intended is still further indicated by the clause giving the wife the power to dispose of it for the benefit of herself and children, which requires the trustees, in case of such disposition being made by her, to execute such writing as should be required by law to carry it into effect; which could be of no avail, and was unnecessary, unless he thought he was investing him with the legal estate.

PART II.

OF LAND AS THE SUBJECT OF PROPERTY.

CHAPTER I.

SUBDIVISION OF LAND FOR PURPOSES OF OWNERSHIP.

- I. The ordinary and usual mode of subdivision. Presumption as to ownership of the underlying strata and of the space above the surface. Effect of this rule on things in such space.**

HOFFMAN *v.* ARMSTRONG.

48 NEW YORK, 201. —1872.

ACTION for assault and battery. Appeal from judgment for plaintiff.

Certain branches of a cherry tree on Dr. Hoffman's land overhang the lands of defendant. Plaintiff, a member of Dr. Hoffman's family, went upon the line fence and undertook to pick the cherries from such overhanging limbs. Defendant forbade her and, as she persisted in her attempt, he tried to prevent her by force and did her a personal injury.

The court below charged the jury, that "every person upon whose lands a tree stands owns the whole of that tree, notwithstanding portions of it may overhang the lands of another; * * * and is entitled to all the fruit growing thereon," and that one who interferes forcibly with his attempt to gather the fruit is a wrongdoer. Defendant excepted to this and asked the judge to charge in substance that the limbs of the tree overhanging the lands of defendant belonged to him and that he was entitled to the fruit thereon and had a right, by the use of all necessary force, to prevent plaintiff from picking it. This was refused and defendant excepted.

LOTT, Ch. C. — The only material question presented in this case is whether the owner of land overhung by the branches of a fruit tree standing wholly on the land of an adjoining owner is entitled to the fruit growing thereon.

The defendant claims that the ownership of land includes everything above the surface, and bases his claim on the maxim of the law, "*Cujus est solum ejus est usque ad cælum*," and that, consequently, he was the owner of the overhanging branches and the fruit thereon. The general rule unquestionably is, that land hath in its legal signification an indefinite extent upward, including everything terrestrial, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hands of man, as houses and other buildings. See Co. Litt. 4 a; 2 Black. Com. 18; 3 Kent's Com. p. 401; 2 Bouvier's Ins. sec. 1570.

This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit — and no one can lawfully obstruct it to his prejudice — yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging. It would be a violation of his right, for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof. See *Aiken v. Benedict*, 39 Barb. 400.

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by Allen, J., in giving the opinion of the Court in *Dubois v. Beaver*, 25 N. Y. Rep. 123, etc., that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie*, 2 Rol. Rep. 141; *Holder v. Coates*, 1 Moody & Malkin, 112, 22 E. C. L. R. 264.

The ground or reason assigned in those cases for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates, and not the ground or maxim on which the defendant's claim is based.

We have not been referred to any case showing that where no part of a tree stood on the land of a party, and it did not receive any nourishment therefrom, that he had any right therein, and it is laid down in Bouvier's Institutes (section 1573), that if the branches of a tree only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow. See also *Masters v. Pollie*, 2 Rol. Rep. 141; *Waterman v. Tooper*, 1 Ld. Raymond, 737.

The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself.

It follows, from the views above expressed, that the ruling of the judge at the Circuit was right, and the judgment appealed from must be affirmed, with costs.

Judgment affirmed.¹

GRANDONA v. LOVDAL.

70 CALIFORNIA, 161. — 1886.

ACTION to compel defendant to remove a certain line of trees on or near the boundary of his land and lands of plaintiff and to recover damages alleged to have been caused by their existence during the preceding four years. Defendant demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action; that several causes of action were improperly joined and not separately stated, and that it was ambiguous, unintelligible and uncertain as not specifically stating the amount of the several items of damage. Demurrer sustained and judgment for defendant. Plaintiff appeals.

MCKINSTRY, J. — The court below sustained a demurrer to the complaint. "Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow, but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil." Wood on Nuisances, sec. 112, citing *Commonwealth v. Blaisdell*, 107 Mass. 234; *Commonwealth v. McDonald*, 16 Serg. & R. 390.

So, it would seem, he may have abated the roots projecting into his soil, at least if he has suffered actual damage thereby.

The general demurrer should have been overruled. * * *

While we are compelled to hold that the complaint is not subject to general demurrer, nor to a demurrer for misjoinder of actions, we think that it is ambiguous and uncertain.

Judgment affirmed.

¹ See also *Skinner v. Wilder* reported *infra*, p. 154. — ED.

II. There may be horizontal as well as vertical subdivisions for ownership.

LORING *v.* BACON.

4 MASSACHUSETTS, 575. — 1808.

PARSONS, C. J. — The plaintiff declares in case upon several promises. The first count is *indebitatus assumpsit* in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labor, and victualing the workmen. The second count is a *quantum meruit* for the same items, technically supposed to be different but similar. The third count is a general *indebitatus assumpsit* for eighty dollars laid out and expended.

The facts being agreed by the parties, the question of law comes before the court on a case stated. From this case it appears that the defendant is seized in fee simple of a room on the lower floor of a dwelling-house and of the cellar under it; and that the plaintiff is seized in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair that unless repaired no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired their respective parts of the house at their several expense. And the question submitted to the court is, whether the plaintiff can recover in this action.

This is an action of the first impression. No express promise is admitted; but if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

Although in the case the parties consider themselves as severally seized of different parts of one dwelling-house, yet in legal contemplation each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant. The chamber, roof, and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that, having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage if he had not repaired.

Upon a very full research into the principles and maxims of the

common law, we cannot find that any remedy is provided for the plaintiff.

Houses for the habitation, and mills for the support of man are of high consideration at common law; and when holden in common or joint tenancy, remedies are provided against those tenants who refuse to join in necessary reparation, by the writ *de reparatione facienda*. In Co. Lit. 56b, it is said, that if a man has a house so near to the house of his neighbor, and he suffers it to be so ruinous that it is like to fall on his neighbor's house, he may have a writ *de domo reparanda*, and compel him to repair his house. In Keilway, 98b, pl. 4, there is a case reported, in the time of Henry the Eighth, in which Fineux and Brudenell, justices of the king's bench, were of opinion that if a man have a house underneath, and another have a house over it, as is the case in London, the owner of the first house may compel the other to cover his house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case. But some of the bar were of opinion that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in Fitz. N. B. 296 there is a writ of this kind. But in the case of *Tenant v. Goldwin*, 6 Mod. 314, Lord Holt was of opinion, that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in Keilway.

But there is unquestionably a writ at common law *de domo reparanda*, the form of which we have Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling, to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used to repair, etc. This writ, Fitzherbert says, lies, when a man who has a house adjoining to the house of his neighbor, suffers his house to lie in decay, to the annoyance of his neighbor's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoined to another on one side, or above, or underneath it.

But if the case in Keilway is law, the plaintiff cannot recover; for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

If the case in *Keilway* is not law, then upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in *Keilway*; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called.

CALDWELL *v.* FULTON.

31 PENNSYLVANIA STATE, 475. — 1858.

CALDWELL sues Fulton for digging and taking away 20,000 bushels of stone coal from under his lands. Caldwell's ancestor had conveyed to one Greer sixteen acres of the tract and "also the full right, title and privilege of digging and taking away stone coal to any extent the said Greer may think proper to do, or cause to be done under any of the land now owned and occupied by the said Caldwell; provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises."

Greer afterwards conveyed an undivided half of the sixteen acres and of the coal to a third party. Fulton has taken coal under a lease from the owner of one of the undivided shares. Plaintiff claims that the sale of a half interest extinguished the right to take coal. Judgment for defendant. Plaintiff appeals to this court.

STRONG, J. — This record presents the same question which was here at October Term, 1855, in an action between the same parties. The writ of error is designed to bring under review the adjudication which was then made. At that time, this court was of opinion that the deed from Caldwell to Greer was an absolute and exclusive conveyance of all the coal under the grantor's land, and not a mere license, or incorporeal hereditament. Such a construction of the deed is supposed to have been erroneous, and we have heard an earnest and able argument in support of the opposite interpretation.

The question is all-important to the rights of the parties; for, if the interest of the grantee is incorporeal, and not exclusive, it is necessarily indivisible; and Greer, having divided it by his own act, by alienation of part, extinguished it. 4 Co. 1; *Van Rensselaar v.*

Radcliffe, 10 Wend. 639. On the other hand, if the deed was a grant of all the coal, it might be conveyed without extinction of the right, either in entirety or in parts. The deed conveys in fee two tracts of land, and in its granting part, after describing the tracts by metes and bounds, adds, "also the full right, title, and privilege of digging and taking away stone coal, to any extent the said George Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said James Caldwell; provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises." Then follow the *habendum* and covenants of warranty, in one of which this subject of the grant is called "the aforesaid right to the stone coal," and in the other "the right of stone coal hereby given." The consideration mentioned is single, for the entire subject conveyed by the deed. It is to be observed in the description of the thing granted, that there are no limits fixed upon the extent to which coal might be taken from the land then owned and occupied by the grantor. The grantee's right was coextensive with his will; not necessarily to be exercised by himself, but one which might be enjoyed by others whom he should authorize. No form of words other than those employed could have given him larger dominion.

Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man, and the mineral right in another. It is not denied, in such a case, that both are landowners, both holders of a corporeal hereditament. Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine — separate from the ownership of the surface — because livery of seisin was in their minds inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was, that they were disposed to regard such rights as incorporeal, though they are not rights issuing out of land, but the substance itself. In this State, however, livery of seisin is supplied by the deed and its registration, and there is nothing incongruous in considering a grant of the *substratum* a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning. Even in England, so long ago as the reign of James I., it was held that ejectment would lie for a coal mine. *Comyn v. Wheatly*, Cro. Jac. 150. It was objected that it was beneath the soil, and that an *habere facias* could not be made thereof; but the objection was disallowed. Yet, ejectment cannot be sustained for an incorporeal hereditament, except.

perhaps, in the case of a common appendant or appurtenant. With us, unfettered as we are by the necessity of livery of seisin, and abounding in mineral districts, I am not aware that it has been seriously doubted that the ownership of a coal bed or seam is a corporeal interest in land. Cases not unfrequently occur in which the owner of lands sells merely the surface right, retaining the minerals which lie in place below the surface. Now, as his whole interest was corporeal before the sale, and as by his deed only the surface passed, that which remains ungranted must be corporeal. This proposition needs no further argument, and it has not been questioned in the discussion before us. In *Turner v. Reynolds*, 11 Harris, 199, a plaintiff in ejectment was allowed to recover a coal mine which he had described in his writ as land, and this, though his title was under a conveyance to him, not of the tract of land, but of the coal.

If, then, the ownership of the coal or other minerals in a tract of land may be vested in one person, while the right to the surface belongs to another, the next inquiry is, by what words it may be granted. There are two modes in which the subject-matter of a deed may be described, both equally potential. The one is by a description of the thing itself, as of land by metes and bounds, or by a known name, and the other is by a designation of its usufruct, or of the dominion over it. Thus, a grant of the rents, issues and profits of a tract of land is uniformly held to be a grant of the land itself: Co. Litt. 4b. Judgments abound to this effect in regard to devises, and though in wills and deeds the rules of construction differ relative to words limiting the estate granted, yet they are the same of words describing the subject-matter of the grant. There are also cases of the same character to be found in regard to deeds. Thus, it has been held that by the grant of a boilery of salt the land passes, for that is the whole profit, Co. Litt. 4b; or a mine of lead, Id. 6a. So by the grant of all growing trees, Cro. Eliz. 522. See also 4 Mass. 266; *Fish v. Sawyer*, 11 Conn. 545. The reason is that the grant of a thing can be no more than the grant of the full and unlimited use of it. So, too, the general power of disposal without liability to account is equivalent to ownership itself, it being the highest attribute of ownership, and a gift of the one necessarily carries with it the other. This is the doctrine of *Morris v. Phalen*, 1 Watts, 389.

Applying these principles to the case in hand, why was not the deed of Caldwell to Greer a conveyance of the coal in the land owned and occupied by the grantor? Because, says the plaintiff in error, it is not a grant of the thing itself, but of a right to take it

and until it is seized or taken the property in the thing remains in the grantor. But if the conveyance of the whole use of a thing, and of the absolute dominion over it, is a grant of the thing itself, only differing in the mode of describing the subject, it is not easy to see what more Caldwell could have sold than he did. If in another form of words he had described the coal as the subject of the grant, Greer would have possessed no greater beneficial rights than were given to him by the form adopted. The ownership of the coal in the ground is but a "full right, title, and privilege" to dig and carry it away, nothing more, nothing less. The words employed in the deed express absolute dominion, and complete enjoyment. These constitute property, and all that is understood in proprietorship.

Again, says the plaintiff in error, this is but a grant of a right to take and carry away part of the profits, and that while a grant of a right to take all the rents, issues, and profits of a tract of land is equivalent to a conveyance of the land itself, because it embraces their whole usufruct, a grant of a right to take part, such as "iron ore, coal," or "minerals," is not. It is said that in such a case the grantee can only take in common with the grantor.

The argument is based upon a misconception. The subject alleged to have been granted here is not the tract of land, but the coal in it, which, as we have seen, is capable of a separate conveyance, and which may be vested in one person, while the ownership of the tract of land, as such, may be another's. The alleged subjects of the grant then being the coal in the land, the *substratum*, the argument is inapplicable. The whole usufruct of that, as well as the entire dominion over it, was granted. The deed is not a conveyance of part of the usufruct, nor of the usufruct of part of the coal, but of the entire enjoyment. As already said, there was no limit to the grantee's right but his own will. He could take out coal to any extent. He could cause it to be taken out to any extent, and at all times under any of the land. He was accountable to no one. His entrance to it and his exit from it were, indeed, required to be on his own land; but the right to take the coal itself was absolutely unlimited. It would seem, therefore, that, according to well-established rules of construction, the deed of Caldwell to Greer was a conveyance of the coal itself, and not of a mere easement or incorporeal hereditament.

It is contended, however, that such a construction is in conflict with the authorities, and we are referred to Lord Mountjoy's case as the leading and principal one. [*After reviewing this case* (Anderson 307) *and Chetham v. Williamson, 4 East, 496; Doe v. Wood, 2 Barn.*

& *Ald. 719, and Grubb v. Bayard, 2 Wall. Jr. 81, the opinion proceeds as follows*]:

These are all the cases adduced to sustain the doctrine that a conveyance of a right to dig, take, and carry away the coal or minerals in a tract of land, though the grant be unlimited in quantity, time, or purpose for which the minerals may be taken, conveys no interest in the coal or minerals until they are taken, passes only an incorporeal hereditament. None of them were decided upon the ground of any supposed distinction between a right to take all the coal and carry it away, and a right to the coal itself. They are all cases in which there was no unrestricted power of taking and disposition conferred upon the grantee. The coal or minerals was to be taken either for a limited purpose, or in restricted quantities, and generally was not to be paid for until taken. And in most of them it is easy to see that the supposed necessity of livery of seisin, in order to pass a corporeal interest in land, was a controlling consideration in the minds of the judges. Even in *Grubb v. Bayard*, it seems not to have been without influence. The impossibility of making livery is, however, in Pennsylvania, no reason for refusing to give a construction to a deed accordant with the intention of the parties. When the intent is to give the entire usufruct and power of disposal, the legal title must be held to pass. Even in England, livery of seisin is no longer indispensable to the grant of a corporeal hereditament. Unopened mines may be conveyed, and the grantee takes more than a right issuing out of land, or exercisable therein. He takes the mines themselves. In *Stoughton v. Leigh*, 4 Taunt. 402, a widow was held entitled to dower of mines, not only in lands in which her husband had been seised in his lifetime and during coverture, but also in those which were in the lands of other persons, the minerals or *substratum* of which had been conveyed to him. It was also ruled, that in assigning her dower, the sheriff should set off to her not one-third of the profits but one-third of the mines themselves, and that the partition might be made either by metes and bounds, or by directing separate alternate periods of enjoyment.

It is not strange, therefore, that it had been held in this State, before the controversy between these parties was first here, that an unrestricted right to take and carry away all the coal in a tract of land is a corporeal right and exclusive. In *Benson v. The Miners' Bank*, 8 Harris, 370, we have this case: Reese was seised of two undivided third parts of a tract of land, and of one-fifth of all the fossil coal under it. He made a deed for the tract to Kepner, containing the clause "excepting and for ever reserving the liberties and privileges for the heirs and legal representatives of Samuel

Potts, deceased (of whom he was one), to dig, take, and carry away all the stone coal that is or may hereafter be found on the above described tract of land." The judgment of this court was, that the deed conveyed no part of the stone coal to the grantee of the land. Of course, it remained reserved or ungranted as a corporeal hereditament.

Thus, after a careful review of the question, we are constrained to hold that, by the deed from Caldwell to Greer, the title to the coal in the lands then owned and occupied by the grantor was conveyed, and not a mere license or incorporeal right. Such was the opinion of this court in 1855, when the same deed was here for construction, and the very able argument of the counsel for the plaintiff in error has failed to convince us that the court was then mistaken. * * *

The judgment is affirmed.

CHAPTER II.

CONSTITUENTS AND INCIDENTS OF LAND.

I. The soil and accretions thereto.

1. ACCRETIONS.

DEERFIELD *v.* ARMS.

17 PICKERING (MASS.), 41. — 1835.

WRIT of entry to recover a parcel of land formed by alluvial deposits on the bed and margin of Deerfield river.

SHAW, C. J., delivered the opinion of the court. — There are several points in this cause to which it seems proper to allude in the outset, and upon which we entertain no doubt.

In the first place it seems very clearly settled that upon all rivers not navigable (and all rivers are to be deemed not navigable above where the sea ebbs and flows), the owner of land adjoining the river is *prima facie* owner of the soil to the central line, or thread of the river, subject to an easement for the public to pass along and over it with boats, rafts and river craft. This presumption will prevail in all cases in favor of the riparian proprietor unless controlled by some express words of description which exclude the bed of the river, and bound the grantee on the bank or margin of the river. In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquæ*.

We also consider it as a well-settled principle of law resulting in part from the former, that where land is formed by alluvion, in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who for convenience, and by a single term, may be called the riparian proprietor. And in applying this principle, it is quite immaterial whether this alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of the river and becomes an island. And where an island is so formed in the bed of the river as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite sides of the river belong to different proprietors, the island will be

divided according to the original thread of the river, between the rival proprietors.

This view of the subject disposes of one of the questions of fact in relation to which some evidence was given; namely, whether the alluvial formation in controversy was separated by water from the eastern bank of the river, claimed by the demandants as riparian proprietors, or whether the newly formed land, at that point, extends quite to the eastern bank. We think this fact entirely immaterial to the rights in controversy between these parties. [*The judge then discusses the title of Deerfield to the lands on the east bank of the river (deciding in favor of such title) and the principles on which the accretion is to be divided among the several riparian proprietors.*]

GODDARD v. WINCHELL.

86 IOWA, 71. — 1892.

X

65, 1

REPLEVIN for an aerolite. Appeal from judgment for plaintiff.

GRANGER, J. — The District Court found the following facts, with some others not important on this hearing: “(1) That the plaintiff, John Goddard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 98, range No. 25, in Winnebago county, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. (2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the second day of May, 1890, an aerolite, passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for \$105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that the defendant

knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. . . . (10) I find the value of said aerolite to be one hundred and one dollars (\$101), as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the second of May, 1890; and that a member of Hoagland's family saw the aerolite fall, and directed him to it."

As conclusions of law, the District Court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by the appellant that the conclusions of law are erroneous; that the enlightened demands of the time in which we live call for, if not a modification, a liberal construction, of the ancient rule "that whatever is affixed to the soil belongs to the soil," or the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit — "that of title by occupancy" — and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "Whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, and supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things, and, therefore, they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules, and note wherein, if at all, the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title, that is to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation

of the earth and sea, it is not difficult to understand what is meant by "movables" within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite of about sixty-six pounds weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by the appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned by accretion or natural causes. The general rules of the law by which the owners of riparian titles are made to lose or gain by the doctrine of accretions are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the

deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "tell-tale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as the appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of \$101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very

doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by the appellant that this case is unique, that no exact precedent can be found, and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In 15 *American and English Encyclopædia of Law*, page 388, is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Soc.*, 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration, the information as to them being too meagre to indicate the trend of legal thought.

Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the District Court is affirmed.

2. SOIL OR ROCK DETACHED.

MCGONIGLE *v.* ATCHISON.

33 KANSAS, 726. — 1885.

[Reported herein at p. 65.]

NOBLE *v.* SYLVESTER.

42 VERMONT, 146. — 1869.

TROVER for a stone. Defendant appeals from judgment for plaintiff. The facts are sufficiently set forth in the opinion.

PIERPOINT, C. J. — It appears from the case that the stone in controversy was split out and removed from its original connection and position in the ledge, and laid up preparatory to its removal from the farm on which it was originally situated. This was done by the plaintiff, who was then the owner of the farm, and the object of splitting it out and putting it in such position was to remove it from the farm and use it in the construction of a tomb. This being the case, the stone may be regarded as being governed by the same principles that are applicable to timber, fence rails, and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, etc., and if on the land at the time the premises are conveyed they will pass by the deed, but if they are there not for the purpose of being used upon the premises, but to be removed elsewhere, then they do not pass by the deed. [So of this stone, it having been severed from the freehold for the purpose of removing it from the premises to be used for a specific purpose elsewhere, we think it would not necessarily pass by the deed; but as there was nothing about the stone, or the position in which it was placed, to indicate the use to which it was to be put, whether for fencing or underpinning, or the like, upon the premises, or for use elsewhere, it was a proper subject of explanation between the plaintiff and Wallace, at the time the deed was executed, and such explanation might well be by parol; it was not an exception of that which would otherwise pass by the deed, but the giving to Wallace a knowledge of facts showing that it would not pass, and thus avoiding all misunderstanding or controversy about it in the future. The fact that such information was accompanied by an exception in form, does not vary the principle. We think there was no error in admitting the parol testimony. And in submitting the question to the jury whether there was a parol exception or not, if there was error, it is not an error of which the defendant has any right to complain, as it was putting the case, in this respect, in quite as favorable a light as he could legally claim.

We think it was not error in the court to allow the plaintiff to show his own sayings in respect to his ownership of the stone made after the deed to Wallace, not for the purpose of proving what took

place between him and Wallace at the time the deed was made, but for the purpose of showing that he had not abandoned the property, inasmuch as the defendant in his pleadings and proof sets up the fact that the plaintiff had permitted the stone to remain where it was when the deed was executed up to the time the defendant took it away, as one ground of defense, and we are to assume that the court, in admitting the testimony for that special purpose, took care that the jury should understand that they were not to use, or regard, it for any other.

But it is insisted that even if the plaintiff did retain the property in this stone, so that the title did not pass to Wallace, still he has lost his right to it by suffering it to remain on the premises of Wallace down to the time it was sold to the defendant and he took it away.

The jury have found that the stone was excepted in the sale and remained the property of the plaintiff; that it was left upon the premises with the knowledge and assent of Wallace, and remained there over thirty years before the defendant purchased it of Wallace. The case shows that Wallace never interfered with the stone in any manner, never made any claim to it, never objected to its remaining there, or ever requested the plaintiff to remove it, but suffered it to remain there just as it was left when the deed was executed. The defendant now claims that the title to this stone became vested in Wallace by lapse of time, and we are called upon by his counsel to say, if thirty years under such circumstances is not sufficient to change the title, what time is sufficient? We do not feel called upon to give a definite answer to that question; but we feel safe in saying when the property of one man is left upon the premises of another, with the knowledge and assent of the owner of such premises, that so long as such owner suffers such property to remain upon his premises, without objection or request to remove it, exercising no act of ownership over it and making no claim to it, just so long the title to the property remains the same, and is not divested from the one and vested in the other by mere lapse of time.

Wallace never was the owner of this stone, and if the plaintiff had abandoned it, it would not necessarily revert to Wallace; but the case does not show an abandonment, and it does not appear to have been put upon that ground at the trial below.

The lapse of time was an element proper to be considered by the jury in determining the question submitted to them, and it is claimed that the County Court erred in not giving the jury special instructions in respect to it. It does not appear that there was any controversy upon the trial as to the propriety of their considering it,

and there was no request, from either side, that the court should give any specific charge upon it. The evidence upon this point, as upon all others, was submitted to the jury; it was doubtless commented upon by the counsel on both sides in their arguments, and we have no reason to suppose it was not duly considered and weighed by the jury. Under the circumstances it was no more error to omit to refer to this particular piece of testimony, than it was not to refer to any or every piece of testimony, put in on either side, and it has never been regarded the legal duty of the court to refer specifically to each and every piece of testimony in the case, in the charge, especially when there is no such request. We find no error in the trial below.

The judgment of the County Court is affirmed.

II. Water as "land."

I. NATURE OF PROPERTY IN SURFACE OR STANDING WATERS.

CURTISS *v.* AYRAULT.

47 NEW YORK, 73. — 1871.

[*Reported herein at p. 126.*]¹

2. NATURE OF PROPERTY IN RUNNING WATERS.

GARWOOD *v.* N. Y. CENT. AND HUD. R. R. R. CO.

83 NEW YORK, 400. — 1881.

DANFORTH, J. — The argument in behalf of the appellant raises no doubt as to the correctness of the judgment rendered by the Supreme Court, or its conformity to well-settled rules of law and equity. The diversion of the water is conceded; the jury have found that it was injurious to the plaintiff; he was, therefore, entitled to damages already sustained. It was continuous and under a claim of right; and to prevent further injury preventive relief was proper, for without it there would be vexatious litigation and multiplicity of suits. Story's Eq. Jur. vol. 2, sec. 927; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Swindon Water-Works Co. v. W. & B. Canal Co.*, 7 Eng. & Irish Appeal Cas. (L. R.), 697; *Campbell v. Seaman*, 63 N. Y. 568. The plaintiff has obtained nothing more; nor has the court in its deci-

¹ See pp. 126 and 130 in particular.—ED.

sion gone beyond the issues in the action. In measuring the rights and obligations of the defendant, it was treated as a riparian proprietor, for the purpose of enjoying the powers especially granted to it, and such as might be necessary to carry those powers into effect. This was proper in view of the concession by the plaintiff that the defendant was the owner of the land upon which the water was drawn. How it became such owner, whether by purchase or by proceedings under the statute (Laws of 1850, ch. 140, sec. 14) does not appear. The court, therefore, was not called upon to determine what the defendant's position would have been if the lands had been acquired under the statute, *supra*, and properly regarded the question as one to be determined by the law regulating the rights of upper and lower riparian owners. That law is well settled, and in defining it the authorities cited by the parties to this appeal agree. Each has a right to the ordinary use of water flowing past his land, that is, *ad lavandum et ad potandum*, for domestic purposes and his cattle, although some portion may be thereby exhausted; and this is so, without regard to the effect which such use may have upon the lower owner. The water may also be used for irrigation or for manufacturing purposes. The cases cited by the appellant are abundant to show this; but in every one the irrigation is of the land to which the right to use the water is an incident, or with which the manufacturing purpose is connected, but even this privilege cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. *Miner v. Gilmour*, 12 Moore's P. C. 156; *Tyler v. Wilkinson*, 4 Mason, 397. Now, in the case before us, the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places and for purposes in no respect pertaining to the land itself. The pipes and reservoirs of the defendant are not laid or constructed for the mere purpose of detaining the water a short time, or applying it to machinery or other object upon the land itself, and afterward restoring it, but for facility in filling the defendant's locomotives, in order that they, with power generated from it, may pass as the interest of the defendant may require, to the east or west, returning no portion of it, even in the form of vapor, to the stream from which it was taken. So far as the plaintiff is concerned, it has carried away from his premises the water, as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damage. Not only this, but it has been done under a claim of right by the defendant,

which, if acquiesced in by the plaintiff, would in course of time ripen into a realty and destroy the incident of his property — the right of the plaintiff as riparian owner to have the water flow as it had theretofore been accustomed to flow. For in that case, although the defendant could not claim the right as riparian proprietor, it might claim it by prescription; and to prevent this result also, the plaintiff had a clear right to an injunction. The terms of the one granted are sufficiently well guarded. The defendant is “restrained” only “from diverting the water, to the injury of the plaintiff.” But the learned counsel for the appellant contends that inasmuch as both plaintiff and defendant require the water for artificial as distinguished from natural uses — the one as a power for mill purposes, the other as material or the means of producing power for railroad purposes — it may be abstracted by the defendant, even to the other’s injury; although he concedes the rule would be different if the plaintiff required the water for natural purposes. It is difficult to see how such a distinction can be maintained. The plaintiff requires the current because its momentum supplies power. The defendant, as riparian owner, has no right to remove the water and so diminish it. If the defendant’s use was for natural purposes, there might be some reason for giving it priority; but this is not pretended. To justify a use beyond that, a grant or license would be necessary. The defendant exhibits neither, but in its answer asserts that its use has been adverse to the plaintiff for more than twenty years. The evidence does not sustain the claim. As to it, therefore, the case presents no exception to the rule [that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose, to the prejudice of any other riparian owner.] This is the doctrine both of the common and civil law, 3 Kent’s Com. 585, and it stands upon the familiar maxim, *sic utere tuo ut non laedas alieno*. In substance the defendant’s claim is, that it has a right to use all the water it pleases; but it does not show the origin or foundation of the right. As the case stands, then, the defendant has diverted the water without right and to the plaintiff’s injury; its use, therefore, could not be reasonable, and the inquiry desired by the defendant, as to whether it was or not, would not be applicable. To this effect also are the cases cited in behalf of the appellant. One much insisted upon is *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191. There, also, the defendants used the water of the stream “for furnishing their locomotive steam engines with water.” The plaintiff sought to recover nominal damage, without proof of actual damage; but the court held against him, and the conclusion was that one riparian

proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural water-course flowing through their lands, unless such diversion causes the plaintiff actual, perceptible damage. It should be noticed that this was an action at law. *The Earl of Sandwich v The Great Northern R. R. Co.*, L. R. 10 Ch. Div. 707, was a case in equity and upon facts, with one exception hereafter noted, not unlike those now before us. The plaintiff asked both damages and an injunction. It was held that the purpose for which the water was taken was a lawful purpose; that it was a reasonable enjoyment of the property of the defendant; that the quantity taken was not excessive, and when the quantity returned to the stream was taken into consideration, the diversion was very slight. The court says: "Is that a case in which, if there is nothing else in it, the plaintiff could ask in this court for an injunction? What injunction is he entitled to? Is there any damage done to him?" And again says: "Nothing that the defendants have done has exceeded the limits of their lawful right to deal with the water, and there is no particle of evidence to show that the plaintiffs have suffered injury, or that the right which they enjoyed and are entitled to enjoy has been in any degree invaded or interfered with by anything that has been done by the defendants;" and the bill was denied. Now, the exception which distinguishes the cases cited from the one in hand is this: Here the jury have found, on sufficient evidence, that the defendant has so diverted the water of the creek above the plaintiff as to "perceptibly reduce the volume of water flowing therein," and "materially reduce or diminish the grinding power of the plaintiff's mill," and in consequence thereof, that he has sustained damage to a substantial amount. In the cases cited similar facts are wanting. They lie at the foundation of the one before us and are sufficient to call for the interposition of a court, whether of law or equity.

The effect and proper construction of the act of 1869 (Laws of 1869, chap. 237), or its amendment (Laws of 1877, chap. 224), conferring upon railroad corporations certain powers to take water, are not before us, for the plaintiff is not shown to have acquired any right thereunder. As the case now stands, no reason is shown why the judgment appealed from should not be affirmed, and that, I think, must be the result of this appeal.

Judgment appealed from affirmed, with costs.¹

¹ See also *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293, and *Strobel v. Kerr Salt Co.*, 164 N. Y. 303. — ED.

SHEPLEY, J., IN *HEATH v. WILLIAMS*.

25 MAINE, 209. — 1845.

THE report [of the referee] further states "that defendant has a clothing mill on the stream above plaintiff's dam. It is fed by a dam which, with its predecessor on the same site, has stood for more than twenty years prior to the alleged trespass. That the plaintiff's dam and mill were built between the years 1829 and 1833. That the defendant next contended that as his mill and dam were the oldest, he had a right of priority to the water and might lawfully break the flume, as he did." Referee was of this opinion, unless the legal principle was controlled or rendered inapplicable by other considerations belonging to the case.

The cases cited in the arguments of counsel decide, that priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor who owns both banks of a stream has a right to have the water flow in its natural current without any obstruction injurious to him, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years. The defendant appears to be the undisputed owner of the land on both banks of the stream below his mill nearly or quite to the plaintiff's dam, unless that title shall prove to be defective in the manner hereafter stated. While it is contended that the plaintiff's "dam and mill were erected with such knowledge and concurrence of the defendant's grantors as amounted to a license," it is not contended that he has acquired any right by grant or by an appropriation for more than twenty years to cause the water to be flowed back upon the defendant's mill. It is not necessary to decide whether the defendant had acquired a right to have the water of the stream so used as to prevent its being thereby flowed back upon his mill by an appropriation of it without such an occurrence for more than twenty years, as decided in the case of *Saunders v. Newman*, 1 B. & Ald. 258. Although he could not derive any right from the statute, c. 126, sec. 2, or from priority of appropriation, yet the common law would afford him sufficient protection against the flow of water back upon his own land to the injury of his mill by the acts of another. Failing to obtain relief from the continuance of such an injury without it, he might lawfully enter upon the land of the plaintiff and remove, so far as necessary, the obstruction which occasioned it.¹

¹ This doctrine as to priority of appropriation is modified in some of the States by the "Mill acts" so called. See note to *Heath v. Williams* in 43 Am. Dec. 265 at p. 276. In some of the western States and territories it is modified also to meet the necessities of irrigation and of mining. *Id.* at p. 279. — Ed

CORNING *v.* TROY IRON AND NAIL FACTORY.

40 NEW YORK, 191. — 1869.

THIS action was brought to restrain defendant from diverting the waters of Wynant's Kill from along the line of plaintiff's land and to compel it to restore to their bed a part of the waters of said Kill already diverted by it.

At the place in question the Kill makes a bend to the north leaving a one-acre-parcel in the bend on the south of the creek. A seven-acre parcel is on the northerly side of the creek and surrounds the one-acre parcel on the east, north and west. The defendant owns the one-acre parcel and for many years held the seven-acre parcel under a lease which expired three or four years before this action was commenced. While leaseholder of the seven-acre lot defendant diverted the stream from its channel between the two lots and caused it to flow across the one-acre lot. The seven-acre parcel now belongs to plaintiff.

The last judgment below was for plaintiff and the defendant appeals therefrom to this court.

GROVER, J. — * * * The defendant entered into possession and occupied under this lease for the entire term. These facts show that the defendant was bound to restore the land with the water running in its natural channel, at the expiration of the lease, unless relieved from such obligation by some immediate act of the lessors, or of those holding their title. While in possession under this lease, in 1839, the defendant constructed an artificial channel for the stream, by which it was wholly diverted from the seven acres, and conducted across the excepted acre, and used upon, a large overshot wheel, constructed to operate the extensive machinery of the defendant. At this time the plaintiffs were the owners of six acres upon the stream, below the premises in question, upon which was extensive machinery, operated by them, by means of the water power of the creek, but having no interest in the seven acres. The plaintiffs drew down their pond at this time, to enable the defendant to excavate a tail race from its wheel to the bed of the stream. It is insisted by the defendant that this precludes the claim of the plaintiffs to have the stream restored to its natural channel, thereby causing a great loss to the defendant in respect to the operation of its machinery. The answer to this is, that the plaintiffs base their claim to such restoration upon their title to the seven acres, which they obtained, in part, in 1852, and the residue in 1856, and that it was known to the defendant at the time that the plaintiffs then had

no interest therein. It was, therefore, not then in their power to affect any right appurtenant to the reversion in the seven acres, as against the then owners or those subsequently acquiring the title. It is further insisted by the defendant that Defreest, one of the defendant's lessors, was precluded from requiring the restoration of the stream, by his assent to its diversion at the time it was made in 1839, and that if his right was thus cut off, no grantee from him could assert, under his grant, any better right thereto than he had. The conclusion is doubtless correct under the facts of this case, as the water was in fact diverted at the time Defreest conveyed to the plaintiffs. This was sufficient to put the plaintiffs upon inquiry as to any right, legal or equitable, of the defendant to make the diversion. Such inquiry would have led to information of the acts of Defreest, and the plaintiffs are, therefore, chargeable with notice of such acts. They are not, therefore, to be regarded as *bona fide* purchasers in this respect, but take the land subject to any legal or equitable right of diversion the defendant had as against Defreest. It must, therefore, be determined what such right, if any, was as against the latter. The case shows that Defreest lived at the time in the immediate vicinity, was frequently at the place while the work was in progress, conversed several times with the managing agent of the defendant, expressed to such agent his opinion that the change would improve the water power, and would benefit his property in the vicinity. That he knew that the contemplated change and improvements would cause the expenditure of a large sum of money, and that while these large expenditures were being incurred, made no objection to the diversion of the water. It is claimed that he must have known, from the amount of the expenditure and the character of the improvement, that the diversion was designed to be permanent. The latter fact is strongly controverted by the plaintiff; but, in considering this question, I shall assume its truth. It is insisted by the defendant that these facts constitute an estoppel upon Defreest from asserting any claim to a restoration of the water to the prejudice of the defendant. The answer to this position is, that the defendant at the time had not only the possession of the seven acres, and the full control of the water belonging thereto, but, also, the right of possession and control for the unexpired term of the lease, a period of thirteen years, and that during that time Defreest had no right to object to any use of the stream by the defendant, except such as worked an injury to the reversion, which the diversion of the stream, during that period, clearly would not. That the defendant, at the time, knew that upon the expiration of the lease its right to divert the water would cease under it, just as

well as Defreest did, and there was no pretense of any other claim by the defendant to any other right to divert the stream from the seven acres. The defendant was not, therefore, in any sense, misled or deceived as to its right by anything done or omitted by Defreest. The case does not, therefore, come within the principle of the class of cases cited by defendant's counsel, holding that when one, in the belief that he has title, makes improvements with the knowledge and encouragement of the owner, such owner shall be estopped from asserting his title to the prejudice of the party having made such improvements. The estoppel is based upon the fraudulent conduct of the owner. There is no such reason applicable to Defreest. He was not estopped, and it follows that the plaintiffs, as his grantees, are not. There is no pretense of an estoppel upon the co-tenants of Defreest, who are also grantees of the plaintiffs. It is insisted by the defendant that the plaintiffs acquired no right to a restoration of the stream, under their deed, although such right existed in their grantors, for the reason that the diversion was prior to the grant, and that the defendant was holding the stream adversely at the time. The land was at the time in the possession of the grantors. [There is no question but the title to that passed by the grant to the plaintiffs, with everything incident or pertaining thereto. The right to the flow of the stream in its natural channel was an incident to the land.] 3 Kent's Com. 439, 1st R. S. sec. 147, p. 739, declares that grants of land shall be void when such lands shall, at the time, be in the actual possession of another, claiming under a title adverse to that of the grantor. This applies to an adverse holding of land, and not to such holding of some right appurtenant thereto, which passes with the land. The purchaser of the land is entitled to such appurtenant rights. *Mason v. Hill*, 4 Barn. & Adolphus. (It follows that the plaintiffs had the right to have the stream flow in its natural channel along the seven acres purchased by them. For a violation of this right by the defendant they had a right of recovery, without proof of actual damage, irrespective of any use of the water power by them.) *Tyler v. Wilkison*, 4 Mason, 400; 3 Kent, 539; *Adams v. Burney*, 25 Vermont, 225; *Embury v. Owen*, 6 Exch. 368; *Townsend v. McDonald*, 2 Kernan, 381. It follows that the plaintiffs were entitled to recover damages of the defendant for the wrongful diversion of the stream. It may now be assumed as settled that the plaintiffs could, in the same action, obtain all the relief to which the facts entitled them, arising out of the diversion of the water, whether such relief was legal or equitable, or both. Code, sec. 167. They were clearly entitled to recover damages, and the judge, therefore, erred in dismissing the com-

plaint, and the General Term were right in reversing the judgment and ordering a new trial. This leads to an affirmance of the order appealed from, and to final judgment against the defendant; but whether such judgment shall be for damages only, or in addition thereto shall award a mandatory injunction for the restoration of the water to its natural channel, remains to be considered. It is urged by the defendant that the latter ought not to be included for various reasons, the principal of which are, that it would be productive of great injury to the defendant, and be of little benefit to the plaintiffs. The former fact is established by the evidence. The latter rests upon the hypothesis that, inasmuch as the plaintiffs have not heretofore used the power and have made no preparations to use it, they do not desire it for use. The facts show that its restoration would give a power sufficient for a grist-mill grinding fifteen bushels per hour, or a cotton factory with forty looms. The question then comes to this, whether the defendant, who has wrongfully diverted from the plaintiffs a stream affording such a water power, shall be permitted to continue such wrongful diversion, and thus to deprive the plaintiffs of what is clearly theirs without their assent, upon the ground simply that its restoration would be a great damage to it. In other words, that by its continuance wrongfully to appropriate to its own use the property of the plaintiffs, it derives a much greater benefit than the plaintiffs could by being restored to their own. The bare statement of the question would seem to suggest the only proper answer. The very idea of justice is to give to each one his due. The use of the natural flow of the stream is the due of the plaintiffs, and to justify withholding it from them requires some better reason than loss to the wrongdoer consequent upon its restoration. It is insisted that the equitable right of restoration has been lost by delay. The statute of limitation, either at law or in equity, has not attached so as to bar the right. The case has, therefore, no analogy to that class of cases where equity has refused relief upon the ground that the legal remedy was barred by the statute. The defendant has expended no money upon improvements since the expiration of the lease, consequently the principle of the cases holding that where, during the delay of a party in asserting his right, expenditures have been made in improvements, equity will not interfere, do not apply. *Lewis v. Chapman*, 3 Beavan, is one of this class. The plaintiff sought to restrain, by injunction, the publication of a work of which he was the owner of a copyright. It appeared that he had lain still for six years and upwards and seen the defendant expending his money in printing the work, etc., etc.; upon this ground, equity refused to relieve the plaintiff. There are

numerous cases of this description found in the books, but they all rest upon the same principle. All there is of the delay in this case is, that the plaintiffs finding the defendant using their water power have permitted it to continue such use for about four years. Clearly this indulgence furnishes no reason for the refusal of equity to aid the plaintiffs in the recovery of their legal rights. It is insisted by the defendant that equity ought not to interpose in behalf of the plaintiffs, for the reason that they do not want the water power afforded by the stream for use. This is a mere assumption. It is true, they have not heretofore used the power, perhaps, for the very good reason that they have not had the ability to use it on account of the defendants withholding it from them. It is said that the plaintiffs have erected no machinery for that purpose. This is true. The plaintiffs have not constructed machinery to rot while litigating with the defendant for the recovery of the stream. But if the facts claimed were clearly established, it would not protect the defendant in wrongfully withholding the stream. No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The plaintiffs, may do what they will with their own. Upon established principles this is a proper case of equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream, in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought is established by authority as well as principle. *Webb v. The Portland Manufacturing Co.*, 3 Sumner, 190 and cases cited; *Tyler v. Wilkison*, 4 Mason, 400; *Townsend v. McDonald*, 2 Kernan, 381; 2 Story's Equity, secs. 901, 926-7; Angell on Water Courses, secs. 449-50. It is further insisted by the defendant that equity will not interpose until the right has been settled at law. That, formerly, was the universal rule, where there was any substantial doubt as to the legal right. *Gardner v. The Trustees of Newburgh*, 2 Johns. Chan. 162. But that rule no longer prevails in this State. We have before seen that all the

relief to which a party is entitled, arising from the same transaction, may, under the Code, be obtained in one suit. Beside, there is no doubt as to the legal right in the present case. My conclusion is, that the plaintiffs are entitled to the aid of equity in restoring the stream to its natural channel, and this whether the loss to the defendant is more or less. The defendant was bound to restore the stream upon the expiration of the lease, equally with the land. The order appealed from should be affirmed, and final judgment given against the defendant for the damages sustained by plaintiffs, and that they restore the stream to its natural channel. * * *

Order of General Term affirmed and judgment final ordered for the plaintiffs for damages to be assessed, and a mandatory injunction that the defendant restore the water within twelve months from the entry of judgment.

3. ARTIFICIAL WATERCOURSES.

CURTISS *v.* AYRAULT.

47 NEW YORK, 73. — 1871.

ACTION to recover damages for the diversion of a part of the waters flowing in a artificial channel which had been dug by a prior owner from whom both plaintiff and defendant deduce their titles. Judgment for defendant. Plaintiff appeals.

FOLGER, J. — We have examined with care the testimony in this case, particularly those portions of it to which we are pointed by the brief of the appellant, and which he claims show the existence in former days of a natural stream. We are of the opinion that the jury would not have been warranted in finding that there was ever a natural stream running from the mouth of Indian Creek or from the marsh into the cove. * * *

The waters which stood upon the marsh, or were held in partial suspense in the earth, were in legal effect surface waters. They belonged to the owner of the soil on which they stood or through which they soaked. He might lawfully lead them off in such direction and in such quantity as he saw fit, and no neighbor could complain, for no neighbor had a right to receive them by percolation. The owner had only to see to it that he did not injure a neighbor by discharging them upon him in unusual quantity, or at unusual place. The following authorities sustain this position: *Ellis v. Duncan*, Ct. of App., cited in *Goodale v. Tuttle*, 29 N. Y. 466; *Buffum v. Harris*,

5 Rd. 1, 243; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, Id. 602; *Wheatley v. Branch*, 1 Casey, 25 Penn. St. 528.

This state of facts and this rule of law accompanying them, continued until Newbold, after having made ditches, divided the tract into parcels and conveyed the parcels to different grantees. And even had he, without having made the ditches, divided the tract and conveyed the parcels to different owners, the same rule would have applied. The grantee of any parcel would have had the right to have carried off these, being surface waters, without affecting any right of any one to receive them from his land. See cases above cited.

But Newbold, being the owner of the whole tract, did very much affect and change its material condition, and the relations of different parts of it to each other. By digging ditches and deepening and extending them, he made a permanent channel by which these waters flowed in a continuous stream, from and through the parcel conveyed to the grantor of the defendant, through other parcels, on to and through the parcel conveyed to the plaintiff's grantor. There is no doubt but that he benefited the lands now owned by the defendant by freeing them from standing water, and that the benefit conferred would continue so long as the ditch was kept open and free below. There is no doubt but that at the present day the continuance of the ditch and the keeping of it open and free above would be a benefit to the lands of the plaintiff in the constant and ample supply of good water which it would afford. And if at the time Newbold made sale of these parcels of land, these reciprocal benefits and burdens were existing and apparent, and were part of the advantages possessed by these lands, and part of the value attached to them in the estimation of those dealing with each other in regard to them, and if they contracted with reference to such a condition of the lands, neither Newbold nor his respective grantees had right after that to change the relative condition of one parcel to the injury of another parcel, in these respects. This principle is distinctly stated and clearly elucidated in *Lampman v. Milks*, 21 N. Y., 505, and does not need particular discussion here; and see *Dunkles v. The Milton R. R. Co.*, 4 Foster N. H. 489.

The only difficulty is whether the facts of this case exactly square with the requirements of the rule in 21 N. Y., laid down in these words: "The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." Now some stress is laid upon the purpose which Newbold had in making the

ditch, and it is claimed that it was naught else than to drain his lands. But the application of the rule does not depend solely upon the purpose for which the changes have been made in the tenement by the owner. It is the open and visible effect upon the parts which the execution of the purpose has wrought, which presented to the view of the purchaser, is presumed to influence his mind, and to move him in his bargaining. We have held in *Simmons v. Cloonan*¹ (decided, December, 1871), that this presumption may be repelled by the actual knowledge of the contracting parties, which may negative any deductions to be drawn from the visible physical condition of the property. And so far, a knowledge of the purpose of the owner is an element. But there was testimony tending to show that though the first and always the chief purpose of Newbold was to drain the lands more immediately affected by the marsh, there was an auxiliary purpose, to furnish all other lands a constant and full supply of water. The question whether the purchaser from Newbold contracted with him, and bought these lands in reference to their condition at the time of sale, depends as well upon what was their purpose and understanding, and what from the physical view of the land, might be inferred to be the effect upon them in their estimate of their advantages and value with this artificial stream of water led through the different parts of it. And the question for decision at the trial was: Considering all the facts established by the testimony, and all the inferences properly to be made from it, and all the presumptions properly to be indulged, did the grantor of the plaintiff, in arriving at the price he would pay, consider and have a right to consider, as an element of the value of the land he was bidding for, this ditch across the tract giving this supply of water through it? Now, there is testimony tending to an affirmative answer; and in our judgment, it was not a correct disposition of the case to take it from the consideration of the jury, and to direct to them their verdict in the negative.

In the first place we have shown the fact that this pure, clear water ran to this parcel of land in full and constant supply. This condition of things was open and visible. The presumption arises at once that a person of even ordinary judgment in quest of a farm must perceive this advantage and be influenced by a consideration of its value. Then there is express testimony that the plaintiff's grantor, the grantee of Newbold, had been before the conveyance to him, the agent of Newbold and familiar with the premises, and that he knew that Newbold was used to pasture cattle in part on this

¹ 47 N. Y 3. — Ed.

parcel of land, and that they found their supply of water in the stream and in the cove. The testimony also tends to show that the lands are peculiarly advantageous for the pasturage of cattle in the summer and of keeping them through the winter, with the ultimate purpose of marketing them as fat cattle; and that the supply of this water through this ditch was useful and necessary therefor. And the proof is ample that the water was of use to the land and of great value, and there is testimony tending to show that it is highly necessary to its full enjoyment.

We think that with instructions from the court to the jury in accordance with the rules announced in 21 N. Y. *supra*, it should have been submitted to them to say whether the grantee of Newbold of the parcel of land now owned by the plaintiff, contracted for it in reference to its condition in respect to this ditch and its water at the time of the sale, and whether to be deprived of it is to lose something of value and of necessity.

Nor would an affirmative answer to it and a judgment in accordance therewith impose upon the defendants, as is argued, the necessity of keeping up a swamp on his land. The benefits and burdens of this ditch are reciprocal, to be enjoyed and borne by all the lands. As the ditch was to the observation as much an aqueduct from one parcel as an aqueduct to another, so it must continue to be. And the defendant has as good right that it should lead away all the surface water and all that Indian Creek brought down, as the plaintiff has that it should be led. So that, as the defendant may not obstruct the ditch to divert the water, the plaintiff may not obstruct it to prevent its flow. And as the plaintiff claims that the defendant may not ditch on his own land and drain away this water in another direction, he must permit him to keep open the ditch on the plaintiff's land, so that it be effectual for the defendant's benefit.

It is also urged that the act of the defendant complained of by the plaintiff violated no right of his, for that the ditch, the capacity of which he increased, was upon the land of the defendant's grantor when Newbold sold to the plaintiff's grantor. The act which the plaintiff complains of is the diversion of water which, when his grantor bought of Newbold, was flowing to the land purchased. It matters not how this diversion is effected, whether by digging a new ditch or deepening an old one. The reciprocal rights of the parties (a certain state of facts existing) are to have the status of the tract maintained as it was when Newbold sold. If water then ran through the ditch which Ayrault has deepened, he may keep a stream there of the same volume it then had, but may not increase

its volume by a diversion of the water which then flowed to the plaintiff's land.

And we remark here, that we do not mean to conflict with cases cited by the respondent, such as *Arkwright v. Gill*, 5 Me. & Welsby, 203. We think that they will be found to be cases in which the owner of land, having for a time drained the surface water from it in a certain direction, while still the owner of the same tract, and the owner of the whole of it, sees fit to change the direction of the drainage. Though he may have yielded in the first place a benefit to other land by his method, he was not precluded from abandoning it and adopting another, for he had sold none of the land benefited to one who had contracted for it in reference to its condition of benefit. It was doing with his own as he had a right, the right of no one else having intervened by his act. It was a dominant tenement foregoing the enjoyment of an easement upon a servient one. In the case in hand both tenements, by the acts of the former owner of both as a whole, have become each dominant and each servient to the other, as their respective needs require. Had there been no drain until the severance of the great tract into parcels, and then the defendant on his parcel had made drains leading to the plaintiff's parcel, which stopping afterwards, he had made others elsewhere, and of this the plaintiff had complained, the cases cited would have been in point.

The point is not taken in this court by the respondent that the complaint of the plaintiff does not put his right of action upon this ground. Nor does it appear to have been taken below. Doubtless, if it had been, the ample power of the court to allow amendments would have obviated the objection without injury to either party.

The judgment of the court below should be reversed, a new trial ordered, with costs to abide the event.

Judgment reversed.

4. PROPERTY IN UNDERGROUND WATERS.

OCEAN GROVE CAMP-MEETING ASSOCIATION *v.* ASBURY PARK.

40 NEW JERSEY EQUITY, 447. — 1885.

BIRD, V. C. — More than fifteen years ago the complainants purchased a large tract of land fronting upon the ocean, chiefly for the purpose of a summer resort, to exercise the right of worship. The enterprise has so grown that in winter it has a population of about

five thousand, and in summer of ten thousand or fifteen thousand. The authorities soon discovered that to preserve the good health of the residents and visitors it was absolutely necessary to improve their water supply and sewerage system. To do this they bored for water, and at the depth of over four hundred feet struck water which gave them a flow of fifty gallons per minute at an elevation above the surface of twenty-eight feet. This they carried into the city by means of pipes, and supplied therewith about seventy hotels and cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed.

The commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north and adjacent to the tract owned by Ocean Grove. Under their management this, too, has become a famous seaside resort. Its population is equal to, if not greater, at all times, than that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over four hundred feet without satisfactory success. One shaft yielded about four gallons to the minute, and another, which yielded the most, only nine. All of these wells, were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce fifteen gallons each per minute, being as much in quantity as they procure from the well which is complained of.

Failing in their efforts upon their own premises they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within five hundred feet of the complainant's well. This bore extended to the depth of four hundred and sixteen feet, within eight feet of the depth of complainant's well. At this depth they secured a flow of water at the rate of thirty gallons per minute, and the supply from the complainant's well was

almost immediately decreased from fifty gallons to thirty per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove.

The Asbury Park authorities propose to sink other wells still nearer the well of the complainants. This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation.

In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or underground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procuring water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use.

Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainant: *Angell on Water-Courses*, secs. 109-114, inclusive; *Gould on Waters*, sec. 280; *Bal-lard v. Tomlinson*, L. R. 26 Ch. Div. 194; *Chasemore v. Richards*, 7 H. L. Cas. 349; 5 H. & N. 982; *Acton v. Blundell*, 12 M. & W. 324; *Chase v. Silverstone*, 62 Maine, 175; *Roath v. Driscoll*, 20 Conn. 533; *Delhi v. Youmans*, 45 N. Y. 362; *Goodale v. Tuttle*, 29 N. Y. 459; *Wheatley v. Baugh*, 25 Pa. St. 528; *Frazier v. Brown*, 12 Ohio St. 294.

The courts all proceed upon the ground that waters thus used and diverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and, consequently, are the absolute property of the owner of the fee as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure; these, when collected, interfere with his progress, and he may remove them, although the spring or well of the landowner below be diminished or destroyed. So, the owner or owners of a bog, marsh, or meadow may sink wells therein, and carry off the water collected in them, to the use or enjoyment of a distant village

or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles there can be no doubt but that every lot-owner in Ocean Grove or Ashbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil.

In the case before me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are. The presumption is the other way.

It seems to be my very plain duty to discharge the order to show cause, with costs.

THE TRUSTEES OF THE VILLAGE OF DELHI *v.* YOUMANS.

45 NEW YORK, 362. — 1871.

By the Court, PECKHAM, J. — If the action of the defendant took the water away from the springs, after it had reached there, after it had become part of an open, running stream, then this action would lie. *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 Id. 553; *Chasemore v. Richards*, 7 House of Lords Cases, 349; *Pixley v. Clark*, 35 N. Y. 520; *Goodale v. Tuttle*, 29 Id. 459; *Ellis v. Duncan*, 21 Barb. 230, affirmed in this court, but not reported.

But if it merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon the defendant's own land, for the use of his family and stock, this action will not lie. The law is settled in that way, both here and in England. (See same cases.)

The facts in this case, as found by the justice who tried it, do not show that the water has been taken away from the spring or running surface stream after it had reached there. On the contrary, the inference from his findings would rather seem the other way. Nor is there any request to find otherwise, nor any exception on that point.

Every inference and presumption that can be reasonably entertained must be indulged in favor of affirming a judgment. It is a well-settled rule that the party who alleges error must show it.

The doctrine of lateral support of adjoining land cannot aid the

plaintiff's case. I do not think it has any application to the facts as found.

It may well be that the plaintiffs have been injured, legally injured, by the acts of the defendant. But the facts as found do not make it appear. In the absence of any request to find, or exception to refusal to find, other facts, we cannot consider the evidence with a view to decide whether other facts may not be regarded as sufficiently proved.

Judgment affirmed.

HALE *v.* McLEA.

53 CAL., 578. — 1879.

SUIT for an injunction.

The court below found: "That the plaintiff and defendant were the owners of coterminous tracts of land. In the vicinity of the division line, running north and south between the parties, is the subject of the controversy. Upon the side of a ridge, upon the land of plaintiff, at a point about twenty-eight feet east of the land of defendant, a natural spring flows from the surface of the ground. This spring is a small one, furnishing a very small supply of water. It has been utilized by the plaintiff for many years, and the water conveyed to troughs, furnishing water for the stock of the plaintiff. The spring furnishes the principal supply of the plaintiff's farm at this point, and is the only water he has for the cattle that pasture upon this part of his land. He also proposes to use and will require this water for a proposed residence he intends to soon build. From this natural spring upon the land of plaintiff, extending toward the west, and upon the land of defendant, a line of bushes, usually found nowhere except over watercourses, appeared, but there was no other indication of a subterranean stream upon defendant's land at this point than that indicated by these bushes. There was no stream upon the surface, and no depression or channel whatever appeared upon the surface of either tract at this point, and the surface of the ground was rocky and dry. The line of bushes above referred to was connected and frequent up to the line extending from this fence to and upon the land of defendant, and to the pit there sunk by defendant. In October, 1875, defendant dug a trench upon his land, about eleven feet from the division line. The trench was parallel with the division line, and at right angles with the line of bushes, and was dug for the sole purpose of intercepting a subterranean stream which defendant supposed flowed to the spring of plaintiff

Any person of ordinary judgment would have expected to intercept the stream at this point, from the apparent situation and surroundings. * * * At the bottom of the trench, and upon the western side, was found a fissure of loose, fragmentary rock, of which the hill was chiefly composed. Through these fragments at this particular point, flowed a small stream of water. The defendant opened this pit, and connected it with pipes laid through the trench, and so arranged it that all the water flowing in from the crevice was taken in a pipe through his trench. Immediately upon the opening of his trench and the laying of this pipe, the water ceased to flow in the spring of the plaintiff and has not since flowed there. The defendant in digging this trench had but one purpose, namely, to secure to himself the subterranean water that he believed existed at this point; he knew that this was the source of the supply to plaintiff's spring, and if intercepted, no water would flow to the spring of plaintiff. He was not actuated by malice."

Judgment for plaintiff. Defendant appealed.

By the Court, CROCKETT, J. — An examination of the English and American decisions on the questions of law involved in this appeal leads us to the conclusion that, on the facts admitted by the pleadings or found by the court, the right of the defendant as against the plaintiff to use the water of the subterranean stream, which is the subject of the action, is, at most, no greater than if it was a surface stream, on which the defendant was the upper and the plaintiff a lower riparian owner. Tested by this rule, the utmost that can be claimed for the defendant on the facts is, that he is entitled to take from the stream as much water as he needs for watering his cattle and for domestic uses, such as cooking, washing, and the like, leaving the surplus to flow to the spring of the plaintiff in its natural channel. But the findings show that the defendant has diverted the whole body of the stream through pipes, in such a manner that no portion of the water can reach the spring; and the surplus, at the commencement of the action, was running to waste, as appears from the admissions in the pleadings. If it were a surface stream, the plaintiff would be entitled to have it flow to and across his lands, in its natural channel, subject only to the right of the defendant to use so much of the water as is necessary to supply his natural or primary wants as above indicated; nor, on the facts found, can the defendant exercise any greater right in respect to a subterranean stream. Assuming, therefore, that the rights of the defendant are precisely the same as though it was a surface stream, he has exceeded them by diverting the whole body of water from

its natural channel, instead of allowing the surplus to flow to the spring in its accustomed bed.

But the exigency of the case does not require us to decide that the defendant has the same right in respect to a subterranean stream as though it was a surface stream flowing across his land; and our decision is only to the effect that, if it be assumed his rights are the same, he has, nevertheless, exceeded them by diverting the whole body of the stream, instead of allowing the surplus to flow to the spring in its natural channel.

There is no question in this case involving the right of a riparian owner to the use of water for purposes of irrigation; nor is the point before us whether or not a landowner may be restrained from diverting or obstructing the flow of an underground current, running in a defined channel across his land, and which supplies a spring or well of the adjoining lands, if it become necessary to divert or obstruct the stream in the prosecution of the business of mining, or any other legitimate enterprise on his own land; nor to what extent, if at all, it would affect the question if the underground current was not known to exist until the fact was discovered in the prosecution of the work. These are grave questions which the exigency of the present case does not require us to decide.

Judgment affirmed.

RHODES, J., concurring: — I concur in the judgment on the ground that the defendant, in my opinion, has no right to divert the waters of the subterranean stream, if the spring of the plaintiff will thereby be materially injured.

III. Ice as incident to land.

I. ICE FORMED OVER LANDS OF PRIVATE OWNERS.

WASHINGTON ICE CO. *v.* SHORTALL.

101 ILLINOIS, 46. — 1881.

MR. JUSTICE SHELDON delivered the opinion of the Court.

This was an action of trespass *quare clausum fregit*, brought in the Circuit Court of Cook county, by Shortall, against the Washington Ice Company, for cutting, removing, and appropriating, in January and February, 1879, a quantity of ice which had formed over the bed of the Calumet river, within the limits of plaintiff's land, in Cook county. Defendant pleaded the general issue, and *liberum tenementum*. A verdict and judgment were rendered in favor

of plaintiff for \$562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this Court.

On the trial, the patent from the United States to Lafrombois and Decant was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125.31 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appears that the call of 125.31 acres contained in the patent, required that the bed of the river should be included to make that quantity; that the Calumet river extended from Lake Michigan westward past the plaintiff's premises, where it is between 165 and 200 feet wide, is in fact a navigable river; that the defendant company owned ice-houses on its own property on the next lot east of plaintiff's, and that in operating on the ice it did not go on the plaintiff's land, save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel — that is, as soon as it had been scraped, plowed, sawed, cut and severed, and ready for removal. Defendant excepted to the giving of such instruction, and asked the court to instruct the jury that a riparian owner on the banks of a river, navigable in fact, has no property in the ice formed in the midst of the stream, where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same, without cause of action or damage to such riparian owner, and that if such access, as above stated, had been gained, then, at most, plaintiff could recover but nominal damages, even if the action of trespass be sustained, — which was refused, and defendant excepted. The giving and refusing of instructions is assigned as error.

It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet river, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the tide ebbs and flows are

regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its center, and the only right the public has therein is an easement for the purpose of navigation. Chancellor Kent, in his commentaries, declares it as settled that grants of land bounded on rivers or upon their margins, above tide-water, carry the exclusive right and title of the grantee to the center of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it. 3 Comm. 427, 428, Marg. And this title to the middle of the stream includes the water, the bed, and all islands. 2 Hilliard on Real Prop. 92; Angell on Water-Courses, sec. 5.

This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 Ill. 179, with regard to the Mississippi river where it bounds this State; in *Braxon v. Bressler*, 64 Ill. 488, as to Rock river; *City of Chicago v. Laflin*, 49 Ill. 172, and, *City of Chicago v. McGinn*, 5 Ill. 266, in regard to the Chicago river.

The Calumet river then, being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man — that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum ejus est usque ad cælum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water — it is a usufruct merely, — a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191, Shaw, C. J., says: "The right to flowing water is now well settled to be a right

incident to property in the land, it is a right *publici juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. . . . Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes."

In *Rex v. Wharton*, 12 Mod. 510, Holt, C. J., says: "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land."

Hilliard states that a water-course is regarded in law as a part of the land over which it flows. 2 Hilliard on Real Prop. 100.

It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream, — he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor, as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner cannot be deprived by a mere wrongdoer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

In *McFarlin v. Essex Co.*, 10 Cush. 309, Shaw, Ch. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term,—that is, in all waters above the flow of the tide,—the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it, if the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river."

The riparian proprietor has the sole right, unless he has granted it, to fish with nets or seines in connection with his own land. Angell on Water-Courses, sec. 67.

In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide, have an exclusive right of fishery opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft; so, too, sea weed thrown upon the shore belongs to the owner of the soil upon which it is cast. *Emans v. Turnbull*, 2 Johns. 313.

The exclusive right in the owner to take the ice formed over his land, is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may, with like propriety, be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it in its indefinite extent upwards.

Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consistent with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of a bed of a stream property in the ice which forms over it, we may well use, as fitly applying, the language of Hosmer, J., in *Adams v. Pease*, *supra*, in speaking of the common-law rule as to the right of Fishery, viz.: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."

The views we hold are in accordance with the holding in *The State*

v. *Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See, further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. Rep. 376; *Lorman v. Benson*, 8 Mich. 18; *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462; *Brown v. Brown*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact, is naturally an obstruction to navigation, and that anyone has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxton v. Bressler*, above cited: "Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel, or soil, except as necessary to the enjoyment of the easement." The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation, — it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this court in those cases: *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 92 Ill. 353; *McLean County Coal Co. v. Lennon*, 91 Id. 561; *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 82 Id. 627; *McLean County Coal Co. v. Long*, 81 Id. 359; *Robertson v. Jones*, 71 Id. 405.

Perceiving no error in the giving or refusing of instructions by the Circuit Court, the judgment of the Appellate Court is affirmed.

THE BROOKVILLE AND METAMORA HYDRAULIC COMPANY v. BUTLER.

91 INDIANA, 134. — 1883.

ELLIOTT, J. — Under the general internal improvement act of 1836, the State, in 1837, for the purposes of constructing a canal, seized land then owned by the heirs of Charles Collett. During that year, and prior to 1842, work was done upon the canal by the State; at the session of the Legislature of the year 1842, a corporation was created named White Water Valley Canal Company, and all the right and title of the State to the land seized was vested in that corporation; the canal was afterwards completed and was

operated by the grantee of the State until the year 1865; in December of that year the canal company conveyed its estate in the canal and appurtenances, reserving, however, all water power and all water rights owned by itself or its lessees; the grantee of the canal company leased to the appellant all the unoccupied water on that part of the canal which is upon the land once owned by the Collett heirs; on that land there was a low piece of ground through which the canal passed; upon this low piece, and immediately adjoining the bank of the canal, is a large pond formed by the water thrown from the channel of the canal; on this pond ice formed in the winter of 1878 and 1879, and was cut and appropriated by the appellees, who were the defendants below.

It is within the power of the Legislature to authorize the seizure of the fee, when that estate is required for the public purpose. When the fee is taken, the owner must be awarded, as compensation, the value of that estate. Our cases declare that the act of 1836 authorized the seizure of the fee, and that this was the estate taken by the State and transmitted to the grantees. *City of Logansport v. Shirk*, 88 Ind. 563; *Cromie v. Board, etc.*, 71 Ind. 208; *Nelson v. Fleming*, 56 Ind. 310; *Water Works Co. v. Burkhart*, 41 Ind. 364. It is not without reluctance that we yield to the rule declared in these cases, but we feel that it has become a rule of property which we should not change. * * *

The title which the appellant acquired was to the canal and its appurtenances. *Sheets v. Selden*, 2 Wal. 177. If the land on which the ice formed can be deemed an appurtenance, then the State acquired and transmitted it to her grantee. But land can never be appurtenant to land. This old rule, old as the law itself, forbids the conclusion that the land passed as an appurtenance.

The right to flow lands conveys no right to the land itself; it vests a mere easement in the possessor. The right which the canal company had in the land adjoining the channel of the canal was an easement, and nothing more. The pond which formed is not shown to have been a reservoir or basin of the canal, nor to have constituted any part of the channel. All that can be inferred from the use of the low ground by the appellant and its grantors is that there existed a right to overflow it. A prescriptive right can never be broader than the claim evidenced by user. Phear, *Rights of Water*, 90.

The appellant owns an easement vesting in it a right to do whatever the owner of an easement to overflow another's land may rightfully do; the owners of the fee possess the right to do all acts which a landowner may lawfully do, not inconsistent with, or injurious to,

the easement. The former as owner of the dominant estate has all the rights that such an estate confers; the latter all the rights of an owner of land burdened with an easement.

We come to the decisive question: Is the owner of an easement to flow another's land entitled to the ice which forms on the water covering the land? There is some diversity of opinion upon this question, but our decisions declare that the ice belongs to the owner of the servient estate. In *State v. Pottmyer*, 33 Ind. 402, 5 Am. R. 224, the question was examined thoroughly, and it was held that the landowner might cut the ice, provided no injury was done to the rights of the owner of the dominant estate; and this was the decision in *Edgerton v. Huff*, 26 Ind. 35. This last case has, it is true, been overruled upon one point, but not upon the point to which it is here cited. Again, in *Julien v. Woodsmall*, 82 Ind. 568, this question came before the court, and it was held that the right to overflow the land of another for mill purposes did not confer the right to cut the ice formed on the pond. The doctrine of these cases is consistent with long-established principles, and is supported by analogous cases. The owner of a servient estate has a right to all the profits which may arise from the soil, and may make such a use of the soil as is not inconsistent with the easement. In the old case of *Goodtitle v. Alker*, 1 Burr. 133, it is said that "The owner of the soil has a right to all above and under ground, except only the right of passage, for the king and his people." This general doctrine applies to a private way. Gates may be erected across it, wells may be dug on it, waterways may be constructed under it, seaweed may be gathered off of it, and herbage may be cropped from it. *Bean v. Coleman*, 44 N. H. 539; *O'Linda v. Lothrop*, 21 Pick. 292; *Baker v. Frick*, 45 Md. 337, 24 Am. R. 506; *Emans v. Turnbull*, 3 Am. Dec. 427, n. An admirable statement of the rule is that of the court in *Maxwell v. McAtee*, 9 B. Mon. 20. There, in speaking of the grant of an easement, it was said: "Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. And for the same reason the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor, but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment." The right of a mill-owner to pond water on another's land, the right of

one owner to use another's land for a sluice-way, the right of one owner to use another's land for drainage purposes, are all easements, and nothing more. *Baer v. Martin*, 8 Blackf. 317; *Snowden v. Wilas*, 19 Ind. 10. Easements do not take from the owner of the fee the right to make any profitable use he can of his property not inconsistent with the enjoyment of the dominant estate. It is immaterial whether the easement is to flow water over the land or to pond it on the land; in either case, as said in *Mason v. Hill*, 5 B. & Ad. 1, the owner of the fee may use it for "profitable purposes." Such a right is said to be "a privilege without profit." *Earl v. De Hart*, 1 Beasley, 280. The right to back or pond water on the land of another, whether acquired under the statute or by prescription, gives no right to the land itself, nor to the profits which a use of it, not injurious to the easement, will produce. *Williams v. Nelson*, 23 Pick. 141; *Paine v. Woods*, 108 Mass. 160; *Storm v. Manchaug Co.*, 13 Allen, 10. The close analogy between the class of cases to which we have referred and those of *State v. Pottmeyer*, *supra*, and *Edgerton v. Huff*, *supra*, is very readily perceived, and is strong proof that the latter cases are founded on solid principle, for no one doubts that the former are well grounded in principle.

There are well considered cases directly sustaining the view adopted by our decisions. In *Dodge v. Berry*, 26 Hun, 246, it was held that a mill-owner who has the right to flow the lands of another, does not own the ice which forms over the lands of such person, and that the latter may take the ice unless he perceptibly injures the owner of the mill. The same conclusion was reached in *Marshall v. Peters*, 12 How. Pr. 218. The court, in *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. R. 196, held that ice belonged to the owner of the fee, and, in the course of the opinion, said: "The views we hold are in accordance with the holding in *The State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal." This doctrine is again held in *Village of Brooklyn v. Smith*, 104 Ill. 429, 44 Am. R. 90.

In *Paine v. Woods*, 108 Mass. 160, the courts thus stated the law upon this subject: "The owner of the land thereby flowed must not, indeed, draw off by canals, aqueducts or ditches, the water which has been raised by the dam. *Cook v. Hull*, 3 Pick. 269; *Storm v. Manchaug Co.*, 13 Allen, 10. But he may use it for watering his cattle, or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible

and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner. *Cummings v. Barrett*, 10 Cush. 186. And his land may be of peculiar value by reason of its situation affording opportunities to do this. *Ham v. Salem*, 100 Mass. 350." These cases lend strong support to the doctrine which prevails in this court, and, with the exception of the case of *Mill River, etc. Co. v. Smith*, 34 Conn. 462, and *Myer v. Whitaker*, 5 Abbott, N. C. 172, we have found none asserting a contrary doctrine. Of the latter case we need only say it is confessedly against the weight of authority, is condemned by the courts of the same State, is the decision of a single judge, and is not well reasoned. The decision in the first of these cases is that of a divided court, and the reasoning upon which it is founded is unsatisfactory. It proceeds thus: "Many of the mill ponds of the State, used in the grinding of grain and sawing of timber, are small and shallow, and often in the winter season, when rain falls infrequently and the fountains are frozen, water is scarce, and anything which further lessens it is a material injury." This seems to us a narrow view and one not in harmony with authority or consistent with sound principle. It may possibly be that if the evidence in a particular case should show a diminution of the supply of water, the landowner might then be prevented from taking ice; this, however, affords no ground for a broad general rule; the court has as little ground for presuming that taking the ice would diminish the supply of water, as for presuming that allowing a dozen, or a half dozen horses to drink from the pond would appreciably injure the owner of the easement. It is difficult, if not impossible, to reconcile the ruling in that case with the decision in the subsequent case of *Seeley v. Brush*, 35 Conn. 419; but, however this may be, we are clear that it is not a case which should be regarded as authority. It is a mistake to suppose that the case of *Higgins v. Kusterer*, 41 Mich. 318; s. c., 32 Am. R. 160, is against the views of this court, for nothing more is there decided than that parties may, by express contract, treat ice as personal property. It is said in that case that "there can be no doubt that the original title to the ice must be in the possessor of the water where it is formed;" and this is in harmony with our cases. In a later case in the same court, it was held that a riparian proprietor had a right to gather ice on a navigable river, and that the owners of a boat which carelessly destroyed it were liable. *People's Ice Co. v. Steamer "Excelsior,"* 44 Mich. 229; s. c., 38 Am. R. 246. The right of the riparian proprietor was likened to that of the owner of land adjoining a public road or

street, and upon this basis was grounded his right to recover. This is the real foundation of our own cases, and they are, therefore, supported, indirectly, at least, by the one just cited. The case of *Wood v. Fowler*, 26 Kan. 682; s. c., 40 Am. R. 330, decides that where the stream is a navigable one, and the adjoining proprietor owns only to the bank, he has no superior claim to the ice; but the court refers with approval to the cases which hold that where the riparian proprietor owns the land he also owns the ice.

Our conclusion is, that where the user is of such a character as to establish an easement to pond water on the land, or to use it as a water way for surplus water, the right to gather ice which forms on the pond is in the owner of the fee, and not in the owner of the dominant estate.

Judgment affirmed.

2. ICE ON PUBLIC WATERS.

WOOD *v.* FOWLER.

26 KANSAS, 682. — 1882.

BREWER, J. — This is a petition for an injunction. A demurrer thereto was sustained in the District Court, and the plaintiffs bring the case here for review. The petition alleges substantially that on the 20th of January, 1880, one Matthias Splitlog was the owner and had the exclusive possession of a tract of land in the neighborhood of Kansas City and Wyandotte, and bordering on the Kansas river, and extending to the middle of the channel; that he then leased said tract to these plaintiffs for ten years, and placed them in the same exclusive possession; that these plaintiffs are ice dealers, engaged in gathering ice, and that they have erected ice-houses on the banks of the Kansas river and in close proximity to this tract of land, for the storage and preservation of ice in great quantities; that merchantable ice is a commodity of great value, and the value thereof greatly enhanced, as it can be gathered in close proximity to the market; that the cities of Kansas City and Wyandotte furnish a good market for the sale of ice to consumers, as well as for export trade; and that merchantable ice of superior quality formed upon the surface of said Kansas river within the limits of said premises, which adhered to the banks of the stream and extended therefrom to the center of the channel. The petition contained further allegations that the defendants were entering the premises and removing the ice, and other facts showing that the plaintiffs were entitled to

an injunction if they were the owners of the ice, or if they had such an interest therein that they could prevent any removal of it.

The question, then, is fairly presented as to the extent of the interest which a riparian owner has in the ice formed adjacent to his property. The petition alleges ownership and possession to the center of the channel; but the defendants insist that this allegation must be disregarded, because the Kansas is a navigable stream, and that the owner of the adjacent soil in such case only owns to the bank, and not to the center of the stream; that this court is bound to take judicial notice of such fact — the official records of United States surveys showing that the stream was meandered, and its navigability being also indicated by early Kansas legislation and its actual navigation a fact of early Kansas history. We think the claim of the defendants is correct — that the court is bound to take judicial notice of the navigability of the stream. * * *

It is true, in 1864 (Laws 1864, p. 180), an act was passed by the State Legislature declaring the Kansas and certain other rivers not navigable; but the plain implication of the act is that the streams had theretofore been considered navigable, and its purpose was to sanction the bridging and damming of such streams. It certainly was not the purpose and the act had not the effect, to enlarge the title of the riparian owners, or to recognize them as possessed of higher rights than heretofore. Indeed, where title is once vested, a mere change in the condition or character of the current or the uses to which the stream is put, will not transfer any title. *People v. Tibbets*, 19 N. Y. 527; *Wheeler v. Spinola*, 54 N. Y. 377. It was an assertion of State control over a stream wholly within its territorial limits; a control which, notwithstanding the general supremacy of the federal government over navigable streams, was asserted to exist in the State in the case of *Naederhauser v. The State*, 28 Ind. *supra*, as well as in many other authorities. So that for all the purposes of this case, and any question in it, we may assume that the Kansas is, at the point in controversy, a navigable stream. The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the State. *Stevens v. Rld. Co.*, 34 N. J. Law, 532; *Pollard's Lessee v. Hagan*, 3 How. U. S. 212. It is true a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea, and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank; above such point, even although the stream was large

enough to be used, and in fact was used, for purposes of navigation, the riparian owner owned the soil *ad medium filum aquæ*. So that really three distinct characters of streams were recognized: First, those smaller streams, which could not be used for any purpose of navigation, in which the title to the soil was in the riparian owner, and along which the public had no rights of highway or otherwise; an intermediate class, in which the riparian owner owned to the middle of the channel, but along whose stream the public had all the rights of a highway; and third, that which was called technically the navigable streams, where the title to the bed of the stream was in the sovereign, and all rights were in the public. The same doctrine of riparian ownership to the center of the stream in all rivers unaffected by the ebb and flow of the tide, is recognized in some States of the Union; but the better and more generally accepted rule in this country is, to apply the term "navigable" to all the streams which are in fact navigable; and in such case to limit the title of the riparian owner to the bank of the stream. Especially is this true in the States where the lands have been surveyed and patented under the federal law. See the following authorities. *Rld. Co. v. Schurmeir*, 7 Wall. 272; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tombden v. Rld. Co.*, 32 Iowa, 106; *Flannigan v. City of Philadelphia*, 42 Pa. St. 219; *Bridge Co. v. Kirk*, 46 Pa. St. 112; *People v. Tibbets*, 19 N. Y. 523; *People v. Loomis*, 33 N. Y. 461. These conclusions seem to compel an affirmation of the judgment of the District Court; for whatever might be the case where a riparian owner owns to the center of the channel, and whatever ownership and control he may have over the ice which forms upon the stream upon his premises, (and as to the extent of his rights, see the following authorities: *State v. Pottmeyer*, 33 Ind. 402, also reported in 5 American Reporter, 224; *Mill River Co. v. Smith*, 34 Conn. 462; *Marshall v. Peters*, 12 How. Pr. 218; *Meyer v. Whittaker*, 18 Alb. L. J. 128; 4 Cent. L. J. 500; 7 Cent. L. J. 141; *Higgins v. Kusterer*, 41 Mich. 318, reported in 9 Cent. L. J. 247; *People's Ice Co. v. The Excelsior*, 11 Cent. L. J. 347; *Paine v. Wood*, 108 Mass. 173; *Gage v. Stumphaus*, Sup. Ct. Mass. reported in 24 Alb. L. J. 516; *Washington Ice Co. v. Shortall*, Ill. Sup. Ct. 13 Rep. 9), it would seem that where there is no ownership of the subjacent soil, a riparian proprietor has no title to the ice. The title to the soil being in the State, and the stream being a public highway, obviously the ownership of the ice would rest in the general public, or in the State as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the

State. The fact that it so joins, gives him no title to that land, or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor. Undoubtedly, in view of the importance that ice is rapidly assuming as a merchantable commodity, it would be wise for the State to legislate in reference to the ice product of the navigable streams; but until such legislation is had, it would seem that the one who first appropriates and secures the ice which is formed is entitled to it, and on the same principle that he who catches a fish in one of those rivers owns it. *Hickey v. Hazard*, 3 Mo. App. 480; *Gage v. Steinkrans* and *Rowell v. Doyle*, Mass. Sup. Ct. 25 Alb. L. J. 23.

There being no other questions in the case, the judgment of the District Court will be affirmed.

3. SALE OF ICE.

HIGGINS *v.* KUSTERER.

41 MICHIGAN, 318. — 1879.

CAMPBELL, C. J. — Higgins recovered below a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that title never passed to Higgins, and that the property was lawfully acquired by himself from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant.

The facts are briefly these: The ice in question was formed upon water which had spread over a spot of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer, and the rest of the year overflowed from a small brook leading into it. After the ice formed, and in February, 1878, Coats, by a parol bargain, sold all the ice in his part of the basin to Higgins, for fifty cents. The parties at the time stood near by in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then all uncut.

About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coates accepted, and Loder cut it, and sold it to Kusterer who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh and forbade the loading and removal on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats who said he had sold it to Loder.

The only question presented is whether Higgins was owner of the ice.

The case was argued very ably and very fully, and the whole subject of the nature of ice as property was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case.

The record is free from any complications which might arise under other circumstances. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claims of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might, from time to time, be formed on the pond, but of ice which was there already, and which, if not cut, would disappear with the coming of mild weather and have no further existence. It was not like crops or fruit connected with the soil by roots or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had.

Its only value consisted in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed it would disappear entirely.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet, it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it again to the realty. It has no more organic connection with the estate than anything else has that floats upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place or not at all, and can only be kept in existence by cold weather. In the present case, the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in

a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until very modern times, and no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection, — if its position in the water can be called a connection, — is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.

We shall not attempt to discuss cases where the bargain includes future uses of land and water, and interests in ice not yet frozen. Whether such dealings are to be regarded as leases or licenses, or executory sales, may be properly discussed when they occur. We think the sale in the present case was rightfully held to be a sale of personalty.

The judgment must be affirmed, with costs.

IV. Vegetable products of the soil.

I. FRUCTUS NATURALES.

a. Classification and legal character and ownership.

(1) TREES AND THEIR FRUIT.

SLOCUM *v.* SEYMOUR.

36 NEW JERSEY LAW, 138. — 1873.

BEDLE, J. — Slocum conveyed to Seymour by an ordinary deed of conveyance, dated December 20, 1860, all the wood and timber

upon a certain tract of land, with the right, in the vendee, to cut and remove the same before July 1, 1862. The deed described the tract by metes and bounds, and as the same premises conveyed to Slocum by Abram W. Haring and wife, by deed of even date with the deed to Seymour. The title of Slocum to a part of the tract proved defective, and this suit is brought upon an alleged implied covenant of title in the plaintiff's (Seymour's) deed. There is no express covenant of title, but there is a covenant against the acts of the grantor. The charge was based upon the assumption that the parties had treated this as a sale of personal property, and that a warranty of title would be implied by the law. Although there is great diversity in the cases, whether a sale of standing timber by the owner of the freehold is of a chattel interest, I am satisfied that such a sale is of an interest in lands, and not controlled by the doctrine of warranty of title in sales of personal property. In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements, or *fructus industriales*, but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law as the effect of a proper instrument of writing. It may be conceded, and such is the law, as in the case of *Smith v. Surman*, 9 B. & C. 561, that there may be a valid parol contract for the sale of timber as a chattel where it is to be cut and delivered by the vendor, although designated as being upon certain land, and where the contract contemplates no property to the vendee in the trees until after they are actually cut down and reduced to chattels; yet, where the sale is of an interest in the trees standing, without having been in legal effect severed by the force of a previous written instrument, and although the American cases differ upon the subject, the best considered of them, and those which I think declare the law, hold that such a sale is of an interest in land, within the meaning of the Statutes of Frauds. *Green v. Armstrong*, 1 Denio, 551; *Buck v. Pickwell*, 27 Vt. 158; *Putney v. Day*, 6 N. H. 430; *Olmsted v. Niles*, 7 N. H. 522.

This also is a fair result of the English cases, although to some extent conflicting. The only adverse ruling in point in England is in 1 Lord Raymond, 182, where it is stated that Treby, C. J., reported to the other justices that on a question before him at *nisi prius*, whether the sale of timber growing ought to be in writing by the statute of frauds, or might be by parol, he was of opinion, and ruled accordingly, that it might be by parol, because it was a bare chattel. The report also states, and Powell, J., agreed to this opinion, but whether informally or in banc, it is difficult to tell from the report. This ruling is also mentioned in Buller's *Nisi Prius*,

282, as per Treby, C. J. But the case of *Scorell v. Boxall*, 1 Younge & Jervis, 395, is directly to the contrary, and in it Hullock, B., regards the report in Lord Raymond as a dictum merely and not as an authority. That report is undoubtedly the foundation of all the American cases to the same effect, but it is not considered as the settled law in England. The case of *Scorell v. Boxall* was this: The plaintiff had purchased, by parol, underwood standing, to be cut by him, and brought his action against the defendants for cutting and carrying it away. The Court of Exchequer held that the plaintiff's contract was a mere parol contract for the sale of growing underwood, a part of the freehold, and in direct violation of the statute of frauds — that it was the sale of an interest in land. See also the case of *Teal v. Auty*, 2 B. & B. 99, to the same effect as to the purchase of growing poles.

As already indicated, trees may become personalty when actually severed, or when the property in claim has become distinct from the freehold by written transfer. There may also be valid parol contracts with the owner of the soil, with reference to their sale and delivery as chattels in contemplation of severance, where no interest in the trees standing is intended by the bargain, the same as contracts for the sale of lumber to be cut, sawed and delivered as such; but when the contract comprehends an interest in the trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds. Such was clearly the character of the contract between these parties, as the deed shows an intention to convey, and does convey, an interest in the wood and timber standing, when a part of the freehold, in the hands of the vendor. The deed secures to Seymour an actual property in the trees as a part of the land, and not merely a right of action under a contract of purchase of personal property.

The bargain having been consummated in this case by the delivery and acceptance of a deed of conveyance, the doctrine of *caveat emptor* must apply in the absence of fraud, unless the purchaser has protected himself by a covenant of warranty of title in the deed. *Phillips v. City of Hoboken*, 2 Vroom. 143; 4 Kent, 471, note.

In this deed there is no such covenant, and the law will not imply one. For these reasons the action was not maintainable, and the judgment must be reversed.

SKINNER *v.* WILDER.

38 VERMONT, 115. — 1865.

PECK, J. — In this case it appears that the plaintiff planted or set apple trees on his own land six feet from the division line between his land and the defendant's land; the trees grew until the roots extended into, and the branches overhung, the defendant's land. The question is whether the defendant is liable either in trespass on the freehold or in trover for picking, carrying away and converting to his own use, the apples growing on the branches overhanging his own land.

Each party claims to be the sole owner of the fruit in question; the plaintiff upon the ground that he is the owner of the tree, and the defendant upon the ground that the branches and the fruit thereon overhung his land, and that in virtue of his ownership of his land he owns everything above it. It is true that whoever owns land owns above it to an indefinite height, — that is, he owns the space above, or rather, has the right to appropriate it to his use, so that no one can lawfully obstruct it to his prejudice. But it is not true in all cases that the owner of land owns everything upon or above it, though placed there wrongfully by another. Certainly in case one's personal property is wrongfully placed upon the land of another the property in the thing is not thereby changed. The owner of the soil has his remedy by action for damages, and he may remove it; but he does not become the owner. If a man build a house on his own land with the eaves and windows above the surface of the ground projecting over the land of the adjoining proprietor, he is liable to an action for damages, and generally, at least under some circumstances, the adjoining proprietor may remove the obstruction as a nuisance; but the material removed does not become his property. In order to justify the act of removal in such case, he must allege that the obstruction was wrongfully encumbering his premises, and that he, therefore, removed it, doing no unnecessary damage. If it appear that he unnecessarily destroyed it, or appropriated it to his own use, the justification fails. This shows that the right of removal does not depend on ownership, but on his right to protect his own premises from invasion. The defendant, therefore, cannot be regarded as the owner of the apples merely because the branches on which they grew were wrongfully encumbering his ground. Suppose the defendant's counsel is correct, as he probably is in the proposition that the defendant had the right to cut the roots and branches of the tree to the division line so far as they penetrated or overhung his land, upon the ground that they

were unlawfully encumbering his premises; this justification does not extend to the carrying away and converting the apples upon such branches to his own use, unless he was the owner of the apples, either solely, or in common with the plaintiff. The title to the apples depends upon the title to the tree, and the defendant was not the sole owner of any part of the tree. The defendant is liable in either count in the declaration unless he had some property in the tree.

The remaining ground of justification on which the defendant relies is, that he was tenant in common with the plaintiff of the tree, and consequently of its product. A tree standing upon the division line between adjoining proprietors so that the line passes through the trunk or body of the tree above the surface of the soil, is the common property of both proprietors as tenants in common. This is not denied. This is another instance where the maxim that he who owns land owns to the sky above it, is qualified and made to give way to a rule of convenience, more just and equitable, and more beneficial to both parties. To hold in such case that each is the absolute owner of that part of the tree standing on or over his own land, would lead to a mode of division of the tree when cut, that would be impracticable, and give the right to one to hew down his part of the tree to the line and thereby destroy the part belonging to the other. The rule is, therefore, settled that in such case the parties are tenants in common. It is claimed that the same principle applies to this case, because some of the roots of the tree extend into the defendant's land whence it draws part of its support. *Waterman v. Soper*, 1 Ld. Raym. 737, is cited in support of this proposition. In that case it is said that it was ruled at *nisi prius*, "that if A. plants a tree upon the extremest limits of his land, and the tree growing extends its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows into the land of A., though the boughs overshadow the land of B., yet the branches follow the root and the property of the whole is in A." There is an anonymous case in 2 Roll. 255, in which it is held that if a tree grows in a hedge which divides the land of A. and B., and the roots take nourishment of both their lands, they are tenants in common of it. It is evident that neither of those cases is necessarily decisive of the case at bar, and that they do not control it unless the principle is fairly deducible from them that the adjoining proprietors are tenants in common of a tree in all cases where the roots penetrate the soil of both, without reference to the distance of the tree from the division line. We think this broad principle is not intended to be established in those cases. In the first, *Water-*

man v. Soper, it is a condition that the tree be planted on the extremest limit of the land, so that growing it extends its roots into the land of the adjoining proprietor. A tree thus planted must almost inevitably in its subsequent growth extend its body more or less upon the dividing line. In the other case the tree grew in the hedge which divided the land of the two proprietors. Such a division hedge, in England, like division fences here, is generally *prima facie* the common property of both, and the tree may have been treated as constituting part of the hedge, but if not, it must have stood in close proximity to, if not upon the line. These cases may reasonably be supposed to have been decided upon the ground that the trees stood substantially upon the line, and not solely on the ground that the roots extended into the land of each. This principle of tenancy in common in a tree merely because some of its roots extend into the land of the adjoining proprietor, regardless of the location of the tree, would be attended with so much inconvenience, uncertainty and embarrassment in its practical application, that it furnishes a strong argument against the construction of these cases contended for by the defendant, as well as against recognizing such a principle unless the authorities lead to that result, or the purposes of justice imperiously demand it. There is at first view an apparent equity in the proposition that the proprietor from whose land a tree draws a portion of its support should have some benefit in return, but to allow him an equal right to the tree and its fruits because a single root penetrates his soil, is quite as unjust as to deny him any right in the tree whatever. If he is tenant in common, what proportion does he own? If his interest is in proportion to the portion of nourishment the tree draws from his land how is the fact to be ascertained? Suppose the division line runs through a grove, a fruit yard, a nursery of trees or a forest, and this rule is adopted, there might be a belt of land rods in width, on which the parties would be tenants in common of more or less of the trees. How is each to know or ascertain what he owns solely, and what in common, and in what proportion, especially as the rights of the parties would be constantly changing by the growth and consequent extension of roots across the division line. Principles of law and rules of property must be such as are capable of practical application to business affairs. But suppose these cases go to the extent the defendant claims, then what are the authorities opposed to them?

In *Masters v. Pollie*, 2 Roll. 141, it was adjudged that if a tree grows in A.'s close, and roots in B.'s, yet the body of the tree being in the soil of A., all the residue of the tree belongs to him also. This case directly in point to show that the plaintiff in the case before

us is the sole owner of the tree, and it is directly opposed to *Waterman v. Soper*, upon the construction put upon that case by the defendant's counsel; and also opposed to the anonymous case above cited, 2 Roll. 255, unless that case is to be interpreted as already stated; but if those two cases stand on the ground heretofore stated, then there is no such conflict. *Miller v. Fondyce*, Poph. 161, 163, and *Norris v. Baker*, 3 Bulst. 178, seem to support the principle of *Masters v. Pollie*, relied on by the plaintiff's counsel. The plaintiff's counsel relies on *Holden v. Coates*, 22 E. C. L. 264. The facts in that case were much stronger in favor of a tenancy in common than in this case, and not so clearly in favor of an entire title in the party on whose land the body of the tree stood, as in this case. The trunk of the tree stood in the defendant's land, and the lateral or spur roots grew in the land of both parties. The plaintiff gave evidence to show that there was no tap root, and that all the principal roots from which the tree derived its main nourishment were those which grew in the plaintiff's land. The defendant's evidence was that there was a tap root growing entirely in his land, and that the spur roots grew alike in the land of each party. The action was trespass for cutting the tree. Littledale, J., speaking of *Masters v. Pollie* and *Waterman v. Soper*, says, "I remember when I read these cases I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*, and I still think so." So far as this expression of opinion goes, the case makes for the plaintiff; but as the case ultimately turned, this point can hardly be said to have been decided. Had the court followed either of these cases, a verdict would have been directed. But the court, after telling the jury not to decide the case upon the relative proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, left the case to the jury to find from the situation of the trunk of the tree above the soil, and of the roots within it, on whose land the tree was first planted, and to render their verdict accordingly; telling them if they could not find that fact, he would then give them directions on the questions they would then have to consider. This view is also in favor of the plaintiff in the case at bar, because the case shows that the plaintiff planted the tree on his own land, six feet from the division line. The jury in that case, however, reported that they could not tell on whose land the tree did first grow; and a verdict was taken for the defendant by consent, on some terms agreed on between the parties; so that the case can hardly be said to be of much authority as a decision. But *Lyman v. Hale*, 11 Conn. 177, is identical with the present case in principle, and in its facts also, except the tree in that case was two feet nearer

the dividing line than in this case. The court in that case, on full discussion and review of the authorities, decided that upon reason, principle, and weight of authority, the tree and the fruit growing on the branches overhanging the defendant's land, were the sole property of the plaintiff on whose land the body of the tree stood, and that the defendant was liable in trespass for gathering and converting to his own use the fruit on such overhanging branches. The elementary books cited are in conflict, all referring to *Masters v. Pollie*, or *Waterman v. Soper*; some following one and some the other of these cases.

There seems to have been the same conflict of opinion in the civil law on this subject, notwithstanding the law of vicinage and the rights and duties of adjoining proprietors, were by the Roman Code defined with much more particularity than by the common law. There is a passage in the Institutes of Justinian that, as it is generally translated, would seem to favor the doctrine of *Waterman v. Soper*, as claimed by the defendant. After stating that if one sets his plant in another's ground, it becomes the property of the owner of the land where it is set after it has taken root, the passage proceeds as follows: "So that if the tree of a neighbor borders so closely upon the ground of Titius as to take root in it, and be wholly nourished there, we may affirm that such tree is become the property of Titius; for reason doth not permit that a tree should be deemed the property of any other than of him in whose ground it hath rooted; therefore if a tree planted near the bounds of one person, shall also extend its roots into the land of another, it will become common to both." Instit. 2, 1, 31, Coop. Just. 79. This passage may have reference only to a tree so near the line as to be regarded as standing substantially upon the line. But however this may be, it is to be observed that the civil law in the days of Rome required a boundary of five feet to be left between farm and farm, or rather between the trees of the two adjoining proprietors, except in the case of an olive or a fig tree, where a space of nine feet was required. It is evident that the passage above quoted has reference to trees set within the prohibited distance from the extreme boundary line. There might be more reason in saying if a party set his tree on the extreme limit of his land, in violation of express law, that the adjoining proprietor should become tenant in common of the tree, than if no such legal regulation existed, or if the tree was set no nearer the division line than the law prescribed. On the other hand, it is laid down in another book of the civil law, that such tree extending its roots into the land of the adjoining proprietor, is nevertheless the property of him in whose land it had its origin. Dig. 47, 7, 6, 2. This is the

rule recognized by Littledale, J., in *Holden v. Coates*. This rule generally would lead to the same result as the rule that the tree belongs to him on whose land the trunk or body of the tree is situated; as a tree would naturally be supposed to grow where it was set or planted. Yet in the case last cited the jury were unable to find on whose land the tree was planted, although the trunk of the tree was on the defendant's land, because the court told the jury to determine it from the evidence as to the situation of the trunk of the tree above the soil, and of the roots within it. Domat, in treating this subject, attributes no consequence to the setting of a tree nearer the division line than the law allows, except that the party thus offending may be compelled to remove it and pay the damages. He does not intimate that the tree thereby becomes the common property of the two adjoining proprietors. I Domat, Civil Law, 589, tit. 6, sec. 1, art. 2; 591, sec. 2, art. 1; Cooper's Justinian, 460, notes. The civil law on the whole is rather in favor of the plaintiff, and is more in accordance with *Masters v. Pollie*. The civil code of France regulates the subject by declaring the boundary hedges and the trees within them, with some exceptions, common property. The civil law cannot be referred to as authority, and can have no bearing unless for its reason, and then only on a question not settled by the common-law.

On the whole we think the weight of authority, reason and analogy, as well as convenience, is in favor of the principle that a tree and its products is the sole property of him on whose land it is situated; and that considering the necessary uncertainty of evidence as to the location and extent of the roots of a tree, its location and property should be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or branches above it. But even if a tree standing with its trunk at the extreme limit of one's land, with the main roots extending immediately into the soil of the adjoining proprietor, should be regarded as so far substantially upon the line as to become common property, it cannot be so regarded in relation to the tree in question, situate six feet from the division line.

No importance is attached to the agreement between the plaintiff and the defendant's grantor as to the distance at which each might set trees; as the defendant, especially as for aught that appears, purchased without notice of it, and is not bound by such verbal agreement.

Judgment reversed and new trial granted.¹

¹ See also *Lyman v. Hale*, 11 Conn. 177, and *Hoffman v. Armstrong*, *supra*, p. 97. — ED.

HOFFMAN *v.* ARMSTRONG.

48 NEW YORK, 201. — 1872.

[*Reported herein at p. 97.*]PURNER *v.* PIERCY.

• 40 MARYLAND, 212. — 1874.

STEWART, J., delivered the opinion of the court.—* * * There then remained but the fifth count, upon which the plaintiff could recover, which alleged the purchase from the plaintiff by the defendant of the fruit growing in his peach orchard, and that the defendant took possession thereof and carried it away. We think the jury were clearly and correctly instructed by the granting of the plaintiff's prayer. * * * *

But the defendant's counsel insists that the contract was invalid under the operation of the fourth section of the statute of frauds. That section provides that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, etc.

Agreement and contract seem to be considered in the section of the same purport, and the appellant's counsel insists the contract or agreement relied upon here to charge the defendant is for lands, or some interest in or concerning them, and therefore not to be established by parol proof.

It would be giving to the statute a very latitudinarian construction to bring the case in question within the mischief designed to be avoided by the statute. We have been referred to no case in this State, and have found none to sanction such doctrine. The cases of *Ellicott v. Peterson's Ex'rs*, 4 Md. 476, and *Smith v. Bryan*, 5 Md. 141, are against such enlarged construction.

The first case, in regard to agreements to be performed within a year, decides that a complete performance by one of the parties within the year is sufficient compliance with the requirements of the statute.

The latter case substantially holds that the sale of standing trees, under the circumstance of that case, was a sale of goods, and conformed to the demands of the seventeenth section, and refers with approval to sec. 271 of Greenleaf's Evidence.

There is certainly some conflict in the adjudged cases in regard to the interpretation of contracts for the sale of crops and the

natural products growing upon land; and it is difficult to deduce therefrom any clearly defined rule upon the subject.

Mr. Alexander, in his admirable treatise on the British Statutes in force here, has carefully referred to numerous cases, both English and American, and deduced therefrom the distinctions which seemed to have prevailed in regard to the operation of the statute in relation to growing crops and other produce of land. At page 532 *et seq.*, contracts, as to the natural product of the land, are distinguished from such as relate to crops raised by the industry of man, and yielding an annual profit. A distinction is also noted between the natural produce when severed by the seller or by the buyer. He refers to the recent work of Benjamin on Sales, 84 *et seq.*, for a fuller discussion. Mr. Benjamin, at p. 99, remarks, from all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz.: Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the fourth section of the Statute of Frauds. Growing crops, if *fructus naturales*, are part of the soil, before severance, and an agreement therefore vesting an interest in them in the purchaser before severance is governed by the fourth section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares and merchandise, governed by the seventeenth, and not by the fourth section of the statute.

Assuming these distinctions to be well founded, still what is the natural and what the artificial product remains to be determined in each case. Mr. Phillips, in his work on Evidence, 3 vol. 250, says, the statute does not include agreements for the sale of the produce of a given quantity of land, and which will afterwards become a chattel; though some advantage may accrue to the vendee by its continuing for a time in the land.

In Taylor's recent book on the Law of Evidence, 2d vol. sec. 952, the following propositions are submitted: 1st. A contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them. 2d. A sale of any growing produce of the earth, reared annually by labor and expense, and in actual existence, at the time of the contract, as, for instance, a growing crop of corn, hops, potatoes, or turnips, is not within the fourth section, though the purchaser is to harvest or dig them. 3d. An agreement respecting

the sale of a growing crop of fruit, or grass, or of standing under-wood, growing poles or timber, is within the fourth section, and a written contract of sale cannot be dispensed with.

However sound his first and second propositions, we think his third is to be taken with some qualification — and that a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may be well classed as *fructus industriales*, and not subject to the fourth section of the statute.

Brown on Statute of Frauds, in sections 236, 237, 246, 247, and 249, and Greenleaf's Ev. 1 vol. sec. 271, have furnished from the adjudged cases, a construction more in consonance with our views upon the subject, and is substantially to the following effect: There is nothing in the vegetable or fruit which is an interest in, or concerning land, when severed from the soil, whether trees, grass and other spontaneous growth (*prima vestura*) or grain, vegetables, or any kind of crops (*fructus industriales*), the product of periodical planting and culture; they are alike mere chattels, and the severance may be in fact, as when they are cut and removed from the ground; or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or where he sells the land, reserving them by express provision.

As a general rule, if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered, as chattels, such a sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land. When such is the character of the transaction, it matters not whether the product be trees, grass and other spontaneous growth, or grain, vegetables, or other crops raised periodically by cultivation — and it is quite immaterial whether the produce is fully grown or in the process of growing, at the time of making the contract.

The circumstance that the produce purchased may, or probably, or certainly will derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute.

If the contract, when executed is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is in the *interim* to confer upon the purchaser an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is affected by the statute, and must be in writing, although the purchaser is at the last to take from the land only a chattel.

To put a reasonable construction upon the terms of the fourth

section of the statute, from the evidence in this case, it is clear that the contract in question is not within its meaning. It had been executed by the plaintiff, and the fruit had been gathered, and in fact paid for at the time of the suit.

It was in proof that a part of the fruit was prematurely ripe at the time of the contract.

It would be a perversion of the objects of the statute to hold as invalid the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties to sell or purchase the soil, but affording a mere license, express or implied, to the purchaser to go upon the land, to gather the fruit and remove the same. Substantially, to use the language of sec. 271, of 1 Greenleaf's Ev., the transaction takes its character of realty or personalty from the principal subject-matter of the contract, and the interest of the parties, and, therefore, a sale of any growing produce of the earth, in actual existence, at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in, or concerning land. Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in contemplation of the parties, a sale of goods only, and not within the statute.

Judgment affirmed.

SMITH *v.* PRICE.

39 ILLINOIS, 28. — 1865.

MR. JUSTICE LAWRENCE delivered the opinion of the Court. — This was a bill in chancery filed by Smith, plaintiff in error, to enjoin Price, the defendant in error, from removing certain fruit trees growing in a nursery, and certain ornamental shrubbery, from a tract of land sold by the latter to the former. Price answered (the oath to his answer having been waived), and on the coming in of the answer a motion was made to dissolve the injunction. A replication was filed and the case seems to have been irregularly set down for final hearing at the same time with hearing the motion to dissolve, and to have been finally disposed of upon the pleadings and the affidavits filed for and against the motion. As no exception was taken to this proceeding, it was probably had by consent. The Court rendered a decree making the injunction perpetual as to a part of the trees, and dissolving it as to a part; and from this decree the complainant prosecutes a writ of error.

The defendant admits a sale of the land by himself to the complainant, and that the latter went into possession under the contract of purchase, but insists that one of the terms of the sale was a verbal reservation of the nursery trees and some other ornamental shrubbery. The proof made in the affidavits upon this point is uncertain and contradictory.

While fruit trees and ornamental shrubbery grown upon premises leased for nursery purposes would probably be held to be personal property, as between the landlord and tenant, yet there is neither authority nor reason for saying that, as between vendor and vendee, such trees and shrubbery would not pass with a sale of the land. They are annexed to, and a part of the freehold. As between vendor and vendee, even annual crops pass with the land where possession is given. *Bull v. Griswold*, 19 Ill. 631. Under the contract of sale and the delivery of possession by Price to Smith, the latter became the owner of the trees as well as of the soil, and it would be a violation of the most familiar rules of evidence to receive proof of a verbal arrangement cotemporaneous with the written contract and impairing its legal effect. The parties, in executing the written instrument, deliberately made it the exclusive evidence of the terms of their agreement. This instrument shows a sale of the land in such terms as to pass the trees. No reservation is made, and to permit the vendor now to show that there was a verbal agreement for their reservation, would be to permit him to prove a verbal contract, inconsistent with the legal import of that executed by the parties under their hands and seals. This the law forbids. We find nothing in the case to make it an exception to this familiar principle, and it is, therefore, unnecessary to advert to the evidence in detail. As the record shows that Price has actually removed a part of the shrubbery, and claimed the right to move much more, it was a proper case for an injunction, and the decree will be reversed and the cause remanded, with instructions to the court to proceed in conformity with this opinion.

Decree reversed.

BATTERMAN *v.* ALBRIGHT.

122 NEW YORK, 484. — 1890.

ACTION for damages for alleged conversion by defendant of nursery trees, grape-vines and bushes standing and growing on a farm which was formerly the property of Peter S. Markle, who was a nurseryman. The farm was subject to a mortgage made in 1868. Plaintiff

now claims title to the trees, etc., in question by virtue of an execution sale in 1877, on a judgment against Markle. Defendant took possession of the premises under a foreclosure sale in 1878, had on the mortgage in question. Judgment below for the defendant. Plaintiff appeals.

BRADLEY, J. — It may be assumed that, as against Markle, the judgment-debtor, the plaintiff, by his purchase at the sale made by the constable upon the execution, took title to the nursery trees and the right to remove them. The question for consideration has relation to the effect, upon such rights, of the foreclosure of the mortgage, and the title to the premises derived from it. The trees and bushes in question had been grown in the nursery since the mortgage was made; and the plaintiff's claim of title was derived wholly from his purchase on the execution sale. As against the mortgagor, the foreclosure and sale were effectual to vest the title to the trees in the purchaser, and in the defendant as his grantee. The rule, as between mortgagor and mortgagee as to crops growing in mortgaged premises, is no less favorable to the claim of the plaintiff than that relating to nursery trees, which partake of the same character. And the principle applicable to both in such case may be treated as the same. The doctrine on the subject of emblements, and who, in their relation to the land on which they were growing, were entitled to them, was well defined at common-law; and it was distinct from that of fixtures. They were treated as so distinct from the real estate as to be subject to many of the incidents of personal chattels. Co. Litt. 55b; 2 Bl. Comm. 404. And although they did not go to the heir, they did to the devisee, and to the remainderman for life. Broom's Leg. Max., 305. And in this State they go to the devisee, subject only to the payment of debts of the testator and the legacies given by his will. *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 Id. 158. They, belonging to the grantor, also passed with a conveyance of the land, and such is now the rule. And the common law, in respect to emblements, is not very greatly modified by the statute, which provides that they be deemed assets and shall go to executors and administrators to be applied and distributed as personal estate. 2 R. S. 82, sec. 6. It may be observed that the doctrine applicable to growing crops is distinguishable from that relating to other personal property on land as between grantor and grantee and mortgagor and mortgagee; the theory on which it rests is that they in some sense appertain to the realty. And the general rule as declared from an early day by text and judicial writers, is that a party enter-

ing into possession by title paramount to the right of the tenant takes them. Co. Litt. 55b; *Davis v. Eyton*, 7 Bing. 154. Whether, without the aid of some statute, that rule is subject to any qualifications or exceptions, and if so, what, it is now unnecessary to inquire or determine. In the present case, the mortgagor had been in default several years at the time of the plaintiff's purchase of the nursery trees on the execution sale. And the defendant's entry into possession of the premises was by title paramount to any right which could have been derived from the mortgagor in them subsequently to the time the mortgage was given. Although since the right to maintain ejectment is denied to a mortgagee by statute (2 R. S. 312, sec. 57; Code, sec. 1498), his mortgage is a mere security, and the title to the mortgaged premises remains in the mortgagor, the foreclosure and sale in practical effect operates to eliminate the defeasance, and the purchaser takes the title of the mortgagor as of the time the mortgage lien was created. *Rector, etc. v. Mack*, 93 N. Y. 488. And while the plaintiff, as against the mortgagor and without liability to the mortgagee, may have taken the nursery trees from the premises prior to the time of the foreclosure of the mortgage, he had no such right, as against the purchaser or his grantee who had entered under the title perfected by the sale on foreclosure and the conveyance made pursuant to it. *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Den. 174; *Gillet v. Balcom*, 6 Barb. 370; *Jewett v. Keenholts*, 16 Id. 194; *Sherman v. Willet*, 42 N. Y. 146; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Adams v. Beadle*, 47 Ia. 439, 29 Am. Rep. 487. The suggestion of the plaintiff's counsel that there has been a modification of the rule of law on the subject, and that the case of *Lane v. King* is not, therefore, entitled to the weight of authority, may be applicable to fixtures to which the authorities cited by him relate. But emblements are not fixtures within the meaning of the rule applied to them. The subject of the former is treated in the law as distinct from the latter; and while they may be taken on execution, supported by a judgment, not a lien upon the realty, those things which have become fixtures cannot. But the doctrine peculiar to growing crops, originating in considerations deemed beneficial to the interests of agriculture, has remained substantially unchanged, and the rule, as stated in *Lane v. King*, was not only followed in some of the cases before cited, but that case and its doctrine have more recently been judicially cited and referred to with approval in this State, *Harris v. Frink*, 49 N. Y. 31; *Samson v. Rose*, 65 id. 416, and it quite uniformly prevails where the common law on the subject remains in force. The rigor of the old common law, which gave forfeiture as the consequence of default in

payment of a mortgage, has been modified so as to permit payment at any time before sale on foreclosure. But that does not affect the question under consideration. And our attention is called to no reason why the considerations upon which the doctrine relating to emblements was founded, and has since been observed, are now any less entitled to sanction than formerly. The fact that the right to ejectment is taken away from the mortgagee by the statute and the mortgage reduced to a mere chose in action secured by lien upon the land, while the defeasance remains effectual, does not seem to have any essential bearing upon the question, inasmuch as the perfecting of title under it has relation to the time it became a lien. The case of *Mott v. Palmer*, 1 N. Y. 564, is not analogously inconsistent with the view here taken. There the right of the plaintiff, under his agreement with the owner of the premises, arose before the sale and conveyance to the defendant. And if the right of the plaintiff in the present case had been acquired to the trees prior to the mortgage, a different question would have been presented. In that event, the sale upon the execution and purchase by the plaintiff may have, so far as essential, been treated as a severance of the growing trees from the realty. But they cannot be so treated as against the title paramount of the defendant. *Shepard v. Philbrick*, 2 Den. 174; *Gillett v. Balcom*, 6 Barb. 370. These views lead to the conclusion that the plaintiff was not entitled to recover, if the foreclosure of the mortgage was effectually made. The plaintiff's counsel contends that it was not because: (1) One Mary M. Markle was not made a party to the foreclosure action, and (2) the plaintiff was not a party to it. The first objection was founded on the fact that the mortgagee had assigned a partial interest in the mortgage to Mary M. Markle. This did not render the decree invalid. The mortgagee was a proper party plaintiff, and the omission to unite the other party having a claim upon a portion of the amount secured by the mortgage furnished no ground for a collateral attack by the mortgagor or the plaintiff. The equity of redemption was barred by the foreclosure. And the plaintiff had no relation to the realty to make him a necessary party for any purpose essential to the title derived from the foreclosure of the mortgage. He could acquire no interest in it by his purchase upon his execution sale. Nor is it found that the mortgagee, at the time of the foreclosure sale had any notice of the claim of the plaintiff founded upon his purchase. Code; sec. 1671.

Judgment affirmed.¹

¹ For effect of partition sale see *Banta v. Merchant*, 173 N. Y. 292. — ED.

DUBOIS *v.* BEAVER.

25 NEW YORK, 123. — 1862.

TRESPASS by one of two adjoining landowners against the other for cutting down line trees. Judgment for plaintiff. Defendant appeals.

ALLEN, J. * * * It is not necessary to determine whether the parties were technically tenants in common of the trees growing upon the boundary lines separating their respective farms, with all the ordinary rights and incidents of such an estate. The trees thus growing are called, in the case, "line trees." By this, I understand, is meant, not trees marked and set apart by the parties as evidences or monuments of the division line, but trees deriving their nourishment from roots extending on both sides of the line, and with bodies so directly over the line, and necessarily on both sides of that line, that it could not be determined upon which side of the line the tree was originally planted; as was the case in *Holder v. Coates*, 1 Moody & Malkin, 112. Different opinions have been held, as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates. *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby*, 12 N. H. 454; 2 Bouv. Inst. 158; while others, with better reasons, as it seems to me, hold that the tree is wholly the property of him upon whose land the trunk stands. *Holder v. Coates*, *supra*; *Lyman v. Hale*, 11 Con. 177; *Masters v. Pollie*, 2 Roll. R. 141; Crabbe on Real Property, sec. 96. The same reasons, and the proprietorship of the soil, would give to the owner of the estate that part of the trunk of a tree which was upon or over his land, when the trunk was divided by the line separating the estates. The ownership of the soil would be several, in the proprietors of the two estates, while the tree, standing and growing partly upon the soil of each, not capable, as an entire thing of several ownership by the two, would be the property of the two in common, and as tenants in common. If a tree grows in a hedge, that divides the land of A. and B., and by its roots takes nourishment in the land of both, they are tenants in common. Anon, 2 Roll. 255; Crabbe's Law of Real Property, *supra*.

The same difficulty and conflict of opinions upon this branch of the law has also existed in the civil law, and in France the difficulty has been avoided by legislation, and boundary hedges, and the trees

in them, are declared to be common property of the owners of the two estates. Note to *Holder v. Coates*, 22 E. C. L. R. 265. So long as neither can make title upon any principles of right known to the law, to the exclusion of the other, a common property necessarily exists in both, and the rule of the French code is but the rule of the common law resulting from the principle which gives to the owner of the soil an exclusive right to an indefinite extent upward and downward, and which makes trees and bushes, growing and being upon land, a part of the land itself. Trees thus standing upon the boundary line, as mete-stones or monuments set up for marking the boundary line, are not like party walls erected with reference to the usual occupation of adjacent premises. The wall is erected for the use of each, and each may use it, and each owns that which is on his own premises, but there is no tenancy in common. *Matts v. Hawkins*, 5 Taunt. 20. This case was, however, decided under the party-wall act of 14 Geo. III., c. 78, and it would seem that but for such act the presumption would be that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common. *Cubitt v. Porter*, 8 B. & C. 257.

Ordinarily, trespass will not lie by one tenant in common against his co-tenant, but when one tenant in common ousts his co-tenant, ejectment will lie at the suit of the latter; and when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party. Co. Litt. 200a, 200b; Crabbe's Law of Real Property, sec. 2318b; *Waterman v. Soper*, *supra*. If one tenant in common destroy the thing in common, as if he grub up and destroy a hedge or prevent his co-tenants of a folding erecting hurdles, trespass lies. Browne on Actions, 414; *Voyce v. Voyce*, Gow. 201; *Cubitt v. Porter*, *supra*. If one tenant in common enter upon his co-tenant and oust him of his premises, trespass *quare clausum fregit* lies for the injury. *Erwin v. Olmsted*, 7 Cow. 229. Here there was a total destruction of the trees, and the plaintiff had his remedy by action for the wrong done. If the parties were not tenants in common, the defendant was clearly a trespasser in cutting and carrying off that portion which belonged to the plaintiff in reality as being upon his land.

The judgment must be affirmed.¹

¹ See also *Griffin v. Bixby*, 12 N. H. 454. For nature of tenancy in common in a line-tree see *Robinson v. Clapp*, 65 Conn. 365. — ED.

BRACKETT *v.* GODDARD.

54 MAINE, 309. — 1866.

APPLETON, C. J. — This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property and may be seized and sold on execution. *Staples v. Emery*, 7 Greenl. 301. So, wheat or corn growing is a chattel and may be sold on execution. *Whipple v. Foot*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed. 2 Kent, 346, or by statute, as in this State by R. S. c. 81, sec. 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate. *Bishop v. Bishop*, 1 Kernan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks Richardson, C. J., in *Kittredge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It

would have been otherwise, had they been cut into logs or hewed into timber. *Cook v. Whitney*, 16 Ill. 481.

The defendant, at the plaintiff's request, traveled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Offset allowed.

(2.) BUSHES AND SMALL FRUITS.

SPARROW *v.* POND.

49 MINNESOTA, 412. — 1892.

SPARROW, in 1886, recovered a judgment against Pond and others. Pond owned land, a part of which was planted to blackberries. The bushes were cultivated and cared for in the usual way. In 1891, Pond was about to gather the berries, when the sheriff made a levy upon them under execution on Sparrow's judgment. The crop was sold to plaintiff on the execution. Pond prevented the plaintiff from taking the berries, and Sparrow brings this action in replevin. Verdict and judgment for defendant. Plaintiff appeals.

MITCHELL, J. — At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man, termed "emblemments," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after death.

This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes, and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life. 4 Kent, Comm. p. *73; 4 Bac. Abr. 372, tit. "Emblemments;" Freem. Ex'ns, sec. 113; 1 Schouler, Pers. Prop., sec. 100 *et seq.*; *State v. Gemmill*, 1 Houst. 9; *Craddock v. Riddlesbarger*, 2 Dana, 205; 4 Amer. & Eng. Enc. Law, tit. "Crops;" *Rodwell v. Phillips*, 9 Mees. & W. 501.

A possible exception to this classification is the case of hops on

the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham v. Atwood*, Cro. Car. 515. See *Frank v. Harrington*, 36 Barb. 415.

It is sometimes stated that the test whether the unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees was subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*," for that reason; but the manner, as well as purpose, of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach. Darlington, Pers. Prop. 26.

This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree.

It seems to us quite clear that at common law such berries, while growing upon the bushes, were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of 1878, G. S. ch. 66, sec. 315, was, while

permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested.

The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblemments," and neither of them included fruits or perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. [As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case.]

To prevent misapprehension hereafter, it may be well, however, to say, with reference to the question whether crops growing upon a homestead under the statutes of this State are subject to levy, or whether their seizure would be an interference with the beneficial use and control of the homestead by the debtor, that it is not determined, as counsel for appellant assumes, by the case of *Erickson v. Paterson*, 47 Minn. 525, 50 N. W. Rep. 699. In that case the grain grew upon land entered under the United States homestead law, by the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and use as a home.

Hence, that case would not necessarily control the question discussed in the present case.

Judgment affirmed.

(3.) GRASSES.

IN RE CHAMBERLAIN.

140 NEW YORK, 390. — 1893.

ANDREWS, CH. J. — We think the surrogate erred in charging the executrix with the sum of \$173.29, the amount received by her for hay grown upon the farm in 1889. The testator died in June of that year, and the tenant of the farm, who worked it upon shares, cut the grass thereafter and paid over to the executrix that sum as her share of the proceeds of the hay under the agreement with the testator. The executrix was devisee for life of the farm. [Growing grass partakes of the nature of realty.] Neither at common law nor under our statute does it go as assets to the executor or administrator, but follows the land and belongs to the heir or devisee. *Evans*

v. *Roberts*, 5 B. & C. 820; *Kaine v. Fisher*, 6 N. Y. 597; 2 Rev. St. 82, sec. 6, sub. 6.¹ On the other hand, corn and other annual crops produced by care and cultivation, and not growing spontaneously, are at common law, as between heir and executor or administrator, treated as chattels, and under our statute are assets for the payment of debts even as against the devisee. Williams on Ex'rs, vol. 1, p. 70; 2 Rev. St. 82, sec. 6, sub. 5; *State v. Wilbur*, 77 N. Y. 158.

It must be assumed, in the absence of evidence, that the executrix took the proceeds of the hay in the character of life tenant and not as executrix. There was no change in the legal character of the grass by any act or contract of the testator in his lifetime. His share in the proceeds of the grass was in the nature of rent reserved, which accrued after the testator's death. The decree should, therefore, be modified by deducting from the amount charged against the executors the sum of \$173.29, and any interest which may have been allowed thereon. * * *

The judgment below should be modified in conformity with this opinion and as modified affirmed, without costs to either party.

Judgment accordingly.

b. Effect on fructus naturales of sale, descent, devise, or mortgage of the land.

(I.) IN GENERAL.

COCKRILL v DOWNEY.

4 KANSAS, 426. — 1868.

By the Court, BAILEY, J. — This was an action for trespass, commenced before Alonzo Cottrell, J. P., by plaintiff in error, against defendant in error, to recover the value of three loads of wood, hauled from the land of the plaintiff in error, by the defendant in error, claiming triple damages under the provisions of ch. 208 of the Comp. L. The action was commenced on the 28th day of December, 1866, and after several continuances, was tried by a jury, who found a verdict for the plaintiff. The defendant appealed, and the cause was again tried at the April term of the District Court of Marshall county, 1867, and judgment rendered for the defendant.

The plaintiff in error, who was also the plaintiff below, now brings the case to this court to procure a reversal of the last mentioned judgment.

It appears from the bill of exceptions that the defendant, Downey, and one Abraham Gossuck, were the former owners of the land on

¹ See § 2712, N. Y. Code Civ. Procedure. — ED.

which the alleged trespass was committed, and that Gossuck and wife conveyed all their interest in the land to Caloni Walworth, by deed dated February 10th, 1865, and that subsequently, on the 28th of August, 1865, defendant, Downey, conveyed all his interest in said land to Walworth, without any reservation whatever, and that said Walworth conveyed the land to plaintiff by deed of warranty, without reservation.

On the trial, the defendant filed no answer to plaintiff's petition on appeal, but offered himself as a witness to prove, with others, that there was a parol reservation of the dead and down timber in the deed from Downey to Walworth, and also in the deed from Walworth to plaintiff, Cockrill. Objection was made to this evidence, but the objection was overruled by the court, and the evidence admitted. We think the court erred in admitting the evidence. The policy of our laws, as evinced by the whole tenor of the legislation as to registration of deeds and the like, is to make titles to real estate depend upon the written deeds of the parties, leaving the smallest possible margin for parol contracts, understandings and reservations.

A deed of land must be, we think, deemed to involve all timber standing or growing on it, unless specially excepted. As to trees standing and growing in the soil, we apprehend that no question would be made; but a tree may be standing and not growing, or growing in a horizontal position, not standing.

Must the law apply a different rule in each case? Suppose the case of trees prostrated by a tornado, but with roots still adhering to the soil; shall they pass by the deed, or be reserved by parol? Obviously, such trees must be considered as part of the realty, and we think that there can be no safer general rule, than that founded on the old maxim, "*Cujus est solum ejus est usque ad cælum*," which may, perhaps, be liberally translated, "The owner of the soil owns from the center of the earth up to the sky." Various qualifications and limitations have been established as to fixtures, emblements, and the like; but we find no judicial warrant or authority for the claims of the defendant in this case.

The judgment must be reversed, and the case remanded for a new trial.

BRADY *v.* WALDRON.

2 JOHNSON'S CHANCERY (N. Y.), 148. — 1816.

BILL filed by the plaintiff, a mortgagee, for an injunction to stay waste in cutting timber on the mortgaged premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure.

THE CHANCELLOR — An injunction lies against a mortgagor in possession to stay waste. The court will not suffer him to prejudice the security. Dick. 75; 3 Atk. 210, 237, 3 Ves. 105.

Injunction granted.

(2.) HOW EXCEPTIONS OR RESERVATIONS MUST BE MADE. THEIR EFFECT.

COCKRILL *v.* DOWNEY.

4 KANSAS, 426. — 1868.

[Reported herein at p. 174.]

CLAP *v.* DRAPER.

4 MASSACHUSETTS, 266. — 1808.

PARSONS, C. J. [After stating the action and reciting the substance of the special verdict.] — The two deeds in this case, executed on the same day, the latter referring to the former, and relating to the same transaction, must be considered as intended to effect the same contract, and must be construed together. The result of this joint construction is, that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close forever, and not merely those then standing, or which should be standing within a limited time; and of a perpetual license to cut and carry them away. The plaintiff having all the estate in the trees, timber and close, which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees. 8 Co. 271; Cro. Jac. 487; 2 Roll. Abr. 455, 20; 11 Co. 46.

For cutting down and carrying away the trees, trespass undoubtedly lies. 2 Leon. 213; *Hitchcock v. Harvey*.

But the defendant insisted that the plaintiff could not maintain trespass for breaking the close. Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close, as well as for cutting. It appears to be a principle of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit*; but not if his interest is in common with others. Thus, this action lies for him who has the herbage, although not a right to the soil. Moor. 355; *Hoe v. Taylor*, — Co. Litt. 4b; Dalison 47, —; Moor. 302, —; Cro. Eliz. 421. But if he is entitled to a portion of the herbage for a particular part of the year, he cannot maintain this action, but may maintain an action of trespass for spoiling his grass. 2 Leon. 213. Vide also Yelv. 187, *Dewclas et al. v. Kendall et al.*

The latest case on this subject is the case of *Wilson v. Mackreth*, 3 Burr. 1824. The plaintiff had an exclusive right to take the turf in a several parcel of ground, in which, and in other parcels adjoining, he and the other tenants of the manor had common of pasture, the right of the soil being in the lord of the manor. The defendant dug and carried away peats in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. And the difference there taken is between exclusive rights and rights in common; that if the plaintiff had only a common of turbary, trespass would not lie.

Upon the authority of this case, as well as the reasonableness of the principle, the plaintiff, in consequence of his inheritance in the trees had such an interest in, although not the right of soil, that he may maintain trespass *quare clausum fregit* in this case, and must have judgment on the special verdict.

SALTONSTALL v. LITTLE.

90 PENNSYLVANIA STATE, 422. — 1879.

EJECTMENT by Little, as executor of Kingsbury, against defendants as trustees, succeeding to the interest of Veazie.

Kingsbury, in 1859, sold to one Hyde certain standing timber to be taken off within twelve years. A few days later he deeded the

land to Veazie, reserving said timber with the right to take it off within twelve years from date of deed.

It was agreed at the hearing below that if the court should be of opinion that the property in said pine timber, remained in Kingsbury, his heirs, etc., after the expiration of the term of twelve years, limited in the deed, then there should be judgment for the plaintiff, but if the court be of opinion, that after the expiration of said term the property passed to Veazie and his assigns, then judgment should be entered for defendants.

Judgment for plaintiffs. Defendants bring writ of error.

PAXTON, J. — Whether we regard the clause in controversy, in the deed from Kingsbury to Veazie, as a reservation or an exception, the result is the same, for in either event Kingsbury or his grantee of the timber was restricted to twelve years, in which to cut and remove it. [The reservation of the timber was not an absolute severance of it from the freehold. It was a severance only upon the condition of its removal within twelve years.] It is true no such express condition appears, and the words, *proviso, ita quod* and *sub conditione*, so much relied upon by Lord Coke, are not to be found in the reservation. But conditions may be implied as well as expressed. There is abundance in the reservation from which such a condition may be implied. “If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years, for this is in the nature of a condition annexed to the grant.” Bacon’s Abridgment, tit. Grant. In *Boults v. Mitchell*, 3 Harris, 371, there was a sale of the land, “excepting and reserving therefrom, all the timber that is suitable for rafting and sawing of every description.” In that case no time was limited within which the timber must be removed, yet it was held that “the grant was in its very nature determinable; the right to cut timber was not to continue forever at the pleasure of the grantee and his assigns; and if from the destruction of the trees, the subject of it, or the refusal of the party to exercise his right after a reasonable notice to do so, the right itself is determined; the privilege of entry is gone with it, and the owner of the land may sue for breach of close, though he may not recover in damages the value of trees taken; the property of which is not in him.” In the case in hand, the parties have fixed the time during which the trees may be removed. Had no time been limited, the law would have allowed a reasonable time in order that the grantor might not be defeated of his reservation. But he would have been compelled to remove them upon reasonable notice, otherwise the reservation would have been a perpetual servitude, which was not contemplated by the parties, and is repugnant

to the grant. Having fixed their own time for the removal of the timber, it is too clear for argument, that the right of entry falls with its expiration. It was contended, however, that even if the right of entry is gone, the right of property in the trees remains, and the case stated was evidently framed to meet this possibility. It would certainly be a barren right to own trees upon another's land, with no right of entry to take them away. The plaintiffs have no such property in the timber. The limitation upon the right of entry was a limitation upon the exception itself. It was a reservation of the timber for twelve years and no longer. After that time, the trees remaining passed with the grant of the soil to which they were attached. This is the construction placed upon such agreements in the lumber regions where they are frequent, and it accords with reason and common sense. We made a somewhat similar ruling in *Leconte v. Royer*, decided in 1877.

It also appears by the case stated, that Kingsbury sold the timber in question, to one Joseph S. Hyde, twenty-six days before his deed to Veazie, with the right to take it off for twelve years from the date of the sale. Whatever the rights of the defendants may be, the plaintiffs, by their own showing have none.

The judgment is reversed, and judgment on the case stated for the defendant.

c. Separate sale or mortgage of fructus naturales — how made.

(1.) THE GENERAL RULE.

HIRTH *v.* GRAHAM.¹

50 OHIO STATE, 57. — 1893.

[Reported herein at p. 34.]

KILLMORE *v.* HOWLETT.

48 NEW YORK, 569. — 1872.

ACTION for damages for breach of a parol contract by which defendant agreed to cut the trees then standing and growing on his lot into cord-wood and deliver the same to plaintiff at his wood yard.

Judgment for plaintiff. Defendant appeals.

GRAY, C. — If the standing trees upon the lot, which by the contract were to have been cut by the defendant and made into cord-

¹ See also *Green v. Armstrong*, 1 Den., 550, reported *supra*, p. 38. — ED.

wood, and delivered by him to the plaintiff at Syracuse, had, instead of the wood to be made therefrom, been sold in their standing condition, "rooted in the soil," the right of the plaintiff to enter and fell them, and make them into wood, would have been a sale of an interest in the land, and without being evidenced by writing would have been void. *Green v. Armstrong*, 1 Denio, 550, 553, *et seq.* This was not a sale of the trees in their standing condition, but rather a contract by the defendant to bestow work and labor upon his own material, and deliver it in its improved condition to the plaintiff. In a similar case, *Littledale, J., in Smith v. Surnam*, 9 B. & C. 561, 566, held it not to be the intention to give the vendee any property in the trees until they were severed from the freehold. Apply the rule contended for by the defendant, and a writing would be indispensable to the validity of a contract by the owner of a peat bed or a sand-bank to deliver a load from it. Such contracts are never regarded as carrying an interest in the real estate from which the thing sold was to be taken by the owner. The judgment should be affirmed.

Judgment affirmed.

(2.) THE KENTUCKY DOCTRINE.

BYASSEE *v.* REESE.

4 MET. (KY.), 372. — 1863.

BULLITT, J. — Byassee filed a petition alleging that he had purchased from one Head, agent of one Walters, 100 trees standing upon land belonging to said Walters; that he was to have choice of the trees standing upon said land, and selected and marked 100 trees which said Head agreed he should have; and that Reese, with knowledge of plaintiff's right thereto, was cutting them down, and converting them to his own use; and praying that he might be enjoined from doing so, and for damages for those that had been converted.

Reese did not controvert any of those allegations in the manner required by the Code of Practice, (section 125,) except the allegation, that he had cut any of the trees marked by the plaintiff; but it was proved that he had cut some of them, and in his answer he claimed the right to cut them all; averring that the land had been decreed to Mrs. Walters by the Louisville chancery court, in a divorce suit, that she had sold it to Moss, and that Moss had sold it to defendant. But these averments were not sustained by any evidence.

Byassee appeals from a judgment dismissing his petition.

We find in the record a copy of a paper purporting to have been signed by Head, which contains written evidence of said sale of trees, but we cannot consider the paper, because it is not referred to in the petition. As the petition does not aver that the contract was in writing, nor refer to any writing, we must assume that it was a verbal contract. 15 B. Mon. 443; 3 Met. 474.

The first question is, whether or not a sale of standing trees is embraced by that provision of the statute of frauds which relates to contracts for the sale of land. This question has produced some conflict of opinion. But, according to the weight of authority, a sale of standing trees, in contemplation of their immediate separation from the soil, by either the vendor or the vendee, is a constructive severance of them, and they pass as chattels, and, consequently, the contract of sale is not embraced by the statute. Green, Ev., sec. 271. And such is the ruling of this court. *Cain v. McGuire*, 13 B. Mon. 340.

The phrase, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it. (See authorities above cited.)

The case under consideration clearly belongs to the former class, though it does not appear that any definite time was fixed for the removal of the trees.

As the trees were sold as chattels, the selection and marking of them by the purchaser, with the knowledge and consent of the vendor, was a constructive delivery, and the title vested in the purchaser.

But, though Byassee may be entitled to the trees, as against Walters, yet, if Reese, or his vendor, acquired title to the land by a *bona fide* purchase, for a valuable consideration paid, before he had notice of Byassee's right to the trees, Reese is entitled to them, and Byassee must look to Walters for damages. In such a state of case, the fact that Reese had notice of Byassee's claim, before cutting the trees, would be immaterial. But, if Reese had no title to the land, he was not entitled to notice.

Upon the return of the cause each party should have leave to amend his pleadings.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.¹

¹ See also *Erskine v. Plummer*, 7 Me. 447 (1831). For a clear statement of the rules which it would seem should control the decision of the cases now under consideration see §§ 118 to 126, Benjamin on Sales, ed. of 1899. — ED.

(3.) THE MASSACHUSETTS DOCTRINE.¹DRAKE *v.* WELLS.

11 ALLEN (MASS.), 141. — 1865.

TORT in the nature of trespass *quare clausum*.

The standing wood and timber on the close described was sold at auction to the defendant who was to have a certain stated time within which to remove the same from the land. Later on, at the same auction, the land itself was put up for sale and sold to plaintiff. There were no reservations in the deed of the land. The acts of trespass complained of consisted in cutting off the trees within the time limited therefor.

BIGELOW, C. J. — The doctrine is now well settled that a sale of timber or other product of the soil, which is to be severed from the freehold by the vendee under a special license to enter on the land for that purpose is, in contemplation of the parties, a sale of chattels only, and cannot be regarded as passing an interest in the land, and is not for that reason required to be in writing as being within the statute of frauds. Such license to enter on the land of another, so far as it is executed, is irrevocable; because, by the severance of the timber or other growth of the soil from the freehold, in execution of the license, it becomes personal property, the title to which is vested in the vendee absolutely, and the rule applies that where chattels belonging to one person are placed or left on the land of another, with the permission or assent of the latter, the owner of the chattels has an implied irrevocable license to enter and remove them. In such case the owner of land cannot, by withdrawing his assent to enter on his premises, deprive the owner of chattels of his property, or prevent him from regaining possession of them. The law will not lend its aid to the perpetration of a fraud. But it is otherwise where the contract has not been executed by a severance of the subject-matter of a contract of sale from the freehold. So long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title passes to the vendee. The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still executory, no title has passed to the vendee, and the refusal of the vendor to permit the vendee to enter on the land for the purpose of discon-

¹ See also *Turner v. Piercy*, 40 Md. 212, reported *supra*, p. 160. — ED.

necting from the freehold the property agreed to be sold is only a breach of contract, the remedy for which is an action for damages, as in the common case of a failure or refusal to deliver ordinary chattels in pursuance of a contract of sale.

These principles have been recognized and established as the law of this commonwealth in several adjudicated cases. In *Claffin v. Carpenter*, 4 Met. 580, 582, it was held that a contract for the sale of standing wood to be cut and severed from the freehold was to be construed "as passing an interest in the trees when they are severed," and that a license to enter on the land under such contract could not be countermanded after it had been acted on. So in *Nettleton v. Sikes*, 8 Met. 34, it was said by the court that a beneficial license to be exercised on land, when acted upon under valid contract cannot be countermanded." To the same effect are *Nelson v. Nelson*, 6 Gray, 385, and *Douglas v. Shumway*, 13 Gray, 498. In these cases it appeared that the license had been acted on by the vendee, who had entered on the land and cut the timber which was the subject of the contract of sale, and had thereby acquired a title to the wood as personal property. In *Giles v. Simonds*, 15 Gray, 441, a case was presented where a vendee had entered on land under a contract of sale of standing wood, and had cut down a part of those which were agreed to be sold, when he was forbidden by the vendor, the owner of the land, from proceeding any further in the execution of the contract, and also from removing those which had been severed from the freehold. He nevertheless did go on the land and take away such of the trees as had been previously cut down. It was held that the vendor had a right to terminate the contract and revoke the license as to the trees left standing, but that he could not do so as to those which had been already cut, and that an action of trespass would not lie for entering and taking away the latter. See also *Burton v. Scherpf*, 1 Allen, 135.

The application of the principles established by these cases is decisive of the rights of the parties to these actions. Taking the most favorable view of these cases in behalf of the defendants, they had acquired no title to the wood standing on the land of the plaintiff. They had only an executory contract for the purchase of the trees growing on the premises, with a license from the plaintiff's grantor to enter and cut and remove the same. This license, not having been acted on, was revocable. And it was revoked by the deed of the land to the plaintiff by the licensor, by which it was conveyed absolutely and free of all encumbrances to the plaintiff. In *Cook v. Stearns*, 11 Mass. 533, 538, it was held that the transfer of land to another, or even a lease of it, without any reservation,

would, of itself, be a countermand of a license. Clearly it must be so, because an unqualified grant of land carries with it the title to everything which is part of the realty or annexed to the freehold, and is inconsistent with a right in any other person than the grantee to enter on the land and remove therefrom trees growing thereon or other products of the soil. *Coleman v. Foster*, 1 Hurlst. & Norm. 37.

It follows that the ruling of the court was erroneous at the trial of this cause. The defendants were trespassers, and were liable to the plaintiff for entering her close and cutting and removing wood therefrom.

Exceptions sustained.

WHITE v. FOSTER.

102 MASSACHUSETTS, 375. — 1869.

COLT, J. — By the deed of May 17, 1865, the demandant's grantor conveyed to the tenants all the standing timber on the demanded premises, with a proviso that it should be removed within three years. He afterwards mortgaged the land by a deed containing a reservation of all the trees growing on the same, describing them as having been sold to the tenants, and then conveyed it, July 1, 1867, to the demandant, with full covenants of warranty, excepting only the said mortgage. We are to take it as proved, in accordance with the tenant's offer of evidence, that the demandant (White), when he took his deed, had actual notice of the previous sale of the trees to them. This writ of entry is brought before the expiration of the term limited for the removal of the timber, and describes the premises in the usual way, by metes and bound. The tenants disclaim any title except that which they have under the deed of May 17.

Upon the case thus presented, we are of opinion that the title of the tenants to this timber may be maintained according to the honest intention of the original parties, as against the present demandant, without infringing any rule of law necessary for the security of title to real property. (It is to be distinguished from most of the cases cited, in the important fact that the tenants claim under a deed, containing apt words for the conveyance of an interest in real estate, which was duly executed and delivered.) When cases have arisen under parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, such agreements, with reference to the statute of frauds, and in order to give effect to them, have been construed as not intended by the parties to convey any interest in land, and therefore not within the statute. Such

contracts are held to be at least executory contracts for the sale of chattels, as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal. *Clafin v. Carpenter*, 4 Met. 583; *Giles v. Simonds*, 15 Gray, 441; *Drake v. Wells*, 11 Allen, 141; *Delaney v. Root*, 99 Mass. 546; *Spurr v. Andrew*, 6 Allen, 420; Browne on St. of Frauds, secs. 249, 251.

Growing timber constitutes a part of the realty, is parcel of the inheritance, and, like any other part of the estate, may be separated from the rest by express reservation or grant, so as to form itself a distinct inheritance. It was early so held by this court in *Clap v. Draper*, 4 Mass. 265, and trespass by the grantee of such an estate against the owner of the soil was maintained, for cutting down the trees. See also *Putnam v. Tuttle*, 10 Gray, 48. When so separated and made a distinct estate, it has the incidents of real property so long as it remains uncut, and the rules which govern the title and transfer of such property must apply. It is like property in mines and minerals, which may in like manner be separated from the general ownership of the soil, and become distinct estates in freehold, with all the incidents belonging to such estates. *Adam v. Briggs Iron Co.*, 7 Cush. 367.

It may be difficult in many cases to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing, or only a right, either definite or unlimited as to time, to enter and cut, with a title to the property when it becomes a chattel. If the former be the true construction, then it comes within the statutes, and must be in writing; if the latter, then, though wholly oral, it may be enforced.

For the purpose of arriving at the intention of the parties, the mode in which the contract is made, whether oral or written, and, if the latter, whether under seal or not, must be regarded, and may be decisive. A simple oral contract for the sale of trees, to be removed in a definite time, would be construed as not intended to convey an interest in the land, because the parties must have known that such could not be its effect; while the same words, if incorporated into the granting part of a deed, with the usual clauses and formalities appropriate to a conveyance of real estate, and especially if full covenants of warranty be added, will be held to convey an interest in the realty, and carry a present title in the property to the grantee. So a permission which, if oral, would only amount to a license to do an act or series of acts on another's land without possession of any estate therein, would, if put in the form of an agreement under seal, convey a permanent incorporeal right or easement; and that, simply because the latter is the appropriate mode of creating such an

estate. It is not true, therefore, as claimed by the demandant, that, if the contract is in writing and under seal, no other or greater interest passes than would pass by the use of the same language in an oral sale. The subject-matter of the contract is the same in both, but the contracts themselves may receive a different interpretation.

The deed under which the tenants claim, thus interpreted, without doubt conveys an interest in real estate. A present interest in the trees was granted; and, by the rule that the grant of a thing carries with it, as incident, all that is necessary to its beneficial enjoyment, there passed by the same deed a right to the soil upon which they grew. This last named right, for the reasons above suggested, was not a mere license to enter upon the land and remove the trees within a limited time, revocable, except so far as already acted upon; but rather a peculiar incorporeal right or easement in the grantor's land, so far as necessary for the support and growth of the trees, with rights of entry and of way during the time named, and not revocable by the grantor.

The estate which the tenants acquired in this case may be regarded either as giving full title to the trees, defeasible by failure to cut and remove the same within three years, with such interest in the demandant's other land, by way of easement or incorporeal right, as is necessary to the enjoyment of the estate granted; or as giving to the tenants a leasehold estate in the premises for three years, with a right of appropriation to be exercised during the term. In either aspect, they establish a good defense under their plea and specification, notwithstanding the deed was not regularly recorded. If the estate created was of the latter description, then, as it was for only three years, there was no necessity that the deed should be recorded. If it was the former, then proof of actual notice to the demandant of the previous sale of the trees, with the reference in his deed to the mortgage to Beals, in which the trees are reserved as having been sold to the tenants, will give them a valid and effectual title, as against the subsequent deed to the demandant. Gen. Sts. c. 89, sec. 3. It is not necessary, to such actual notice, that there should have been an actual exhibition of the deed. It has been held that a description in a deed, bounding on land of a party by name, was notice to the grantee in the deed that the land bounded upon was so owned by virtue of some proper instrument of conveyance. *George v. Kent*, 7 Allen, 16; *Pike v. Goodnow*, 12 Allen, 472.

Verdict set aside; new trial ordered.

*d. Separate levy of execution on fructus naturales.*ADAMS *v.* SMITH.

1 BREESE (ILL.), 221. — 1828.

Opinion of the Court by Justice LOCKWOOD. — This was an action of trespass *quare clausum fregit*. The defendants plead not guilty, and Adams justified under an execution from a justice of the peace against the plaintiff, by virtue of which, he seized and took the apple trees, etc., in the plaintiff's declaration mentioned.

To this plea, plaintiff below (Smith), demurred, and the court sustained the demurrer, and on trial of the issue of not guilty, the jury found a verdict for plaintiff below for \$130, and judgment was given thereon. To reverse which, a writ of error has been brought to this court. The first error assigned is, that the Circuit Court erred in sustaining the demurrer. The only question presented by the demurrer is, whether on an execution from a justice of the peace, a constable can enter on land, and sell fruit trees there standing and growing? This question is easy of solution. Fruit trees are part and parcel of the freehold, and can, in no sense, be considered as goods and chattels. How far trees growing in a nursery might be considered goods and chattels, is not involved in the question decided by the demurrer, for the plea does not allege them to be nursery trees intended for sale. The demurrer was, therefore, correctly decided.

Another error assigned is, that the court erred in overruling the motion for a new trial. It has been frequently decided by this court, that overruling a motion for a new trial cannot be assigned for error. The judgment below must be affirmed with costs.

Judgment affirmed.

2. FRUCTUS INDUSTRIALES.

*a. What they are.¹*SPARROW *v.* POND.

49 MINNESOTA, 412. — 1892.

[Reported herein at p. 171.]

¹ See also *Graves v. Weld*, 5 B. & Ad. 105, reported *infra*, p. 403.— ED.

SMITH *v.* PRICE.

39 ILLINOIS, 28. — 1865.

[Reported herein at p. 163.]

b. Effect on fructus industriales of sale of land.

(1.) IN GENERAL.

TRIPP *v.* HASCEIG.

20 MICHIGAN, 254. — 1870.

GRAVES, J. — The plaintiff in error sued Hasceig for the alleged conversion of a quantity of standing corn, which Tripp claimed as his property, and upon the trial a verdict passed for Hasceig. Tripp now brings error and insists that the circuit judge erred in charging the jury, and he asks that the judgment be reversed therefor.

The evidence conduced to show that Tripp, being the owner of a farm in Kalamazoo county, on which he resided and on which he had raised a field of corn in the season of 1865, conveyed the farm to defendant about the 13th of December, in the same year, by warranty deed, while the corn was still standing, unsevered, where it grew, and without inserting in the deed any exception or reservation; and that Hasceig took and appropriated a part of the crop as properly conveyed to him by the deed. It was claimed by Tripp on the trial that the crop, being over ripe when the deed was given, did not pass by the conveyance, but the circuit judge advised the jury that the corn, though ripe and no longer deriving nourishment from the ground, would, if still attached to the soil, pass by conveyance of the land; and this is one of the rulings complained of.

We think this instruction was right, and we concur in the suggestion of the circuit judge, that whether the corn would pass or not, could no more depend upon its maturity or immaturity, than the passage of a standing forest tree by the conveyance of the land, would depend upon whether the tree was living or dead.

It is true that the authorities in alluding to this subject very generally use the words growing crops, as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops.

In some cases, where the question has been raised under the statute of frauds, as to the validity of verbal sales of unsevered crops, a

distinction has been drawn between such as were fit for harvest, and such as were not, upon the supposition that the former would not be within the statute, while the latter would be embraced by it. See cases referred to in *Austin v. Sawyer*, 9 Cow. R. 39.¹ In *Austin v. Sawyer*, however, Chief Justice Savage seems to have rejected the distinction, as he held that a verbal sale of growing crops was valid in New York.

But one case has been cited, or is remembered, in which it has been intimated that a mature and unsevered crop would, because of its being ripe, remain in the grantor of the land, on an absolute conveyance of the premises without exception or reservation; and that is the case of *Powell v. Rich*, 41 Ill. 466, and the point was not essential to the decision there.

There are many authorities, however, opposed to the distinction suggested in that case. 2 Bl. Com. 122, note 3; Broom's Maxims, 354, margin.

In *Kittredge v. Woods*, 3 N. H. 503 Judge Richardson cites Wentworth, 59, for the proposition that "When the land is sold and conveyed without any reservation, whatever crop is upon the land passes," and after stating that ripe grain in the field is subject to execution as a chattel, Judge Richardson adds: "Yet no doubt seems ever to have been entertained that it passes with the land when sold without any reservation." And in the case of *Heavilon v. Heavilon*, 29 Ind. 509, cited by plaintiff's counsel on another ground, the court expressly admit that until severance, the crop, as between vendor and purchaser of the land, is part of the realty. Indeed, the authorities are quite decisive that, whether the crop of the seller of the farm goes with the land to the purchaser of the latter, when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and most practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong with the land or not, if owned by the vendor.

If, however, the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point.

It was further urged by plaintiff in error that, if it should be considered that the corn would pass by the deed, still the jury should

¹ Reported *supra*, p. 31. — ED.

have been allowed to inquire whether the parties did not enter into a contemporaneous verbal agreement, by which the grain was to belong to Tripp as part of the consideration for the farm. Without pausing to consider whether the plaintiff could be permitted to make the proof suggested, or could support his action by any arrangement like that supposed, it is quite sufficient to observe that there does not appear to have been any evidence fairly tending to show the existence of such an agreement. The plaintiff was himself on the stand, and yet he did not hint at the existence of a bargain of that kind.

It was finally insisted that the charge of the court was erroneous in stating that a subsequent agreement by the vendee, that the vendor should have the corn, would be void for want of consideration; and we are told that the error on this point is shown by the circumstance that there was enough to warrant the jury in finding that defendant was under an equitable obligation, to have the deed so reformed as to except the corn, and that this fact constituted a sufficient consideration for an agreement by Hasceig, that the crop should belong to Tripp.

This argument assumes, that if the nonreservation of the corn in the deed was by mistake satisfactorily ascertained or admitted, that then an equity would arise for the correction of the deed, which in turn would be an adequate consideration to support a subsequent agreement by Hasceig, that the grain should belong to Tripp. We need not examine the validity of this view, since it is quite manifest that the case contemplated by it, is not found in the record before us.

The position taken implies that there was evidence before the jury to establish, according to the requirements of a court of equity, a mistake in the deed in not reserving the corn, and that there was also evidence conducing to prove a subsequent agreement that Tripp should have the corn, and resting for consideration on the right to have the deed corrected in equity.

There was a little evidence favoring the idea of a subsequent parol recognition by Hasceig of the right of Tripp to the corn under the conveyance of the land, but we look in vain for evidence of the assumed mistake in the deed.

It is well settled that to raise an equity to correct a deed, there must not only be an error on both sides, but the mistake must be either admitted or directly proved. Adams' Eq. 171, margin; Fry on Specif. Per. (2d Am. ed.), p. 312, top, and note 11. The language of several of the cases cited by plaintiff's counsel is to the same effect. In *Kennard v. George*, 44 N. H. 440, the court say that the mistake

must be clearly proved. In *Candey v. Marcy*, 13 Gray, 373, it is said the court has jurisdiction to reform a deed upon clear oral evidence of the mistake, and in *Beardsley v. Knight*, 10 Vt. 185, the expression is still stronger. It is there declared that the court will correct a mistake in a conveyance "when undeniably proved," and that "unless it be so proved it will not interfere." It is very certain that the record before us fails to show that a mistake in the deed was established on the trial below, or that any evidence was there introduced, fairly tending to show that fact, and therefore upon the theory of plaintiff's counsel, there was no evidence of any consideration for a subsequent agreement by Hasceig, that Tripp should have the corn.

The charge of the court should be construed in the light of the evidence before the jury, and when viewed in this way we discover nothing of which the plaintiff can justly complain.

In order to preclude all misapprehension as to the scope of this decision, we deem it not improper to add, that we express no opinion as to whether Tripp would be liable to Hasceig for any part of the crop appropriated by the former, with the acquiescence of the latter, under a verbal reservation.

The judgment of the court below is affirmed with costs.

CHRISTIANCY, J. — I concur with my brethren in the opinion of my brother Graves; but had it appeared in the case that it was the custom of the country where the farm was situated, (as it is in some of the western States,) to keep the ripe corn in the field for the winter, or till wanted for use or market, and to be taken only on the like occasions or for the like reasons as if stored in the crib or granary, — thus using the field merely as a substitute for such crib or granary, — I am inclined to think I might have agreed in the opinion intimated by the Supreme Court of Illinois in *Powell v. Rich*, 41 Ill. 466, cited by Brother Graves.

BAKER v. JORDAN.

3 OHIO STATE, 438. — 1854.

ASSUMPSIT. August 18, 1874, plaintiff contracted verbally for the purchase from defendant of certain real estate, whereon there was standing a number of acres of corn which was reserved by parol. Two days later the deed was made containing no reservation or exception of the crop. Defendant offered to prove the parol reser-

vation. This evidence was received under objection. Verdict for defendant. Motion for a new trial, and the court being equally divided on the motion, the case was, by consent, reserved for decision in this court.

WARDEN, J. — That growing corn will pass by common deeds of the lands whereon it grows, when no valid conversion of it into personalty is shown to have preceded the conveyance, cannot be doubted. But whether such a conveyance always purports to carry the title to growing crops, is another question. Many things may be in or on the ground when a deed is made, which the parties do not intend, and which no inflexible rule of law requires to fall under the conveyance. Such things are realty or personalty, according to the intention of the parties. Lands may be sold while under lease; the lessee may have built, for manufacturing purposes or the like, with the right, as between landlord and tenant, to remove his buildings at the end of his term; in such a case, would a deed to a stranger purport to convey the buildings? It is certain, that when the vendor is in possession, and has himself made such erections on his lands, they would pass by his deed. Why not, then, construe the deed as pretending to convey them in every case? And why admit proof outside of the deed, to show that the buildings were of the nature first supposed, and thus to manifest the understanding of the parties that they were not touched by the conveyance? Is it not because such proof does not vary, enlarge, diminish, or contradict the deed, that it is admissible, as an answer to whatsoever complaint the vendee may prefer, on the ground that he has failed to get what his deed purports to convey?

When we consider the case of a parol sale of growing corn to A., and a subsequent deed of the land to B., while the corn continued to grow on the land, we must allow that proof of such sale, and notice of the fact given to B., when he took his deed, would establish satisfactorily that the parties to the deed never intended to treat the corn as part of the realty, or as within the conveyance. Does the evidence of such intention vary or contradict the deed? I think not. But these are all cases in which the vested, fixed rights of some third person are involved.

However little favor should be shown to reservations made by the vendor by parol, when he is in possession, there must be some such reservations which are valid. It is, in such instances, a question of intent. Where that intent relates to things which may sometimes be treated as realty, and sometimes as personalty, the evidence of its manifestation in the conduct of the parties, or in their words, at the date of the deed, does not seem to alter, enlarge, or limit their

written contract. For, as already observed, that contract does not necessarily embrace such things.

The case of a deed, then, is clearly distinguishable from that of many other written contracts. What such an instrument purports to convey, is to be known from the legal rules which have assigned to it a definite legal character. And when those rules are attentively considered, it will be found that the common words describing the ground conveyed, must always leave it an open question, whether the growing crops were intended as part of the thing, in which the property was to change. In the absence of any proof that any other valid disposition of them attended, or had preceded the deed, that instrument would certainly convey them. But proof of such other disposition would as certainly withdraw them from the conveyance, where the right of any third person interposed itself. Is there any reason for holding that other disposition void, because it was between the parties to the deed, and none other? If not, is such disposition void because the evidence of it is not carried into the writing of conveyance on any presumption that all the agreement is therein witnessed?

This question is not without difficulty. Among the purely artificial rules of evidence, none much more commends itself to regard than that which forbids the parties to a solemn contract, reduced to the certainty of a writing, to alter, vary, limit, enlarge, or contradict what they have thus made certain, by the recollections of witnesses attempting to show what the parties said before or at the time of signing the contract. If, in some instances, the strict observance of this rule may work hardship, such cases are so exceptional, and the reason of the rule is so evident, that nothing less than the caution of a chancellor can make a safe departure from it to correct or set aside the solemn evidence of what the parties have agreed or declared.

From the wise policy of that rule of evidence we are not disposed to depart. But, after a careful examination of the question, and notwithstanding some contrary opinions elsewhere, we have felt it our duty to respect the common understanding of our people on this subject. Custom in Ohio, if not in most of the States, treats growing crops as personalty, even where the strict law laid down by some of the courts would not allow it to assume that character. It would not be difficult to establish that growing wheat, corn, and the like, are generally looked upon as though severed from the land, when a conveyance of the latter is made. On this subject, a section in Greenleaf's Evidence, 337, deserves attention: "Upon the same principle, parol evidence of usage or custom is admissible to annex

incidents,' as it is termed; that is, to show what things are customarily treated as incidental and accessorial to the principal thing which is the subject of the contract, or to which the instrument relates. Thus it may be shown by parol that a heriot is due, by custom, on the death of a tenant for life, though it is not expressed in the lease. So a lessee by deed may show that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed. This evidence is admitted on the principle that the parties did not intend to express in writing the whole of the contract by which they were to be bound, but only to make their contract with reference to the known and established usages and customs relating to the subject-matter. [But, in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract] for otherwise it would not go to interpret and explain, but to contradict that which is written. This rule does not add new terms to the contract, which, as already shown, cannot be done; but it shows the full extent and meaning of those which are contained in the instrument." Now, it is to be observed, that our courts are to take notice of a usage far more respectable than any of the customs above alluded to — a usage showing a common acceptance and understanding of the rules relating to growing crops, which appears rightly to interpret their spirit and purpose. "It has been sometimes said," observed Lord Ellenborough, "*communis error facit jus*; but I say, *communis opinio* is evidence of what the law is — not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice." *Isherwood v. Oldknow*, 3 M. & S. 396. This language has more fitness, perhaps, when the opinion of lawyers is that respected; but it is not without force when related to a popular construction of the law, which is not forbidden by its terms. Applied to the common understanding of the legal rules respecting growing crops, it seems entitled to regard. In our statute law it is written, that "the emblements are annual crops raised by labor, and whether severed or not from the land of the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory."

What more natural than such an enactment in a community like ours? The law harmonizes with the common understanding; and that common understanding itself perfectly agrees with other rules of law on the same subject. In the excellent work of the late Mr. Gwynne, those rules are thus stated: "Wheat growing is a chattel, and may be levied upon, under an execution against a defendant who

is raising it on land of another. Such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are not personal property, but incidents to the land. Everything produced by annual planting, cultivation, or labor, such as corn or potatoes, may be sold on a *fi. fa.*, even when growing and immature. In such a case, the sheriff may wait until the wheat or other crop is ripe for harvest, then cut and carry it away, and sell it. He need not, however, wait, unless required to do so by statute, but may sell before the crop is matured or severed from the ground. Where growing corn is sold, it need not be removed by the purchaser until it is ripe. If left, it will not be liable to distress for rent (where distress is allowed), unless it is left for an unreasonable time. A purchaser on execution of a growing crop, raised annually by labor and cultivation, acquires the right and interest of the defendant in execution to the crop, with the right of ingress, egress, and regress, for the purpose of cutting and carrying it away. The purchaser may lawfully enter and remove the crop, provided it belonged, when sold, to the defendant in execution, although the land on which it was growing, and the crops, were held fraudulently by another person. He does not become a trespasser thereby; nor, by entering with the sheriff to levy and sell, nor by purchasing at the sale." It is due the learned and lamented author of the work from which these sentences are taken (Gwynne on Sheriffs, 220, 221), to keep in mind the subject of his treatise. For the purpose of a levy, growing wheat is certainly, always a chattel; and there is no want of accuracy in what he has said, when his object and meaning are considered in the construction of his language. As we shall presently see, however, the rule is not quite as he has given it.

The language of C. J. Lane, in *Cassilly v. Rhodes*, 12 Ohio, 95, does not, at first, appear to clash with that just cited. He says: "If the question were between the grantor and grantee, whether growing crops, annual or other, pass by a deed of sale, it would be of easy solution. They are not, technically, 'emblems,' but 'issues,' or 'profits,' and part of the land, while in the owner's hands; and, unless excepted, pass by the deed, because it is construed most strongly against him who makes it." But his citation of authorities, 9 Cow. 39, 15 Mass. 159, would furnish a construction of his words such as would, if it must prevail, require a large modification of Mr. Gwynne's language. The latter writer says: "Wheat growing is a chattel." C. J. Lane calls it a "part of the land while in the owner's hands." The true rule is not fully given by either. To Mr. Gwynne's rule, as well as to that of C. J. Lane,

qualifications are to be annexed. Wheat growing is not always a chattel; nor even while the lands whereon it grows are held by the owner, is it always a part of the land. No question of reservation by parol was involved, or attempted to be raised in 12 Ohio. We are not called upon to overrule any decision, in saying, as we do, that growing corn, or the like, may sometimes be a mere chattel, though not always so, and on the other hand, may be such mere chattel, although unsevered from the lands, while the latter are in the hands of the owner himself.

Thus regarding the legal character of growing corn, or the like, we feel authorized to declare, that a parol reservation of it may be proven, notwithstanding a subsequent deed between the same parties, in the common form. And in so declaring, we make no departure from the wholesome rule of evidence, which gives so much respect to the solemn, written contracts of parties.

A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding that as between them it is personalty, the law will so regard it and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect.

There was no error in admitting the evidence objected to in this case.

The motion for new trial will be overruled, and judgment given for the defendant.

(2.) EXCEPTIONS OR RESERVATIONS,—HOW TO BE MADE.

AUSTIN *v.* SAWYER.

9 COWEN (N. Y.), 39.—1828.

[*Reported herein at p. 31.*]

SMITH *v.* PRICE.

39 ILLINOIS, 28. — 1865.

[*Reported herein at p. 163.*]

BAKER *v.* JORDAN.

3 OHIO STATE, 438. — 1854.

[Reported herein at p. 191.]

(3.) EFFECT OF SALE OF LAND ON FORECLOSURE.

LANE *v.* KING.

8 WENDELL (N. Y.), 584. — 1832. .

By the Court, SUTHERLAND, J. — The question in this case is, whether the lessee of a mortgagor is entitled, as against the mortgagee to the crops growing on the mortgaged premises at the time of the foreclosure and sale, the mortgagee having become the purchaser. In England the mortgagee may sustain an action of ejectment against the mortgagor or any one claiming under him, by title subsequent to the mortgage, without any notice to quit; they are considered mere tenants at will. *Keech v. Hall*, Doug. 21; *Moss v. Gallimore*, Id. 269; Pow. Mort. 205, 206, ch. 7. In this State, however, it has been held that a mortgagor is entitled to notice to quit before he can be treated as a trespasser, on the ground that there is an implied consent and agreement between him and the mortgagee, that the former may continue to occupy the premises. *Jackson v. Longhead*, 2 Johns. 75; *Jackson v. Fuller*, 4 Johns. 215; *M'Kercher v. Hawley*, 16 Johns. 289. A purchaser of the interest of the mortgagor, or a lessee under him, or any third person, stands upon the same footing here as in England, and is not entitled to notice to quit from the mortgagee. There is no privity of contract or estate between the mortgagee and such third person — as to him they are trespassers. 4 Johns. 215; 16 Id. 289; 20 Id. 61. The English doctrine, therefore, in relation to the rights of a mortgagee against a mortgagor or his grantees or assignees, is entirely applicable to this case.

In *Keech v. Hall*, Doug. 21, already referred to, the mortgagee brought an action of ejectment against a tenant, who claimed under a lease from the mortgagor, given after the mortgage without the privity of the mortgagee. *Ld. Mansfield*, in delivering the opinion of the court, said: "On full consideration we are all clearly of opinion, that there is no inference of fraud or concert against the mortgagee to prevent him from considering the lessee of the mortgagor as a wrongdoer." The question turns upon the agreement between the mortgagor and the mortgagee; when the mortgagor is left in possession, the true inference to be drawn is an agreement that

he shall possess the premises at will in the strictest sense and, therefore, no notice is ever given him to quit and he is not even entitled to reap the crops as other tenants at will are because all are liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage; the tenant stands exactly in the situation of the mortgagor.

This court, in *M'Kercher v. Hawley*, 16 Johns. 292, also held that the relation subsisting between the mortgagor and mortgagee, did not imply a right on the part of the mortgagor to lease. The mortgagor, therefore, in giving a lease becomes as to the mortgagee a disseisor; *vide* also *Jackson v. Hopkins*, 18 Johns. 487; *Jackson v. Dickerson*, 6 Cow. 147; Woodf. 237; and if during the disseisin, he should cut down the grass, trees or corn growing on the land, the disseisee, after re-entry, may have an action of trespass *vi et armis* against him for the trees, grass or corn; for after re-entry, the law, as to the disseisor and his servants, supposes the freehold always to have continued in the disseisee, though perhaps trespass *vi et armis* would not lie against the lessee, for the fiction of law shall not by relation make him a wrongdoer *vi et armis*, who comes in by color of title, because *in fictione juris semper æquitas existat* Lifford's Case, 11 Co. 51. But though the lessee shall not be treated as a trespasser, still if he cuts the grass and trees, or sows the land and cuts and carries away the crops, they may be recovered by the disseisee after re-entry; the re-entry by relation vests the property in him, as well for the emblements as the freehold, and equally against the feoffee or lessee of the disseisor as against disseisor himself, though it will not, as against a person coming in by color of title, give him an action of trespass *vi et armis*. 11 Co. 51; Dyer, 31, 173; Pow. Mort. 213, 214, ch. 7. Mr. Powell observes, that as to emblements there is a distinction between tenants who have particular estates that are uncertain, defeasible by the act of the parties, or by the act of God, or those who have particular estates uncertain — defeasible by a right paramount; for in the latter case, he that hath the right paramount shall have the emblements. The mortgagee undoubtedly, as against the mortgagor and his grantees, has the paramount right. Mr. Powell considers the right of a mortgagee to emblements as against the lessee of the mortgagor, as necessarily resulting from the doctrine established by Ld. Mansfield, in *Keech v. Hall*, Doug. 21, that a mortgagor has no right to lease; he observes, that he can see no ground on which the case of such lessee, as to emblements, can be distinguished from any other tenant under a tortious title; for if he be considered a wrongdoer as to his occupation of the

premises, he cannot be considered in a different character as to the emblements, nor can there be any ground to imply a consent to cultivate the property, when no implication is admitted of a consent to occupy it. Jac. Law Dic., Emblements; 4 Rep. 21.

This reasoning appears to me to be conclusive. The plaintiff, therefore, according to the stipulation of the parties in the case, is entitled to judgment for \$40 damages and \$30 costs.¹

HECHT *v.* DETTMAN.

56 IOWA, 679. — 1881.

BECK, J. — I. Two cases are presented together in this appeal. They involve the same facts and rules of law, and are between the same parties; they are, therefore, properly submitted together upon the same abstract. There is no dispute as to the facts, which are as follows: The property replevied is barley, cut and in shocks, and oats, being partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant had rented the land of one Ehrke, who had previously executed two mortgages thereon, one, the senior incumbrance, to the New England Loan Company, and the other to the plaintiff, Hecht. After defendant had rented the land plaintiff foreclosed his mortgage, and on the 7th day of July, 1879, the time for redemption from the sale, as prescribed by the statute, having expired, a deed was executed by the sheriff. The other mortgage was foreclosed and the land was sold to one not a party to this transaction and the time of redemption under the statute expired August 15, 1879, when a sheriff's deed was made. The foreclosure and sale under this mortgage cut off all claim or title held by plaintiff as well as by the mortgagor. Defendant continued in possession of the land up to the trial in the court below. At the time plaintiff received his deed the grain was not cut, but it was mature and ready for harvesting before that day. Rainy weather had prevented the defendant from cutting the grain before plaintiff's deed was executed. The court instructed the jury that the title of the grain passed to plaintiff by the sheriff's deed and directed a verdict for plaintiff. We are required to determine whether this view of the law be correct.

II. The sheriff's deed executed upon the foreclosure sale vested plaintiff with the title of the land and the right to all growing crops followed the title thus acquired. *Downard v. Groff*, 40 Iowa, 597.

¹ See *Batterman v. Albright*, 122 N. Y. 484; *supra*, p. 164. — Ed.

This rule, we think, is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty. See 1 Schouler's Personal Property, 125, 126; Bingham on Sales of Real Property, 180, 181.

This conclusion is well supported upon the following reasons: The grain being mature, the course of vegetation has ceased and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil; the ground now performs no other office than affording a resting place for the grain — it has the same relations to the grain that the warehouse has to the threshed grain or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing; it is no longer living blades which require the nourishment of the soil for its existence and development. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now the mature grain is not regarded by the law like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil.

Suppose the defendant had cut a part of the seventy-two acres of grain in controversy; the grain so cut, it will not be denied, would not have passed to plaintiff. There is no valid reason why the act of cutting should change the property in the grain. The work required time and, therefore, plaintiff loses a part of his property. All of the grain is in the same condition, all ready for the reaper. The part cut is his property, while the part uncut belongs to the landowner. We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition. We conclude that for the reason the grain was mature and was uncut because defendant has been unable to do the work, it cannot be regarded as part of the realty which passed with the deed to plaintiff.

Counsel for defendant insists that as defendant was in the adverse possession of the land, the action of replevin will not lie to recover the grain. We find it unnecessary to determine the question thus raised, as we hold that defendant's right of property in the grain accrued when the grain matured, whether he did or did not hold adversely to the plaintiff after the sheriff's deed was executed.

The judgment of the Circuit Court must be reversed.

WILLIS *v.* MOORE.

59 TEXAS, 628. — 1883.

MOORE was the owner of a cotton plantation which he mortgaged by a deed of trust to secure a debt to Reed & Smith. Thereafter he let one John A. Gill into possession of the premises to work the same on shares, and then sold his own share of the proceeds to Alex. J. Gill. Later on and while the crop of 1881 was ungathered the land was sold under the mortgage and bought by plaintiff Willis. A. J. Gill sold the crop and claimed the one-half of the proceeds under his contract with Moore. Willis sues for this money, making all persons likely to be interested parties to the action. Judgment for the defendants. Plaintiff appeals.

STAYTON, J. — The deed in trust made by Lewis Moore to secure the notes executed by him to Reed & Smith, having been duly recorded, it must be held that A. J. Gill bought the interest of Lewis Moore in the crop upon the land on the 1st of August, 1881, with notice of whatever right the appellant, by virtue of the transfer of the notes, which carried with them as an incident the security evidenced by the trust deed, had in the crops then standing ungathered upon the land.

There might be some difficulty in determining the true relation which existed between Lewis Moore and J. A. Gill, under the agreement of date December 24, 1877; but it is treated by appellant's counsel as a partnership, in which, for their mutual benefit, the land was cultivated by the latter, the material for that purpose being in part furnished by each, the net proceeds to be equally divided between them. This is probably the true relationship of the parties, rather than that they were landlord and tenant, and we will so consider them in disposing of the case. It does not appear when the notes to Reed & Smith matured, but it is found that they were due and unpaid on the 8th of September, 1881, at which time the substituted trustee sold the land, and thereby the appellant became the owner thereof.

The question for our decision then is, is the purchaser of mortgaged lands, as against the mortgagor or any person claiming under him by a purchase of the crops, entitled to such crops as were standing ungathered upon the land at the time of his purchase? A. J. Gill does not necessarily stand in the same relation to this question as would Lewis Moore were he the claimant.

That in England and in many States of this Union, the mortgagee is deemed the holder of the legal title, cannot be questioned; and

that upon such title he may maintain ejectment against the mortgagor. Where such is the rule, many decisions are to be found in which it is held that neither the mortgagor, nor a tenant under him claiming through a lease made after the execution of the mortgage, is entitled to carry away the crops growing upon the mortgaged land at the time of foreclosure or actual entry by the mortgagee; and this upon the theory that, from the date of the mortgage, the mortgagor is but a tenant at sufferance; and that a lease made by him, being unauthorized, works a disseisin. [*The judge then quoted at length from Lane v. King, reported herein at p. 197.*]

In the case of *Keech v. Hall*, 1 Doug. 23, in reply to a suggestion that the tenant of a mortgagor was entitled to emblements, Lord Mansfield said: "I give no opinion upon that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to make the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but however that may be, it would be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear."

In this State it has been held, from an early day, that a mortgage is but a security for a debt; that the title to property mortgaged remains in the mortgagor, and with it the right of possession, which is one of the ordinary incidents of title. *Duty v. Graham*, 12 Tex. 427; *Wright v. Henderson*, 12 Tex. 44; *Wootton v. Wheeler*, 22 Tex. 338.

Such being the legal effect of a mortgage in this State, it will be readily seen that the foundation upon which the rights of mortgagees is based in England and in some of the States wholly fails:

1st. There the paramount title is held to be in the mortgagee; here the paramount title remains in the mortgagor, and no estate passes to the mortgagee unless through foreclosure.

2d. There the right to the immediate possession of the mortgaged property vests in the mortgagee, with the consequent right to appropriate the fruits and revenues without liability to account, unless called upon to do so in a proceeding to enforce the equity of redemption; here no right to the possession, nor to the fruits and revenues so long as the mortgage stands unforeclosed, unless under some proceeding peculiarly equitable.

3d. There the mortgagor, under the conflict of authority, is held

to be either a tenant at sufferance or a tenant at will, with no power to do aught else than, under the strict rules of the common law, a tenant with the feeblest tenure may do, a lease by him operating as a disseisin of the mortgagee, and making himself and his lessee tortfeasors; here he is the owner of the fee, if such be his estate in the land which he mortgages, recognizing no landlord, neither a tenant at will nor a tenant at sufferance, in any sense in which these terms can be legitimately applied, for the owner cannot be, in the nature of things, the tenant of any one; he has power to lease without disloyalty to any one, his lease, if made after mortgage, subject, however, to be terminated in case of foreclosure before its expiration.

The reason sometimes given, why a mortgagor should not be permitted to have the crops still standing upon the land at time of foreclosure, is, that he may obtain their value in account upon bill to redeem; with us this reason can have no effect, for there is no such thing in our practice as the right to redeem after foreclosure, which is made by sale.

The crops were planted, cultivated, and, in fact, must have been almost, if not quite, matured before the sale in September, and while the paramount title to the land upon which they grew was still in Moore, the vendor of Gill, Moore sold them. The element of uncertainty, in so far as Gill was concerned, as to the continuance of title in his vendor, was very nearly as great as though he had held as tenant at will. The direction of the creditor to sell under the deed of trust, and thereby place in himself or some other person the title to the land was an act of will, without the exercise of which the paramount title to the land would continue in Moore; and even such exercise of the will would not necessarily affect that result; for Moore might be able to pay the indebtedness and thereby effectually prevent the divestiture of his title.

Where the mortgage is held to vest the title in the mortgagee, no such elements of uncertainty exist; he may enter whenever he pleases.

The right of a person purchasing under a foreclosure of a mortgage, where it is held that the mortgage passes no estate, but is a mere security, to have the crops on the land at time of foreclosure is questioned by Mr. Washburn. 1 Washburn on Real Property, 124. The reasons for the rule in question not existing here, it seems to us the rule must be held not to exist.

The deed of trust seems to evidence the fact that the parties contemplated, even if sale was made under it, that Moore and those claiming under him should not at once surrender the land to the purchaser, but from the time of the sale should attorn to the purchaser,

which carries with it, by implication, at least an agreement that, from such time, Moore or his assigns should, as tenants, recognize the purchaser as the landlord and pay rent for the land from the time of foreclosure.

By attornment is meant "the act of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him. The word is taken from the feudal law, where it signifies the transfer, by act of the lord and consent of the tenant, of the homage, service, fealty, etc., of the tenant to a new lord who had acquired the estate." Abbott's Law Dictionary.

It is true that the trust deed provides that the holding shall be as tenant at sufferance; but there can be no such thing as tenant by sufferance when the tenancy is the result of agreement such as is found in the trust deed, with reference to which the purchaser must be presumed to have bought, and by which he is as much bound as though he had been a party to that instrument; and in the absence of something in the agreement evidencing that it was the intention of the parties, after the foreclosure, to have their rights to stand strictly upon the relation of landlord and tenant at sufferance, the parties should be held to have intended that such a tenancy should exist as is created by agreement; at least a tenancy at will, which would carry with it the right to the crops then nearly or quite matured, but ungathered at time of foreclosure.

A tenancy by sufferance "is of such a nature as necessarily implies an absence of any agreement between the owner and the tenant, and if express assent is given by the owner to such possession, the tenancy is thereby *instantly* converted into a tenancy at will or from year to year, according to the circumstances." Wood's Landlord and Tenant, 15. It matters not what parties may designate such a tenancy.

This view of the case would be conclusive of the question, but there is another view of the case which is equally so.

A mortgage being simply a lien to secure the payment of a debt, it cannot be held to give to a mortgagee or person purchasing under it any greater right to ungathered crops standing upon the mortgaged land than would a person have who purchased under a lien acquired in any other manner prior to the time the crop was planted, or the right to plant it accrued. *Hogsett v. Ellis*, 17 Mich. 363.

"Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are, therefore, liable to voluntary transfer as chattels. It is equally well settled that they may be seized and sold under execution." Freeman on Executions, 113, and citations; Benjamin

on Sales, 120. Such being the case, if there be nothing in the contract of the parties by which land is conveyed, nor in the circumstances attending the sale, evidencing the intention of the parties that crops nearly or quite matured should pass with land sold, it is difficult to see upon what principle it can be held that property strictly personal in its character should pass by an instrument which upon its face purports only to convey land. The weight of authority, however, is to the effect that such crops will pass by the sale of the land if they belong to the owner of the land at time of sale. The application of this rule to sales made under mortgages, having only such effects as mortgages here are held to have, upon crops produced many years after the mortgage was given, need not further be considered. As, however, the crops are separate and distinct in their nature from the land upon which they grow, the ownership of the one, even on mortgaged property, may be in one person, and the title to the other in another; and whenever crops growing or standing upon land covered by a lien given by the owner of the land, or acquired by law, have in law or in fact been severed in ownership, or actually severed from the land prior to sale of the land under the lien, title thereto will not pass by the foreclosure of the lien.

A mortgagor is entitled to sever in law or fact the crops which stand upon his land at any time prior to the destruction of his title by sale under the mortgage; this results from his ownership and consequent right to the use and profits of the land, and the mortgage is taken with knowledge of that fact.

In the case of *Meyers' Assignees v. White*, 1 Rawle, 355, it appeared that Meyers had executed a mortgage upon a tract of land, subsequent to which he had a crop upon the land, which, with the land, he assigned for the benefit of his creditors. There was subsequently a sale under a foreclosure of the mortgage, and the purchaser at that sale of the land claimed the crop, and it was held that the crop passed to the assignees, and not to the purchaser under the foreclosure of the mortgage; and this upon the ground that the crop, by conveyance to the assignees, had been severed. The court said: "As there is no difference in this respect between a judgment and a mortgage creditor, this case has been virtually decided in *Hambach v. Yeates*, not yet reported, in which it was held that grain growing in the ground is personal property, and might be levied upon and sold as such, and that it did not pass by a sale to the sheriff's vendee. Peter Meyers, before judgment on the *scire facias*, had parted with his interest in the crop. At the time of the sale, all his right was vested in his assignees for the benefit of his creditors."

In the case of *Stambaugh v. Yeates*, 2 Rawle, 161, Yeates had

recovered a judgment against Kyrm and caused a *feri facias* to be levied upon his land and returned, after which the land was sown in grain, and another creditor caused a levy to be made upon the grain under a judgment which he had obtained, and the grain was sold; afterwards the land was sold under a *venditioni exponas*, and it was held that the creditor who levied on the grain was entitled to the proceeds.

These cases are approved and applied in *Bear v. Bitzer*, 16 Pa. St. 178, and in *Groff v. Levan*, Id. 179.

All of these cases, as well as the case of *Bittinger v. Baker*, 29 Pa. St. 70, were considered in the case of *Metzgar & Crugg v. Hershey*, 90 Pa. St. 218, and were reviewed and approved; and referring to the case of *Bear v. Bitzer*, the court say: "The latter case rules that a purchaser of land at sheriff's sale is entitled to the growing grain thereon, which had not been severed before the sale. There the owner of the land which was sold owned the crop, and there had been no act of separation. The test is, whether there has been a severance of the growing grain; if so, it does not pass to him who purchases the land subsequent to the severance; if not, it goes with the land." All these cases recognize a sale by the owner or by judicial process, if made before the sale of the land, as a severance.

The Court of Appeals of Maryland, in *Purner v. Piercy*, 40 Md. 223, in speaking of what constitutes severance, say: "There is nothing in the vegetable or fruit which is an interest in or concerning land, when severed from the soil. . . . Whether grain, vegetables, or any kind of crop (*fructus industriales*), the product of periodical planting and culture; they are alike mere chattels, and the severance may be in fact, as where they are cut and removed from the ground, or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or when he sells the land, reserving them by an express provision." To the same effect is the case of *Titus v. Whitney*, 1 Harrison, 85.

In *Buckout v. Swift*, 27 Cal. 443, it was held that a house which stood on mortgaged land, but which was severed from the land subsequently by a storm, did not pass by the sale under foreclosure.

There is no error in the judgment, and it is affirmed.

Affirmed

SHERMAN v. WILLETT.

42 NEW YORK, 146. — 1870.

[Reported herein at p. 209.]

c. Devise of the land,—effect on crops in ground at testator's death.

STALL *v.* WILBUR.

77 NEW YORK, 158. — 1879.

EARL, J. — This appeal is from a judgment overruling defendant's demurrer to plaintiff's complaint. Two grounds of demurrer are specified: That the complaint does not state facts sufficient to constitute a cause of action; and that there is a defect of parties plaintiff, in that Richard E. Wilbur and Erastus C. Wilbur should have been joined as plaintiffs.

The complaint alleges that Ephraim Wilbur died February 24, 1873, leaving a will, by which he devised to Richard E. Wilbur, Erastus C. Wilbur, Mary J. Harris, and to the defendant and the plaintiff, a farm, subject to certain advancements to the devisees, which advancements had been satisfied and equalized by the partition and sale of the farm; that the will had been admitted to probate; that at the time of the testator's death there was growing on the farm a crop of wheat, put in on shares by the defendant, under an agreement with the testator, by which he was to cultivate, harvest and thresh the crop, and deliver to the testator one-half thereof on the farm; that after the testator's death the crop matured, and was harvested and threshed by the defendant; that he retained possession of the whole of the crop, and although the plaintiff had often demanded of him her share of one-fifth of one-half thereof, the whole crop being 450 bushels, and her share under the will being forty-five bushels, refused to deliver to her her share, but had sold and converted the same to his own use. There was a second count, precisely similar, based upon an assignment to the plaintiff of the share in the crop of Mary J. Harris.

Growing crops are not part of the real estate upon which they are growing. They are personal property. They can be sold and transferred as such. *Austin v. Sawyer*, 9 Cow. 40. They can be taken upon execution, and at common law they could be distrained for rent. *Whipple v. Foot*, 2 J. R. 418. At common law also, upon the death of the owner of the real estate, they passed, not to the heirs, but to the executor or administrator, to be administered as personal assets. They pass with a conveyance of the real estate, as appertaining thereto. *Tripp v. Hasceig*, 20 Mich. 254. At common law also, they passed to the devisee of the real estate, not as a parcel thereof, but upon the presumed intention of the devisor that he who takes the land should also take the crops growing thereon. Gilbert

on Ev. 499; Williams on Ex. 713; *Cooper v. Woolfitt*, 2 Hurl. & N. 122; *West v. Moore*, 8 East, 339; *Bradner v. Faulkner*, 34 N. Y. 347.

This common-law rule was somewhat changed by the Revised Statutes. They provide that growing crops "shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof." 2 R. S. 83.¹ Under this provision, the executor takes possession of the growing crops, as he does of all other personal property. But he takes possession only for the purpose of administration according to law. He may sell it, if necessary, for the payment of debts and legacies. But when the land, upon which the crop is growing, has been devised in such form as to convey it to the devisee, then the crop, in my opinion, is to be put upon the footing of a chattel specifically bequeathed; and it cannot be sold for the payment of general legacies, and can be sold for the payment of debts only after the other assets, not specifically bequeathed, have been applied. 2 R. S. 87. * * *

It was not necessary for the plaintiff to allege that there were no legacies to be paid under the will, or that there was sufficient other personal property to pay the legacies, as this property specifically given, as shown above, could not be taken or sold to pay legacies. It could no more be taken for such a purpose than other personal property specifically bequeathed. * * *

As stated, the defendant is in no better position than if he had been executor; and he cannot make a defense which an executor could not make. It matters not whether an executor was appointed or not. The facts showed that the plaintiff was entitled to this property, and that she is the only person injured by the conversion thereof by the defendant.

The complaint is not defective in not joining as plaintiffs the two other co-tenants named in the demurrer. As to such property, separable in respect to quantity and quality by weight or measure, each tenant in common may demand of his co-tenant having possession of the whole his share, and upon refusal or a conversion by such co-tenant, may sue in his own name, without joining all the other co-tenants. *Channon v. Lusk*, 2 Lans. 211; *Lobdell v. Stowell*, 37 How. 88; s. c. 51 N. Y. 70.

The judgment must, therefore, be affirmed, with costs.

Judgment affirmed.

¹ See § 2712 N. Y. Code Civ. Pro., with subs. 5 and 6.—ED.

d. Death of owner intestate — effect on crop in ground.

SHERMAN v. WILLETT.

42 NEW YORK, 146. — 1870.

ACTION to recover the value of a crop of rye alleged to have been converted by Cornelius Willett, defendant's testator.

Elmer Willett owned a farm on which he planted the crop in question and died before it was harvested. He had mortgaged the farm to one Cornell and was in default on the mortgage when the crop was planted. Cornell was appointed administrator, and as such sold the growing crop to plaintiff at auction. Afterward, and before the crop was gathered, Cornell foreclosed his mortgage and the land was sold to P. K. Willett, who conveyed the same to defendant's testator. Notice of reservation of the rye was given at the foreclosure sale. Defendant's testator was present at both sales, went into possession of the premises, and would not permit plaintiff to reap the rye, but took it himself. This is the conversion complained of. Judgment below for the plaintiff. Defendant appeals.

EARL, CH. J. — The crop of rye was personal property, and as such passed to the personal representatives of Elmer Willett as assets, to be applied and distributed as part of his personal estate. 2 R. S. 82, sec. 6; *Bradner v. Faulkner*, 34 N. Y. 347. The administrators had the right to sell it. They have always had the right to sell the personal property of their intestate, and that right is not limited by section 25, 2 R. S. 87. They have the right to sell for the payment of debts and legacies, and also for the purpose of distribution. Willard on Executors, 268. But if it be true, as claimed by the counsel for the appellants, that they have the right only to sell personal estate so far as may be necessary for the payment of debts and legacies, they are not required to get an order of the surrogate authorizing the sale; and when they sell, certainly, in the absence of any proof to the contrary, it will be presumed, in favor of a faithful discharge of their official duty, that they acted legally, and that the exigencies existed authorizing the sale. Hence there is no room for doubt, that the sale of the crop of rye to the plaintiff on the 21st day of October, 1863, by the administrators, was a valid and legal sale.

The plaintiff, by this sale, took his title to the rye subject to the contingency that it might be wiped out by a foreclosure of the mortgage given by the intestate upon the land before the crop of rye was sown. *Shepard v. Philbrick*, 2 Denio, 174; *Simers v. Saltus*, 3 Denio, 214; *Lane v. King*, 8 Wend. 584. If nothing had been done before

the mortgage foreclosure or at the mortgage sale affecting the title to the rye, it would have passed to the purchaser under the foreclosure sale. Was the plaintiff's title, then, under the facts as they exist in this case, cut off by the foreclosure sale?

While a mortgagee is not bound to sell the mortgaged premises in parcels unless they are in the mortgage described in parcels, *Lamerson v. Marvin*, 8 Barb. 9; *Griswold v. Fowler*, 24 Barb. 135, yet I have no doubt he may do so where the premises are so situated that he can sell in parcels; and in such a case, when he has sold land enough to satisfy his mortgage, he need sell no more; and in such a case, if any one can complain of a sale by parcels, and seek to avoid the foreclosure, it certainly cannot be a purchaser, but must be some one at the time interested in the equity of redemption. When it is admitted that a mortgagee can release a portion of the premises and sell the remainder, although they are described as a whole in the mortgage, I do not see why he may not sell the same portion before releasing any. In this case, the mortgage was a lien upon the whole premises, including the rye, and at the time of sale, the mortgagee announced that he would not sell the rye, but would sell the balance. The purchaser knew this, and bid with this understanding. The rye was not sold. The purchaser did not buy it. How can he claim it? If the sale was void because not regularly made, and because the entire premises were not sold, then certainly the defendant has no standing upon which he can base any claim to the rye. Hence, if I am right so far, the plaintiff's title to the rye is good. But I go further and hold that this title is good also upon the doctrine of estoppel. Zina Cornell, the administrator, was also the mortgagee. He sold this rye to the plaintiff, professing to give him a good title free from the lien of his mortgage. He induced him to buy and pay for the rye. After making this sale, he was estopped both as mortgagee and as representing the intestate, the mortgagor, from setting up any title or claim against his own sale. The defendant holds under the mortgagor and mortgagee, and he has no greater title than they could give him; and when his grantor purchased at the foreclosure sale he was also present, and they both knew of the facts constituting the estoppel and bid recognizing the rights of the plaintiff. Hence he is equally bound by the estoppel.

It is true that the affidavits of foreclosure, as filed, show a sale of the entire premises without any reservation; but these affidavits are not conclusive upon the plaintiff, who was not a party to the foreclosure. They are by statute only made presumptive evidence of the facts contained in them. Any person, unless it be the mortgagee, and those claiming under him, can controvert them by paro

evidence. *Arnot v. McClure*, 4 Denio, 41. In the case cited, Judge Bronson says: "As the affidavits are an *ex parte* proceeding, and are only made presumptive evidence of the facts therein contained, there can be no doubt that they may be controverted by the mortgagor and those claiming under him. All or any of the facts stated in the affidavits may be disproved."

The judgment should be affirmed.

*e. Separate sale of crops in ground.*¹

SEXTON *v.* BREESE.

135 NEW YORK, 387. — 1892.

GRAY, J. — The action was in replevin for the purpose of recovering a crop of wheat which had been harvested from a farm, and the question presented relates to the respective rights thereto of the plaintiff, as mortgagee of the farm, and claiming to be in possession as such, and of the defendant, as the vendee of the growing crop, under a bill of sale from the owner and mortgagor. The mortgage was executed and delivered in 1875 to the plaintiff's firm, as a collateral security for any liabilities which the mortgagor might thereafter incur, and was to become due, by its terms, one month after demand. In February, 1879, the owner of the farm left the place, allowing the defendant, to whom he was in debt for moneys borrowed, to have possession of the farm and to work it for himself.

In the following month he sold to the defendant the standing or growing crop of wheat in question, and which he had himself sowed in the previous autumn; the bill of sale giving to defendant the right to secure and harvest the crop. In the following month of April, the owner of the farm executed and delivered a certain instrument to the plaintiff, wherein he authorized him "to take possession of my farm at Macedon and to rent same and after paying all expenses to apply the net income upon my indebtedness to him." He entered upon the farm under this instrument, and it is his claim that thereby he become mortgagee in possession. When the wheat had ripened the defendant went upon the farm to cut it, but was prevented from doing so by the plaintiff, who proceeded to harvest it for himself. Before, however, the plaintiff had gotten in the wheat from the field, the defendant entered, early in the morning, and carried it off. This action then resulted.

¹ See case last reported. — ED.

I do not think that the instrument, under which the plaintiff entered into the possession of this farm, had the effect of making the possession that of the mortgagee, as that is technically understood. Its very terms seem to preclude that idea; for the possession, which the plaintiff was authorized to take, was qualified and limited to the exercise and enjoyment of certain prescribed acts; namely, to rent it and to apply the net income upon the indebtedness. The mortgage had not become due, inasmuch as there had been no demand for the payment of any indebtedness accrued and to be secured by it, or at any rate, such a demand as the nature of this mortgage required. But I do not think it very important to our decision whether we hold that the possession was technically that of a mortgagee, or one authorized by and assumed under the writing referred to. Although, if that question should be deemed essential, I should regard the possession taken by plaintiff through this instrument of April, 1879, as not equivalent to a possession by surrender of the land from the mortgagor. In this State it must be regarded as settled by the cases that the title of the mortgagor to the land is not changed by the mortgage. It remains as before; while the mortgagee has in the mortgage a security for the mortgagor's debt, which is impressed upon the lands described and incumbers them with the burden of the debt. It must also be regarded as settled that even if the mortgagee goes into possession of the premises by a surrender of them from the mortgagor, the legal title or fee still remains in the mortgagor; and what the mortgagee thereby acquires is the possession of the pledged property. He holds it then for the purpose of paying off the debt, with which it was incumbered, but takes no estate in the land. *Kortright v. Cady*, 21 N. Y. 343; *Trimm v. Marsh*, 54 Id. 599. In *Trimm v. Marsh*, the question of the effect upon the title, where the mortgagee acquires the possession of the land, was quite fully discussed upon theory and in the light of earlier cases, and the decision should be considered as settling, and, as I think, quite in accordance with the reason of the thing, that a mortgagee, who merely is let into the possession of the mortgaged land does not acquire the legal title.

(If we assume that the plaintiff was in possession of the land as by an actual surrender from the mortgagor, his rights in its use were subject to the previous disposition made of the growing crop of grain by the owner of the land. He had planted the crop and it was perfectly competent for him to dispose of it while he held the title to the land. Though, in a sense, a growing crop of grain is a part of the real estate, it, nevertheless, possesses the characteristics of a chattel and is salable and transferable as other personal property

is, and may be taken upon execution and sold in discharge of a judgment debt. *Whipple v. Foot*, 2 Johns. 422; *Stall v. Wilbur*, 77 N. Y. 158.

The relation which growing crops bear to the land has been frequently the subject of discussion in the courts and is in some respects a peculiar one. They pass to the grantee in a conveyance of the land as appertaining thereto. *Wintermute v. Light*, 46 Barb. 283; *Stall v. Wilbur*, *supra*. And equally upon a sale in foreclosure of a mortgage, the purchaser would acquire with the title to the land the right to the growing crops. *Shepard v. Philbrick*, 2 Denio, 174.

In England growing crops, which were *fructus industriales*, that is to say, annual products of a tillage of the earth by the labor of the occupier, have been regarded as chattels, quite independent of the land. Any supposed confusion in the decisions, with respect to their relation to the land, arose rather in the consideration of the question of the validity of their transfer by parol, under the statute of frauds, than in any difference in opinion as to their being chattels.

Distinctions, of course, were made between growing crops of grain and trees, the fruits of trees and perennial plants. *Crosby v. Wadsworth*, 6 East, 602; *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 A. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501.

Those views, as to the legal relation of these annual products of the land to the land itself, obtained and were held here in the early cases of *Whipple v. Foot*, *supra*; *Shepard v. Philbrick*, *supra*; *Green v. Armstrong*, 1 Denio, 550; and more recently in the case of *Stall v. Wilbur*, to which I have referred. Probably the rights of a third person to the growing crops of grain, under a contract of purchase with the owner, would be annulled by the sale upon the foreclosure of a mortgage of the land, according to the decisions in *Shepard v. Philbrick*, *supra*, and *Lane v. King*, 8 Wend. 584, for then the transfer of the title to the mortgaged premises would carry with it to the purchaser a paramount title to the growing crop. But, in the present case, that proposition is not before us and the title of the mortgagor to the mortgaged land was not divested or transferred to the mortgagee with the possession. The defendant, Breese, was the purchaser of the growing crop of wheat and, upon its becoming ripe for harvesting, as well under the express authority of his bill of sale, as without it, impliedly, he had the right of ingress to gather and to carry it away. *Stewart v. Doughty*, 9 Johns. 108.

His vendor's legal title to the land had not ceased, and the fact of the mere possession having changed to another person, was not sufficient to annul Breese's contract, and was, consequently, inoperative upon his right to enter and carry away the ripened wheat.

We think the conclusion reached by the General Term that the defendant was entitled to the verdict at circuit was correct and, as no other error appears from the record, their order denying plaintiff's motion for a new trial upon his exceptions, and directing judgment on the verdict, should be affirmed with costs.

Order affirmed and judgment accordingly.

f. Levy of execution on growing crops.

PARHAM *v.* THOMPSON.

2 J. J. MARSHALL (KY.), 159. — 1829.

ROBERTSON, J. — The only question which it is necessary to decide in this case, is whether a creditor who has a *feri facias* against the estate of his debtor, is guilty of a trespass, by entering on land in the possession of the debtor, for the purpose of assisting the officer to levy the execution on the growing crops, and afterwards entering, to bid at the sale of the crop, before it is ripe, or is secured. A *feri facias* may be levied on a growing crop; it is a chattel. It is "*fructus industrialis*," which goes to the executor. 2 Tidd's Pra. 917; Gill, Executor, 19; 1 Salk. 368; 2 Bl. Com. 428; Toller, 204.

Corn growing, passes to the devisee of the personal property, and not to the devisee of the land. Toller, 204; Swin. 933. It passes by parol contract. Roberts on Frauds, 126; *Noble v. Smith et al.*, 2 Johnson's Rep. 52; 1 Ld. Raym. 182; Bul. Ni. Pri., 34.

Consequently, although it may be inconsistent, and injurious to sell growing corn, and therefore, the general practice is to wait after the levy until it shall be gathered; yet the legal right to sell it before it shall be gathered, results from its personal character and the right to levy on it. See Tidd, 91, and *Whipple v. Foote*, 2 Johnson's Rep. 422.¹ The argument "*ab inconvenienti*," applies no more to this case than it would to the mere right to sell anything else which is immature; as a colt or a pig.

The creditor, therefore, is not a trespasser, by entering with the sheriff, to levy and to sell; nor for directing the sale, and purchasing the crop, if the process be regular, the judgment valid, and the sale fair, as they all seem to have been in this case.

Wherefore, as in this case the court decided according to this opinion the judgment of the Circuit Court is affirmed.

¹ Page 402, *infra*. — ED.

CRADDOCK *v.* RIDDLESBARGER.

2 DANA (KY.), 205. — 1834.

ROBERTSON, Ch. J. — Riddlesbarger having obtained a judgment against Craddock, for damages for the conversion of a field of growing corn, which he (Riddlesbarger) had bought at a sale under a *feri facias*, as the property of one of the defendants in the execution, Craddock now urges a reversal of the judgment, and relies on three grounds: — First, that there was no judgment that authorized the execution; second, that growing corn was not liable to sale in virtue of a *feri facias*; third, that the Circuit Court erred in rejecting evidence offered by Craddock, and in instructing the jury, and in withholding instructions.

As we are of the opinion, that the judgment and the replevin found exhibited in the record, authorized the execution, and sufficiently correspond with it, and with each other, for every purpose of reasonable certainty, we shall, without a more particular notice of the first ground, proceed to the consideration of the second and third grounds.

Second. Although such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are, therefore, not personal, nevertheless everything produced from the earth by annual planting, cultivation and labor, and which is, therefore, denominated for the sake of contradistinction, *fructus industriales*, is deemed personal, and may be sold, as personalty, even whilst growing and immature. And the purchaser of such an article in such a growing state will have the consequential right of ingress and egress, for purposes of cultivation, preservation and removal, though he will have acquired no interest in the land itself, nor any other control or dominion over it, than such as may be necessarily incident to his right to the growing *fructus*. *Parham v. Thompson*, 2 J. J. Marshall, 159, and the authorities therein cited; and also *Eaton v. Southby*, 2 Willis, 131.

The authorities leave no pretext for doubting that growing corn is a chattel and as such, may be sold by the owner, or taken by an officer in virtue of a process of *feri facias*. The only doubt which has been intimated, is as to the proper time of selling under an execution. But, though some have expressed the opinion, that the sale should be postponed until after the corn shall have been matured and severed from the land, and though such a course might often be advantageous to all parties concerned, still it seems to us that, prior

to an act of the last Legislature, the law conceded the right to sell the corn in the condition in which it was when the execution was levied on it. The right to levy implies the right to sell, as soon as legal notice can be published of the time and place of sale, and of the thing to be sold. Was it the duty of an officer to keep possession of growing corn for months after his levy, and, in the meantime, cultivate and gather it, or be responsible for its deterioration in consequence of non-cultivation, or for the wasting, or destruction, or abduction of it by the owner, or by other persons? Or was all such hazard and burthen devolved on the creditor? What might have been most expedient in a given case, or what the sheriff, (with the concurrence of the creditor and debtor or either of them,) might have done, is far different from what he had the power to do in virtue of his legal authority. And, not doubting his power to sell growing corn, we must decide accordingly. It is our duty to declare, not to give, the law. * * *

Judgment affirmed.

PENHALLOW *v.* DWIGHT.

7 MASSACHUSETTS, 34. — 1810.

TRESPASS for breaking and entering plaintiff's close, and cutting down and carrying away his corn "thereon growing and then fully ripe and fit to be gathered." Defendant justified under an execution against plaintiff.

Curia. — As the defendant had the right, and indeed was obliged by the duty of his office, to enter the close of the plaintiff, and to seize any personal property of the plaintiff, whereby he might satisfy the execution he then held against the plaintiff; the only question is whether corn, then in a proper state to be gathered, but found standing, might, lawfully be cut down and disposed of to raise the money due upon the execution. And we have no doubt that corn or any other product of the soil, raised annually by labor and cultivation is personal estate; and would go to the executor, and not to the heir, on the decease of the proprietor. It is therefore liable to be seized on execution, and may be sold as other personal estate.

An entry for the purpose of taking unripe corn, or other produce, which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil, would not be protected by this decision.

Let the defendant have judgment for his costs.

ELLITHORPE *v.* REIDESIL.

71 IOWA, 315. — 1887.

REED, J. * * * Plaintiff acquired title to the premises on the sixth of July, 1885, by deed from the Iowa Railroad Land Company. In 1880 that company had executed a contract for the sale of the land to W. R. Able. M. R. Ellithorpe became the owner of this contract by assignment, and he went into possession of the premises in 1884. He cultivated the land during that year, and raised a crop thereon during that year. He also planted the crops in question in 1885. At some time before the date of the deed from the land company, he assigned the contract to plaintiff, who paid the balance of the purchase money due thereon and received the conveyance; but the date of that assignment was not shown. The defendant, Reidesil, recovered a judgment against M. R. Ellithorpe in Justice's Court, on which an execution was issued on the sixth of June, 1885. The constable to whom this execution was directed attempted to levy the same on the crops growing on the premises, and on the sixth of July following he offered them for sale under the execution, and they were bid in by defendant Leinmiller. At the time of the levy and sale, the crops were all immature, some of them having been planted but a short time before the levy. Leinmiller entered upon the premises some three or four weeks after this purchase, and harvested a portion of the crop, and removed a small portion of the grain from the premises; and these are the acts of which plaintiff complains.

Plaintiff claimed that his purchase of the contract was made before the sale on execution; but, as stated above, the date of the assignment was not proven. Nor did he prove that Leinmiller had any notice of his purchase when he bid in the crops at the execution sale. The Circuit Court ruled that, as Leinmiller had no notice of plaintiff's ownership of the premises when he bid in the property, he acquired title to it and was not guilty of a trespass in gathering the crops after they matured. This ruling cannot be sustained. There is no pretense that the constable had any authority or power to levy on or sell any interest in the real estate. Nor is it claimed that he did so. The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such. But while they remained immature, and were being nurtured by the soil, they were attached to and constituted part of the realty. They could no more be levied upon and sold on execution as personalty than could the trees growing

upon the premises. The doctrine is elementary, and it has frequently been declared by this court. See *Downard v. Groff*, 40 Iowa, 597; *Burleigh v. Piper*, 51 Id. 649; *Hecht v. Dettman*, 56 Id. 679; *Martin v. Knapp*, 57 Id. 336. The case is very different in its facts from *Nulkolls v. Pence*, 52 Id. 581. In that case, although the crop was immature when plaintiff purchased the premises, it was mature when the execution against the vendor was levied upon it and it was sold; and it was held that it was then personalty; and as the purchaser at the execution sale had no notice of the change of ownership, he acquired title by his purchase. But in the present case it pertained to the realty when the attempt to sell it was made. The purchaser, therefore, acquired nothing by his purchase. Conceding that the plaintiff had no interest in the premises before the execution of the deed from the land company, as the crops were then immature, they passed to him by the conveyance as part of the realty.

Reversed.

V. Fixtures.¹

I. NECESSITY FOR "ANNEXATION," EITHER MEDIATELY OR IMMEDIATELY, TO THE SOIL.

a. Actual and constructive annexation.

WALKER v. SHERMAN.

20 WENDELL (N. Y.), 636. — 1839.

PARTITION. The parties were tenants in common of a woolen factory, a house, barn and twenty acres of land. The commissioners to make partition failed to take into account certain articles of machinery, regarding them as personal property. Defendants allege this as error and move to set aside the report.

By the Court, COWEN, J. — Judging from the affidavits before us, the machinery which the commissioners excluded as being personal property, was such only as was movable, and in no way physically attached to the factory or land, though it had been used for several years, as belonging to the factory, and was as material to its performance in certain departments of its work, as the machinery which

¹ "A fixture may be defined as an article or structure which, in itself personal property, has been annexed, or has become accessory to real estate," Chase's Blackstone (3rd ed.), n. p. 223. As thus defined "fixtures" are either "removable" or "irremovable." For other definitions see cases reported herein. Cases on houses and other structures built on the land are included here under the head of "fixtures." — ED.

was actually affixed. Did the commissioners err in disregarding the movable machines? That is the only question. If they were right, the equality and justice of the partition are apparent upon the proofs; if wrong, the report should be set aside, and the commissioners be required to review their decision.

The question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it is more extensively applied than between any others. As between tenant for life or years and reversioner or remainderman, all erections by the former for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such, may be removed by him during his term, or be made available to his creditors on a *fiери facias*. On his death, they go to his executors or administrators; yet by a conveyance, they pass to the vendee. *Fructus industriales*, it is well known, always go, on the owner's death, to the executor or administrator, not to the heir; whereas, they are carried by a devise or other conveyance of the land, to the devisee or vendee. *Spencer's Case*, Winch. 51; *Austin v. Sawyer*, 9 Cow. 39; *Wilkins v. Vashbinder*, 7 Watts, 378, and cases cited overruling *Smith v. Johnston*, 1 Pa. 471, *contra*. The general rule is, that anything of a personal nature, not fixed to the freehold, cannot be considered as an incident to the land, even as between vendor and vendee. (The English cases on this subject are, most of them, well collected and arranged in Amos & Ferard, *Law of Fixtures*, p. 1, ch. 1, and p. 180, ch. 5, Am. ed. 1830. For some still later, see Gibbons, *Law of Fixtures*, 15, ch. 2. The American cases are mostly collected in 2 Kent, Com. 345, 3d ed., n. c. I have said that, as a general rule, they cannot be considered an incident unless they are affixed. This is not universally so. A temporary disannexing and removal, as of a millstone to be picked, or an anvil to be repaired; will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and in this country it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict

against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose, movable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be attached to it in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.

The question has been occasionally examined in this court as between grantor and grantee, and in some other relations. The most material cases are *Heermance v. Vernoy*, 6 Johns. 5; *Cresson v. Stout*, 17 Johns. 116, 121; *Miller v. Plumb*, 6 Cow. 665; *Austin v. Sawyer*, 9 Cow. 39; and *Raymond v. White*, 7 Id. 319. None of them treat a personal thing as a fixture short of physical annexation; and some are peculiarly strong against the purchaser. * * *

The cases of constructive annexation, where the article is seldom or never corporally attached to the realty, are few, and may be set down as exceptions to the general rule. They are said to be the charters or deeds of an estate and the chest containing them, deer in a park, fish in a pond, and doves in a dove-house. 2 Com. Dig. Biens, B. 6 Greenl. 157; 3 Dane's Abr. 156; 3 N. H. 505. The deer, fish and doves are set down by Amos & Fer. Fixt. 168, as heirlooms; and so of various other animals. Heirlooms are a class of property distinct from fixtures. But the doors, windows, locks, keys and rings of a house will pass as fixtures, by a conveyance of the freehold, although they may be distinct things; because they are constructively annexed to the house." Amos & Fer. Fixt. 183, and the book there cited. Many other obvious cases may be supposed. One is, our ordinary Virginia fence on country farms. No vendor would consider that as mere personal property. And in *Kittredge v. Woods*, 3 N. H. 503, it was held that manure lying about a barn-yard passed by a conveyance of the land as an incident.

These instances seem fully to justify the courts when they speak of the great difficulty in fixing on any certain criterion which shall govern all cases. They lead to a train of reasoning by Mr. Dane, in the third vol. of his Abridgment, p. 156, as well as by Weston, J., in *Farrar v. Stackpole*, by which, if followed out in practice, the machinery now in question might well be considered as a part of the realty and, therefore, the subject of partition. Mr. Dane says, that in all the instances put by him, the articles "are very properly a part of the real estate and inheritance, and pass with it because not

the mere fixing or fastening to it is alone to be regarded; but the use, nature and intention." * * *

The ancient distinction, however, between actual annexation and total disconnection is the most certain and practical; and should, therefore, be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dane, and of the learned Judge in *Farrar v. Stackpole*, before cited, while it cannot be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures, from the moral adaptation of what is in fact a mere movable, to the carrying on a farm or factory, etc., however essential the movable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the heir or the purchaser have been long governed. The judicial application of the rule is already sufficiently nice and difficult. As between heir and executor, it was partially altered by 2 R. S. 24, sec. 6, sub. 4, 2d ed.¹ By this, "Things annexed to the freehold, or to any building, for the purpose of trade and manufacture, and not fixed into the wall of a house, so as to be essential to its support," pass to the executor. And see 3 Id. 638, 9, 2d ed. Appendix. This provision certainly indicates anything but a legislative intent to enlarge the rights of freehold. Taken literally, it would strip the heir of the wheels, gearing and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by him. It is certainly contrary to the ancient common law; see 11 Vin. 167, Executors, Z. pl. 6; Amos & Fer. Fixt. 133, and cases there cited on to p. 138; and seems to derive very questionable countenance from more modern authority. *Squire v. Mayer*, a short note of which is given in 2 Freem. 246, goes the farthest towards our statute rule; but how very doubtful this and some other modern cases of the like tendency are may be seen by Amos & Fer. Fixt. ch. 4, sec. 2, p. 151, and cases there cited. See also Gibbons, Fixt. 11, 12. As between devisee and executor, the suggestion of Vice-Chancellor Hart in *Lushington v. Sewell*, 1 Sim. 435, 480, seems to go beyond any adjudged cases in favor of the freehold. He inclined to think that the devise of a West India estate would pass the incidental stock of slaves, cattle and implements; because such things are essential to render the

¹ New York Code of Civil Procedure, § 2712, Subd's 4 and 9.—ED.

estate productive; and, denuded of them, it would be rather a burden than a benefit.

It is, I think, obvious, not only from our statute, but from both the English and American cases, that there is a stronger tendency to consider fixtures for the purpose of trade as mere personal property, than we find either in regard to those of an agricultural or domestic character. See Gibbons, Fixt. 10, 11; Amos & Fer. Fixt. 138, ed. of 1830. By several English cases cited in these treatises the executor was in respect to trade fixtures preferred in his claim against the heir, though the doctrine is far from being settled. By several American cases we have seen, that such fixtures were denied to have passed even as between the vendor and vendee of the freehold; though such a rule derives no countenance, or certainly very little, from any English authority, and seems to be against the weight of American adjudication.

On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm or lot, etc., or in terms denoting a mill or factory, etc., nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself, would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detached, and restored to its ordinary place, as easily as the chain in *Farrar v. Stackpole*. I think it would be a fixture notwithstanding. But I am unable to discover, from the papers before us, that any of the machines in question before the commissioners were even slightly connected with the freehold. For aught I can learn, they were all worked by horses or by hand, having no more respect to any particular part of the building, or its water-wheel, than the ordinary movable tools of such an establishment. These would have their common place, and be essential to its business. So a threshing machine, and the other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily, or commonly attached, even by bands or hooks, to any part of the realty. The word "fixtures" is derived from the things signified by it being fastened or fixed. "It is a maxim of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty, to which it adheres, and partakes

of all its incidents and properties." Toml. Law Dic. Fixtures. Hence "fixtures" are defined to be chattels or articles of a personal nature which have been affixed to the land." Id. "It is an ancient principle of law," says Weston, J., in *Farrar v. Stackpole*, "that certain things, which in their nature, are personal property, when attached to the realty, become part of it as fixtures." And see *Amos & Fer. Fixt.* ch. I, p. 1.

It is not to be denied that there are strong *dicta*, and perhaps we may add the principle of several adjudicated exceptions, upon which we might, with great plausibility, declare the machines in question, so essential to the purposes of the manufactory, although entirely disassociated with the freehold, a fit subject for entering into the list of constructive fixtures.

The general importance of the rule, however, which goes upon corporal annexation, is so great that more evil will result from frittering it away by exceptions, than arise from the hardship of adhering to it in particular cases.

Nor can we possibly say, as in the case of the steelyard or engine in the cotton manufactory, cited from *Caldecott*, that the machines in question must in the nature of the thing, be annexed to the freehold. It appears, by the papers before us, that they have been used with the factory for several years, and have passed with it in conveyances. But the affidavits do not state that they are affixed in any way. They are treated by both parties, for aught I can see, as entirely detached, though the defendant ventures to express an opinion that some of them constitute a part of the factory itself. He gives no particulars, however, from which we can say they make a part, any more than if they were so many chairs to sit on.

It is true, that this factory seems to have been pretty much dismantled. The principal part of its machinery has been treated as mere movables. Both the defendant and Mr. Smith, one of the commissioners, concur in stating that nothing about the factory was treated as a fixture, except the water-wheel, fulling-mill, dye-kettle, press and tenter-bars; and Mr. Smith says the factory was impelled by a valuable water-power. The suspicion would, indeed, be quite strong, from such facts standing alone, that, at least, some of the important and valuable machinery excepted, might be brought within the legal notion of fixtures; and yet the defendant himself has not ventured to state, as I can find, that any part of the particular machinery excepted from the report was in the least dependent for its operation on the water-wheel or other permanent parts of the factory; while Mr. Goodrich, one of the commissioners, says, in his affidavit, that the excepted machinery was not affixed to the building

or land. There the case is left; not one of the deponents pointing out any connection whatever. No authority cited on the argument, nor any that I have seen, goes so far as to say that mere loose and movable machines totally disconnected with, and making no part of the permanent machinery of a factory, can be considered a fixture even as between vendor and vendee.

We think the motion must be denied with costs, and the report of the commissioners is confirmed.

VOORHIS *v.* FREEMAN.

2 WATTS AND SERGEANT (PA.), 116. — 1841.

TROVER by Voorhis against Freeman for the conversion of one hundred and six soft and chilled rolls, part of the machinery of an iron-rolling mill. Defendant claims under the foreclosure of a mortgage made by Sample, a former owner; plaintiff claims under an execution sale of the rolls as personal property on a judgment against Sample. Judgment below for the defendant. Plaintiff brings the case on writ of error to this court.

GIBSON, C. J. — It is true we ruled in an unreported case, *Chaffee v. Stewart*, that the spindles and other unattached machinery in a cotton mill, were personal property for purpose of execution, on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but an examination of their foundation would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear birds-eye view of it has been spread before the profession by Mr. Justice Cowen in *Walker v. Sherman*, 20 Wend. 636, from which it is evident that no distinctive principle pervades the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case, is that the court adhered to the old distinction when the question related to a woolen factory, instead of following out the principle started by Mr. Justice Weston in *Farrar v. Stackpole*, 6 Greenleaf, 157, which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and improvements of the age. By the mere

force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury, to the buildings.

It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal-chests, screens, scales, weights, elevators, hopper-boys, and running gears of a grist-mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such. If physical annexation were the criterion in regard to such things, the slightest tack or ligament ought to constitute it; else if we were to get away from it even ever so little, we should have no criterion at all. There are so many fashions, methods, and means of it, and so many degrees of connection between material substances, that there is nothing about which men would more readily differ than whether a thing held by a band or a cleat were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the result of the decisions professedly regulated by it. To avoid discrepance it would be necessary to hold the slightest fastening to be sufficient, but to exclude from the character of real property, as well everything constructively attached to it by the nature of the thing, as everything held to the ground by the attraction of gravitation. Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them it would make havoc of the cases already decided, and indeed, produce the most absurd consequences by stripping houses of their window shutters and doors, and farms of the houses themselves. When, therefore, we reflect on the necessary exceptions to the rule, as well as the cases of constructive attachment without the semblance of a tack or ligament, we are not surprised at the confusion and embarrassment in which we are left by the decisions. The inherent imperfections of the rule required so many exceptions to it in order to avoid absurdity and injustice in its application, that it has almost ceased to be a rule at all. Being purely artificial, and having no regard to the purposes for which capital is invested, a rigid applica-

tion of it would be ruinous to the manufacturer. In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton-spinner, for instance, whose capital is chiefly invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels not only separately but piecemeal. A creditor might as well be allowed to sell the works of a clock, wheel by wheel. His interest, it may be said, would forbid him to do so; but in the case of a manufactory, he would often be compelled to sell a part, or to sell many times the worth of the debt, and none but a person entering into the business would purchase either a part or the whole. The sacrifice that would be induced by either course, is incalculable; but that is not all. The bare walls of the buildings would be comparatively of little value. They might perhaps answer the purposes of a barn; but so might the walls of a dwelling, when deprived of their doors and windows, and why are these considered a part of the dwelling? Simply because it would be unfit for the purposes of a dwelling without them. What, then, is demanded in the case of a building erected for a manufactory, but an application of the same principle? Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment; and it is the principle of *Farrar v. Stackpole*, glanced at by Lord Mansfield in *Lawton v. Lawton*, 1 H. B. 259, note, who seems to have foreseen its day. I speak not here of questions between tenant and landlord or remainderman, but of those between vendor and vendee, heir and executor, debtor and execution creditor; and between co-tenants of the inheritance. With this limitation, nothing said or done by this court, except its decision in *Chaffee v. Stewart*, already mentioned, and an obiter recognition of an adverse decision, by the judge who delivered the opinion of the court in *Gray v. Holdship*, 17 Serg. & Rawle, 415, will be found to conflict with the principle proposed. Certainly nothing else ever said by us gives countenance to the notion that the rolls of an iron mill may be seized and sold as personal property.

But such rolls, being adapted to the manufacture of bars of different shapes and sizes, cannot all be used at once; and according to the ordinary criterion, only those in place and fixed for use would be

deemed a part of the mill. But by the criterion proposed, they must be deemed equally a part of it when unfixed to give place to others; for a rolling mill without rollers for all work, would be as incomplete as a hatter's shop without blocks for all heads. By this, however, I mean not to be understood as intimating that any such block is part of the realty. On the principle, then, that a thing temporarily severed from the freehold does not cease to belong to it, the whole set must be considered a part of the mill. Some two or three of these rolls, however, were duplicates; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the super-numeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and cannot be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency consequently follow the realty on the principle by which duplicate keys of a banking-house, or the toll-dishes of a mill, follow it.

We are of opinion, therefore, that the rolls in question passed as a part of the freehold by the mortgage and sale on the *levari facias*; but that if they had not passed, they could not have been sold as chattels on the plaintiff's *fieri facias* against the mortgagor; and were it necessary, we would further hold that they might have passed, had they been chattels, by force of the word apparatus in the description of the premises. On all these points the case is with the defendants.

Judgment affirmed.

FARRAR v. STACKPOLE.

6 MAINE, 154. — 1829.

TROVER for a mill-chain, dogs and bars. Plaintiffs claimed title through a deed from defendant. It was proved that the chain, dogs and bars were in their proper places when the deed was made. As the chain in question was prepared for being hooked and unhooked at pleasure, the trial judge ruled that it was a personal chattel which would not pass by the deed of the mill, unless by uniform and general usage it should be considered a part of the same. The question as to usage was left to the jury on the evidence and they found for plaintiff. The questions of construction and of admissibility of parol evidence as to usage were reserved for this court.

WESTON, J., delivered the opinion of the Court:

If the chain in question passed as a constituent part of the mill, the plaintiffs have made out their title, and have a right to judg-

ment on the verdict. A considerable portion of the machinery and power of a mill, like that conveyed by the defendant, is designed to be applied to draw up logs into the mill; which is essential to the operation of one of this construction. It is not denied that other parts of the machinery intended for this purpose, go with the mill; but it is insisted that the chain is of the nature of personal property, and therefore passes not by a deed of the realty unless specially named. To this it may be answered, first, that if it be an essential part of the mill it is included in that term, whether real or personal; secondly, that that which is in its nature personal may change its character, if fixed, used, and appropriated to that which is real. Is it too much to say that the mill is incomplete without a chain, a cable, or other substitute? It may be that a mill-wright who contracts to erect a mill, and to furnish materials, may be deemed to have completed his engagement without supplying a chain. One mill-wright, a witness in this case, has testified that such is his impression. And if this is understood generally his contract might not extend further. But the owner would find that he had yet something more to procure before the mill could be in a condition to operate. The chain is the last of the parts in the machinery to which the impelling power is communicated to effect the object in view. Its actual location in the succession of parts can make no difference. If it is in its nature essential to the mill it is included in that term; and that, as has been before remarked, whether it be personal or real property. But upon consideration, we are of opinion that it ought to be regarded as appertaining to and constituting a part of the realty.

It is an ancient principle of law that certain things which in their nature are personal property, when attached to the realty, become part of it, as fixtures. One criterion is that if that which is ordinarily personal be so fixed to the realty that it cannot be severed therefrom without damage, it becomes part of the realty; as wainscot work and old fixed and dormant tables and benches. Other things pass as incident to the realty, as doves in a dove-house, fish in a pond, or deer in a park: 2 Com. Dig. Biens, B. On the other hand, as between landlord and tenant, for the benefit of trade, in modern times many things are regarded as personal which, as between the heir and executor, would descend to the heir as part of the inheritance.

Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures it has not been the only one. Windows, doors, and window-shutters are often hung but not fastened to a building, yet they are properly part of the real estate, and pass with it; because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention. Dane's)

Abr. ch. 76, art. 8, sec. 39. Modern times have been fruitful in inventions and improvements for the more secure and comfortable use of buildings as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning-rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half-century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for saving of human labor. Hence there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron, and marble, some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, incloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts or to the building. But it would be a very narrow construction which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms applied to new subjects as they arise. In other words, it will understand terms used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptance.

There was at Bath, in this State, a saw-mill propelled by steam, generally called the steam saw-mill. Suppose this establishment had been conveyed by the name of the steam saw-mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property, for it is of quite modern invention; and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended

operations. The parties in using the general term would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties. Salt-pans have been held to pass with the realty, and to belong to the inheritance; because adapted and designed for and incident to an establishment for the manufacture of salt. The principle is that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character, and appertain to the realty, as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage. The verdict is, therefore, sustained, although not upon a ground in accordance with the impressions of the judge who presided at the trial. This, we think, upon the whole, a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject-matter. The jury have found, upon the evidence submitted to them, that by general and uniform usage the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage, but the weight of evidence went to support it. At any rate, it is apparent that the usage is rather in favor than against the construction we have adopted. But as we are of opinion that the title of the plaintiffs is well supported by the deed, independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point.

Judgment on the verdict.

SNEDEKER *v.* WARRING.

12 NEW YORK, 170. — 1854.

ACTION to recover the value of a statue and sun-dial withheld by defendant from plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

PARKER, J. — The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection; the claim of the defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corliss v. Van Sagin*, 29 Maine R. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. R. 306. Permanent erections and other improvements, made by the mortgagor on the land mortgaged, become a part of the realty and are covered by the mortgage. In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. R. 411, is entirely removed by the later authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Metc. R. 306; 3 Edw. Ch. R. 246; 1 Hilliard on Mortgages, 294 note *f*, and cases there cited; and see *Bishop v. Bishop*, 1 Kern. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty. No case has been found in either the English or American courts, deciding in what cases statuary placed in a house or in grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed

real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar; and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But, as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands. * * *

No evidence could be received more satisfactory of the intent of the proprietor to make a statue part of his realty, than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, * * * greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that

particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention.) It was decided by the Court of Cassation in France, in *Hornelle v. Enregistr.* 2 Ledru Rollin, Journal du Palais, Répertoire, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would placed on the house, or as one of two statues placed on the gate-posts at the entrance to the grounds.)

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

It is said the statues and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for 4,000 years. Taylor's *Africa*, 113 *et seq.* And if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected

for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the pyramids of Egypt or Cleopatra's needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing-wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.¹

b. What mode or degree of annexation is conclusive against removability; what is not.

WARD *v.* KILPATRICK.

85 NEW YORK, 413. — 1881.

FINCH, J. — There is one serious question in this case, and a great many which may be disposed of without difficulty. As to the latter a very brief statement of our conclusions must suffice.

The action was to foreclose a mechanic's lien under the act of 1875 (chap. 379), applicable to the city of New York. The defendant was the owner of eight houses in process of construction, and had contracted with plaintiff for mirror frames to be set in the parlor and hall of each house; those in the halls to be arranged to serve the purpose of hat-racks and umbrella-stands. The work having been completed as plaintiff claimed, he presented his bill, and pay-

¹ The parts of the opinion omitted contain a discussion of the legal character of statuary in the Roman Law. — ED.

ment being refused filed the mechanic's lien, which is now sought to be foreclosed. * * *

Some other minor objections were taken in the case, not important to be considered, and it now becomes necessary to determine the principal question, whether the articles furnished became so attached to the buildings in progress of construction as to justify a lien under the act of 1875. The language of its first section is "every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any building, etc., shall have a lien upon the same." Labor upon the building, materials used in its construction are the test of the lienor's rights. In other words, the work and the materials both in fact and in intention must have become part and parcel of the building itself. The inquiry approaches so nearly the doctrine of fixtures as to make the decisions in that respect authoritative, and the necessary guides to our conclusion. If, as between vendor and vendee, the mirror frames in question would have passed by a deed of the real estate, without special enumeration or description, it will follow that they formed part of the house, and were elements in its construction, and so furnished a basis for the lien claimed. The general subject was much discussed in this court in *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489. The results arrived at were as precise and definite as the nature of the subject would permit, and must form the basis of our judgment. The question arose between mortgagor and mortgagee, and three requisites were named as the tests of a fixture. These were first, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, the intention of the party making the annexation to make a permanent accession to the freehold.

The mirror frames in the present case were actually annexed to the realty. They were so annexed during the process of building, and as part of that process. They were not brought as furniture into the completed house, but themselves formed part of such completion. Those in the hall filled up and occupied a gap left in the wainscoting. They were an essential part of the inner surface of the hall, and of a material and construction to correspond with and properly form part of such inner surface. Those in the parlor fitted into a gap purposely left in the base-board. Both those in the hall and those in the parlor were fastened to the walls with hooks and screws. They could be removed, but their removal would leave unfinished walls and require work upon the house to supply and repair their absence.

They were fitted to the use and purpose for which the part of the building they occupied was designed. They formed part of the inner wall. Their construction and finish was made to correspond with the cabinet work of the rooms. In each house they faced each other and formed the most prominent feature of the internal ornamentation.

They were intended by the owner to be permanently attached to the buildings and to go with them when sold as essential parts of the construction. Three of the houses were in fact thus sold. The owner testified as to these frames, that he regarded them as "the most attractive portion of the house;" that he stated to the agent of the maker, that it was very important to have a few of the frames in immediately "so that a party who would be desirous of purchasing the house could see these mirrors and hat-racks;" that the agreement with Mr. Evers was that he should go on immediately and put in the frames in two or three of the houses "so as to be able to show what the houses would be, without delay;" that the kind of work he called this particular work that was to be done, was "cabinet carpentering;" that on one or more occasions he complained of the work not having been done, adding "and that I could not get my houses ready for market;" and that he was very strenuous about having the frames put up "because he wished to show the houses to some parties." These facts indicate very plainly the purpose and intention of the owner to permanently attach the frames to the building and make them a part of the structure. It follows that they became parcel of the realty, and as between vendor and vendee would have passed by deed. The recent case of *McKeage v. Hanover Fire Insurance Co.*, 81 N. Y. 38, does not conflict with this conclusion. In that case the proof showed that the mirrors "were not set into the walls;" were put up after the house had been built; were capable of being easily detached without interfering with or injuring the walls; and were as much mere furniture as pictures hung in the usual way. The difference between the cases is obvious.

We are of opinion, therefore, that the work done by the lienor was work upon the house, and the materials furnished were used in its construction. The objection that no lien attached cannot be sustained.

We find in the numerous exceptions no sufficient ground for reversal, and the judgment should be affirmed, with costs.

Judgment affirmed.

O'BRIEN *v.* KUSTERER.

27 MICHIGAN, 289. — 1873.

GRAVES, J. — On the 13th of August, 1868, the complainants in the original bill, O'Brien and Calkins, leased to the defendant Kusterer and one Werner, for three years from the 15th of the succeeding September, the east basement of Phoenix hall in Grand Rapids, for an eating house or saloon, at a yearly rent of six hundred dollars, payable quarterly. The lessors, at considerable expense, fitted up the property with a bar and other conveniences to adapt it to the business to be carried on by the lessees. Some time in the fall the lessees entered under the lease. In some little time afterwards one Schoeding became associated with Werner, and the room was extensively altered and fitted up by the tenants with bowling-alleys, which were put down and connected with the floor and sleepers in a very substantial manner. The changes were numerous and thorough, and the character of the establishment was completely altered. In the course of a few months the defendant Kusterer united in himself the whole leasehold interest, by purchase or otherwise, and on the 24th of May, 1870, assigned to the defendant Conkey, and took back a chattel mortgage to secure three hundred and fifty dollars of the purchase price. In this transaction Kusterer assumed to sell and take back a mortgage upon the alleys and other fittings, and they were described in the mortgage as "all and singular the bar, bar fixtures, ice box, four bowling-alleys, with the balls and pins appertaining thereto, with all the chairs and tables therein, one chandelier over the bar, two street lamps and signs, with all keys, faucets, stock on hand, and all fixtures and furniture, all in the Court Place saloon, so called, in the basement of the Phoenix block, so called, on the north side of Lyon street, in said city of Grand Rapids, being the same property this day sold by said Kusterer to said Conkey, and this mortgage being given for a part of the purchase price thereof."

About June 1st, 1870, Conkey sold the same property to James Irons, the complainant in the cross-bill, for the consideration of one thousand and fifty dollars, and Irons assumed, as part of the consideration, the payment of the chattel mortgage given by Conkey to Kusterer. At this time Kusterer assured Irons that the property was "all right," and that he would "stand between him (Irons) and all harm." A controversy had previously arisen between the complainants in the original bill, O'Brien and Calkins, and Kusterer, as to the ownership of the alleys and some other things in the establishment.

O'Brien and Calkins claimed that the bar, bar fixtures, cupboard, bowling-alley ways and racks, were permanent fixtures and belonged to them as owners of the reversion, and the defendant Kusterer insisted that they were removable articles and subject to and held by his mortgage from Conkey. The mortgage becoming due, and Irons declining to pay it while the title to the property was thus in dispute, Kusterer threatened to enforce his mortgage lien and remove the property from the premises. O'Brien and Calkins thereupon filed the original bill to prevent any interference with, or removal of, the property claimed by Kusterer, and to restrain the alleged injury and waste which a removal would be likely to produce. Irons then filed the cross-bill to protect his interests as they should be affected by results.

The Circuit Court, in passing upon the case of the original bill, decreed that the bar, bar fixtures, cupboard, bowling-alley ways and racks were fixtures attached to the building, and owned by complainants, and awarded a perpetual injunction; and in passing upon the cross-cause adjudged that the defendant Kusterer should pay to Irons nine hundred dollars, with interest thereon from June 24th, 1870, in the place of the fixtures.

But two questions were made on the hearing in this court. The first being whether the things in question were so annexed to the freehold as to belong to it. This question is decisively answered in the affirmative by the evidence, and it would be a waste of time to repeat it.

The second question is whether Calkins' conduct was such as to estop himself and O'Brien from claiming, against the mortgage right of Kusterer, that the property was permanently and immovably attached, and I think upon a fair estimate of the evidence this question should be answered in the negative.

Kusterer was a tenant holding of Calkins and O'Brien when the annexations were made, and they are to be considered as made by his direction and authority, or at all events, with his sanction; and by itself, his sale of the things so annexed, as personalty, and the taking a chattel mortgage back upon them, could not invest him with any new right as against his landlord. Such a transaction, standing alone, could not affect the right of the landlord derived from the annexation. It might tend more or less to show that the tenant did not consider the fixtures immovable. But the landlord would not be concluded, unless shown in some satisfactory way to have assented to their being dealt with by the tenant as personalty, or things removable.

The fixtures now in question were made a part of the realty, so

far as mechanical annexation could make them so, before Kusterer sold to Conkey and got the mortgage back; and the evidence does not show that when that annexation occurred, it was one which left the tenant at liberty to sever and remove what was annexed. When this transaction with Conkey occurred, Kusterer had no title, as against O'Brien and Calkins, to these things as personalty, and he gained none by the mortgage from Conkey, unless O'Brien and Calkins in some way waived or relinquished their right derived from the annexation, or precluded themselves from asserting it against him, and this, I think the evidence, when fairly considered, shows they did not do.

The decree below should be affirmed, with costs.

CROSS *v.* MARSTON.

17 VERMONT, 533. — 1845.

HEBARD, J. — There is no question made by either side but that the articles in controversy in this suit, at the time the plaintiff became possessed of them, were personal property; but it is insisted that they became attached to the building, and passed by the deed from Day to the defendant on the 22d of April, 1843. The plaintiff purchased the articles in question in 1836, while he and Day had a mortgage upon the building, in which they then were, and took the case of drawers from the building and carried them to his store. In 1838, Day, who had then acquired the whole title to the building, carried the case of drawers back to the building and leased the building for a book store; and at this time the case of drawers was put in its original place and nailed to the wall, — but in such manner that it might be taken away without injury to the case of drawers, or to the building; and in this situation it remained until 1843, when Day deeded the premises to the defendant; — and it appears, also, from the case, that the plaintiff was not ignorant of the disposition and use of the case of drawers.

The case was disposed of by the County Court, by their informing the parties, that they should instruct the jury, that these articles were so far fixed to the freehold, that they would pass by Day's deed to the defendant; and that, if the plaintiff knew of Day's putting them into the shop, in the situation described, as early as 1838, and acquiesced in their remaining there until after the sale, he would stand in no better situation, in regard to the property, than Day would, had he owned it; and that the jury might infer the acquiescence of the plaintiff, in the use to which Day put the articles, from

his long silence, — he knowing of that use. The argument of the case has proceeded mainly with reference to the fact, whether this property, by the use to which it had been put, had become a fixture.

This question about fixtures most frequently arises between landlord and tenant. As between grantor and grantee, it is more proper to inquire whether the thing was so attached to the freehold, that it will pass by the deed; and such is the case in numerous instances, when the same thing might have been taken away by the tenant. And in all these cases, the party fixing the chattel to the freehold, was, at the time, the owner of it. Such was not the fact in this case. (The thing was originally a chattel, and the plaintiff was the owner; and there is no proof that he ever parted with his title to it, except by the act of Day, and his own acquiescence in that act. And the inquiry here is, whether that can change the ownership of the property, while the property itself preserves its identity)

It is a principle of law, in relation to this subject, that the owner may pursue his property, wherever he can trace it. But when the property has lost its identity, it ceases to have its legal existence; — as, if one man should convert a quantity of bricks and erect them into a house, and then deed the house to a third person, these bricks will have lost their identity, — they are so changed in their character that they cease to be chattels, and the owner cannot pursue them against such third person. But in this case I apprehend there was no such change of the property, as would give it a different character. The nailing it to the building did not incorporate it into and make it a part of the building. It was merely a part of the furniture of the building, and, as the case finds, capable of being taken away without injury to the property, or to the house. No one would doubt, probably, but what the outgoing tenant would have the right to take property similarly situated.

That, as between Day and the defendant, this property would have passed by the sale, providing Day had owned it, cannot be decisive of the question; for if so, it would apply to all sales, — as when B. sells the horse of A. to C., as between B. and C. the title to the horse passes; but A., being the owner, may pursue the horse, notwithstanding the sale. The main question, in relation to this part of the case, is, whether the property has lost its identity; if it has, the plaintiff cannot pursue it; if it has not, he may pursue it into whatever hands it may have chanced to come.

The defendant relies somewhat upon the case of *Goddard v. Bolster*, 6 Greenl. 427. But, in relation to that case, whatever there may be peculiar to it, the ground upon which it was put does not conflict with the plaintiff's claim in this case. That decision goes

upon the ground that the plaintiff's brother, in the erection of the mill, and the putting in the mill stones and mill irons, acted but as the agent of the plaintiff; and, as the mill was on the plaintiff's land, and erected by the plaintiff's agent, which was the same as if erected by the plaintiff himself, the mill and all its attachments were the property of the plaintiff. No such consideration is involved in the case now before us. The plaintiff did not put the drawers into the building himself, nor was Day his agent in doing it. The plaintiff had no interest in the building, nor in the land upon which it stood. This case, then, loses all its analogy to the case cited. *Miller v. Plumb*, 6 Cow. 665, presents only the same question, that would arise, if Day claimed this property and had sued the defendant for it. *Colegrave v. Dias Santos*, 9 E. C. L. 30, is to the same effect; the question was, whether the vendor could recover of the vendee for fixtures, after having given up the possession. *Longstaff v. Meagoe*, 29 E. C. L. 60, was decided upon the authority of the case of *Colegrave v. Dias Santos*.

The conclusion, therefore, to which we come, is that this property was not so attached to the freehold, as to change its character, or lose its legal existence. It once being the property of the plaintiff, it will continue to be his, until he has parted with his interest in it by his own consent, or by the operation of some law. And that presents the inquiry in relation to the other part of the charge of the court. The jury were to infer an acquiescence on the part of the plaintiff in the disposition which Day made of the property, from his long silence.

If Cross had stood by and seen Day sell the property, without remonstrating, he would be estopped from claiming it of the purchaser; but I do not suppose that anything is to be inferred, in a legal point of view, unfavorable to his claim, simply because he has delayed to assert his claim, unless barred by the statute. As the claim is not barred by the statute, and as the case does not find that the plaintiff ever stood by and saw Day attempt to pass over the property, without objecting, we do not see how he has, either by his own consent, or by the operation of law, parted with his interest in the property, or forfeited his right to pursue and claim his property wherever he can find it.

Indeed, the question of acquiescence, it seems to me, has nothing to do with the case. If Day could transfer a title in the property to the defendant, it was because it had ceased to be a chattel interest; if that was the condition of the property, it was the attaching the property to the building, that wrought the metamorphosis; therefore the property became changed, and the plaintiff lost his

interest in it the moment the nail was driven, if he ever lost it. But we have already said that this was not such a use of the property as was inconsistent with the nature and character of the property itself, or with the plaintiff's claim and title to it.

Judgment reversed.

MURDOCK *v.* GIFFORD.

18 NEW YORK, 28. — 1858.

JOHNSON, Ch. J. — The question in this case is, whether the twenty-five broad looms levied upon under the executions of the defendants, Gifford, Sherman, and Innis, were personal property; or whether, as being part of the realty, they were bound by the lien of the mortgage which the plaintiffs are seeking to foreclose. The mortgage was of "all that estate and real property, known as the Owasco Woolen Factory, situate on the Owasco outlet, in the city of Auburn, county of Cayuga and State of New York, the same being the plot of ground, buildings and water privileges lately owned by the Auburn Woolen Company, and the same being all the property recently conveyed by the trustees of said company, by deed to Harris & Waterman; and it is intended that the whole property conveyed by said deed, and every part thereof, is included in and covered by this deed, with all the machinery and the fixtures of all kinds whatever now in the mills lately belonging to said woolen company, together with all and singular the tenements, hereditaments and appurtenances," etc. Conceding that the looms now in question were intended to pass and did pass by the terms of the mortgage, the question is, whether they passed as part of the real estate. For if they did not pass as realty, then it was necessary, as there was no actual change of possession, that the mortgage should be filed as a chattel mortgage, which was not done. The question for this purpose is, therefore, the same as would have been presented if the mortgage had described, by metes and bounds, and had conveyed, in terms, the land on which the factory was situated, without specifying the building, machinery and fixtures. For, although the intent of parties is to govern as to the subject on which a conveyance is to operate, it is beyond their power to make a conveyance operative without a compliance on their part with the rules of law in respect to the mode of conveyance appropriate to the kind of property sought to be conveyed. As they could not, by writing without seal, pass the title of land, though their written agreement termed it personally and declared it should pass, so they cannot, by an instrument

and by ceremonies appropriate to pass land, transfer chattels in mortgage, as against creditors of the mortgagors, without either an actual change of possession, or filing the instrument as a chattel mortgage.

The question then is, were these looms realty as between mortgagor and mortgagee? Between these parties and between grantor and grantee, the effort of a court is always to ascertain the intent of the parties, and to give it effect. If their language affords evidence that a chattel is intended to pass, it will pass, of course, whether it be a mere chattel or one which by annexation has become part of the realty. But where no specific intention is collectible, or where the conveyance is of land by metes and bounds, and on the land a building stands in which is the thing in controversy, there it will pass or not, according as the thing is or is not, in law, part of the realty. In such a case, the only specific intention is, that the realty shall pass, and the inquiry to which a court in such a case addresses itself is, does the law regard the thing in question as pertaining to the realty? It is obvious that this question presents itself in the neatest way, completely unembarrassed by any collateral consideration, upon the death of the general owner in fee of the land. The chief distinction between the different species of property, is in the course of devolution on the general owner's death. Realty goes to the heir, personalty to executor or other personal representative. Accordingly, the cases of heir and executor, and of vendor and vendee, in the absence of evidence of specific intention, have always been deemed identical in respect to their right in a chattel claimed to be a part of the realty. It was so held in 21 Hen. 7th, 26, and it has continuously since been so held. *Holmes v. Tremper*, 20 Johns. 30; *Miller v. Plumb*, 6 Cow. 668; *Farrar v. Chauvetete*, 5 Denio, 527. And whenever it has become necessary to consider such a question between vendor and vendee, resort has been had for its solution to the case of heir and executor, where the same question was presented, unembarrassed by evidence of any particular intention; a kind of evidence from which a deed from grantor to grantee would rarely be free. A statute, therefore, determining the course of devolution of property on the death of the general owner, if it is not conclusive to fix the character of property for all purposes, is at least very strong evidence in respect to its legal character. When the statute gives a particular species of property to the executor, and gives lands, tenements and hereditaments to the heir, it should be regarded at least as furnishing very clear proof, that in the legislative mind that kind of property is considered as not being in any sense included in

lands, tenements or hereditaments. The Revised Statutes (2 R. S. 83, sec. 7) declare that things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the sixth section, and that subdivision declares that "things annexed to the freehold or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," shall be deemed assets, and shall go to the executors or administrators.

The looms in question were merely placed on one of the floors of the factory, and were fastened to the floor by means of ten screws in each loom, as the case states, "merely for the purpose of keeping the said looms in their places and in a steady position, and not otherwise, during the operation and working of the said looms." They were worked by a band carried by the fixed machinery. Any one of them could be separately disconnected with the motive power, and they could be easily and conveniently removed without injury to themselves or to the building.

In *House v. House*, 10 Paige, 158, the chancellor had occasion to consider the statutory provisions which have been cited, and he observes that it was impossible, in a sentence of three lines, to define what was to be considered as part of the freehold itself, and what mere fixtures or things annexed to the freehold for the purposes of trade or manufacture; and that it was, therefore, still necessary to resort to the principles of the common law and to the decisions of the courts, in order to ascertain what is a substantial part of the freehold and what is a thing annexed thereto for the purpose of trade or manufacture. These observations are certainly just; for it is quite obvious that the statute does not mean that the executor shall take everything not essential to the support of the walls of a building, but that only such things are spoken of as are not a constituent part of the freehold, or of the artificial structure erected on the land.

The case *Lawton v. Salmon*, decided by Lord Mansfield, and reported in a note to *Fitzherbert v. Shaw*, 1 H. Bl. 258, furnishes a criterion by which the character of chattels annexed to the freehold may be determined. That was a case of salt-pans, made of hammered iron and riveted together, which were brought into the salt-house in pieces and might be removed in pieces. Davenport, for the defendant, argued that if the salt-pans were removed, the house would go useless to the heir and the executor gain nothing but old iron. Lord Mansfield says: "The salt spring is a valuable inheritance, but no profit arises from it unless there is a salt-work, which consists of a building, etc., for the purpose of containing the pans,

etc., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance, he could never mean to give them to the executor, and put him to the expense of taking them away without any advantage to him, who could only have the old material, or a contribution from the heir in lieu of them." The ground of the decision was, that the pans had a specific relation to the inheritance. They were adapted to use in connection with the inheritance, and, by removal, would lose all the value which that adaptation gave them, and become merely old iron. It was this on which the case turned. The specific form which the iron had received, fitted the pans for use with and made them valuable in relation to, the inheritance, and not valuable as property unconnected with the inheritance.

Applying this principle to the case of a factory, the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, would belong to the freehold; while an independent machine like a loom, which, if removed, still remains a loom, and can be used as such wherever it is wanted and power can be applied to it, will still retain its character of personalty. With the rule as thus stated, many of the cases coincide, and those, too, which have been carefully examined. *Powell v. Monson Co.*, 3 Mason, 459; *Gale v. Ward*, 14 Mass. 352; *Cresson v. Stout*, 17 John. 117; *Swift v. Thompson*, 9 Conn. 63; *Teaff v. Hewitt*, 1 McCook, 511; *Vanderpoel v. Van Allen*, 10 Barb. 157. It is true that, upon this subject, all the cases cannot be reconciled, and that perhaps no rule can be laid down, in abstract terms, which will furnish a clear guide in every case. But in respect to the species of property, the rule we act upon in this case is not difficult of application, and it will, we think, generally coincide with the actual intention of persons erecting and owning such property.

MCKEAGE v. HANOVER FIRE INSURANCE CO.

81 NEW YORK, 38. — 1880.

RAPALLO, J. — The mirrors and gas fixtures in controversy were placed in the house in 1870 by Mr. Curtis, who was then owner thereof. We concur with the court below in its conclusion that they were not so attached to the building as to form part of the realty. Gas pipes which run through the walls and under the floors

of a house, are permanent parts of the building, but the fixtures attached to these pipes are not. They are not permanently annexed but simply screwed on projections of the pipes from the walls, left for that purpose, and can be detached by simply unscrewing them. It was shown that the fixtures in question were simply put on in the usual way. The mirrors were not set into the walls, but were put up after the house had been built, being supported in their places by hooks or supports, some of which were fastened with screws to the wood work and others driven into the walls, and were capable of being easily detached from these supports without interfering with or injuring the walls. All these articles were, in their nature, mere furniture, and, therefore, chattels, and not appurtenances to the building. *Winslow v. Merchants' Ins. Co.*, 4 Met. 311; *Vaughen v. Haldeman*, 33 Penn. 523; *Rogers v. Crow*, 40 Miss. 91; *Montague v. Dent*, 10 Rich. L. R. (So. Car.), 135; *Shaw v. Lenke*, 1 Daly, 487; *Lawrence v. Kemp*, 1 Duer, 363; *Beck v. Rebow*, 1 P. Wms. 94. In respect to such articles, the mere declaration of the owner that he intends that they shall go with the house does not make them realty. They no more constitute part of the realty than would pictures supported by fastenings driven into the wall. Assuming that such fastenings or support become part of the building, it does not follow that the mirrors or pictures which they support acquire the same character.

On the sale of the house by Curtis to Nelson, the gas fixtures and mirrors were specially bargained for and purchased by Nelson, with the house. They were not mentioned in the deed, nor was any bill of sale of them given, but these were not necessary, for the title to the chattels passed to the purchaser by delivery.

Nelson, after this purchase, executed the mortgage to the defendant, under the foreclosure of which it claims these chattels. He testified that they were in the house when he mortgaged it, and that when he applied for the loan he represented to the defendant that they were to go with the house; that the house included mirrors, gas fixtures and so forth. No mention of them was, however, made in the mortgage, nor was any separate mortgage of them given.

Nelson afterward sold and conveyed the house and lot to one Shrope who afterward conveyed to Cornelius C. Westervelt. These conveyances stated that the premises conveyed were subject to the mortgage to the defendant, but made no mention of the gas fixtures and mirrors.

The plaintiff's title to them is founded upon a bill of sale executed by Westervelt to William McKeage, dated the 11th of December, 1874, and delivered in the same month, purporting to have been

made in consideration of \$1,500. Westervelt's title to the fixtures does not appear, except from the statement in defendant's answer, that they passed, by the deeds, from Nelson to Shrope and from Shrope to Westervelt. Whether there was, or was not, any further transfer, written or verbal, was not shown on the trial. They may have passed in the same way that they did from Curtis to Nelson. It was shown, however, that Westervelt was in possession of them at the time of the execution by him of the bill of sale to William McKeage, and that he delivered possession of them to McKeage, to whom he had contracted to sell the house, together with the gas fixtures and mirrors. This was sufficient *prima facie* evidence of Westervelt's title, which was not disputed.

Before the foreclosure sale McKeage paid a large part of the purchase-money payable under his contract with Westervelt, by conveying to him certain real estate in New Jersey, which was, by the contract, to be taken as a payment of \$23,000 of such purchase-money.

The sale, under the foreclosure of the defendant's mortgage took place in April, 1875. The defendant became the purchaser and received a deed from the referee; this deed contained no mention of the articles in controversy. The defendant, however, claimed that they passed by this deed as part of the realty, and prevented McKeage from removing them.

The claim that they became part of the realty by annexation cannot be sustained, for the reasons before stated, but the defendant contends that by reason of the verbal representations and statements made by Nelson, when negotiating for the loan, they should be deemed part of the realty and covered by the mortgage. These statements could not change the character of the property, and even if some equity, as between Nelson and the defendant, could be claimed by reason of these representations, subsequent purchasers for value, having no notice of them, could not be affected thereby. It does not appear, nor is it alleged, that before the foreclosure sale, either Shrope, Westervelt, or McKeage had any such notice, and it does appear that Wm. McKeage, before defendant claimed the articles, paid a large part of the purchase money payable under his contract with Westervelt, which contract embraced the chattels in question. There was no legal mortgage of them, and the purchaser from Westervelt, without notice was not affected by a merely equitable lien of the mortgagee, if any such existed. Nor was any such lien asserted or enforced in the foreclosure suit. We do not, however, intend to decide that such a lien did exist.

It is further claimed that Wm. McKeage, having been present at the foreclosure sale, and having failed to give any notice of his claim

of title to the chattels, his silence estops him from asserting it against the purchaser. It is sufficient to say on this point, that the property exposed for sale was the house and lot only, and there was no announcement that the chattels in question were to be included in the sale. There was no occasion, therefore, for any protest or other proceedings on the part of McKeage.

The plaintiff claims by assignment from Wm. McKeage executed after the cause of action for a conversion of the property by the defendant had accrued. This assignment transferred McKeage's title to the property as well as the cause of action. The consideration for it was not a material subject of inquiry so long as it was valid between the parties, and a recovery by the plaintiff would protect the defendant against any claim by Wm. McKeage.

The judgment should be affirmed.

Judgment affirmed.¹

HOYLE *v.* PLATTSBURGH AND MONTREAL RAIL-ROAD CO.

54 NEW YORK, 314. — 1873.

SUIT to foreclose two mortgages given by the Plattsburgh and Montreal R. R. Co. upon its railway, corporate and other franchises and equipments. The instruments were duly recorded as real estate mortgages but were not filed under the chattel mortgage act of 1833. The defendant Vilas answers, claiming to be the owner of the rolling-stock of the road under execution sales made since the giving of the mortgages.

A reference was ordered to determine whether or not the rolling-stock was subject to the lien of the mortgages. The referee held that, though the mortgages covered the property in question, they were void as to that property, as against subsequent judgment creditors because not filed as chattel mortgages. Plaintiff excepted and the exceptions were allowed by the Special Term, which decision the General Term upheld. Defendant now appeals to this court.

JOHNSON, C. — The first question necessarily to be decided in this case is, whether the rolling stock of a railroad is personal property, or whether it is to be deemed constructively annexed to the road upon which it runs, so as in law to be regarded as part of the realty. If it be determined that rolling-stock retains its character of personal property, then the question arises whether a mortgage of a railroad

¹ See also *McRae v. Bank*, p. 271, *infra*.

and its equipment needs to be filed under the statute of 1833, requiring mortgages of personal property to be filed when the possession of the property is not immediately delivered to the mortgagee. Laws of 1833, chap. 279, p. 402. The questions thus presented are not authoritatively determined in this State. The opinion of the Supreme Court has been given in four reported cases. The earliest was that of *The Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 484, in which the judgment rendered in October, 1857, by Justices S. B. Strong, Birdseye and Davies, declared that as between mortgagees and judgment creditors the rolling-stock was to be deemed fixtures, and consequently that such a mortgage did not need to be filed under the act of 1833. In this case the mortgage specified engines, tenders, cars, etc., as part of the property mortgaged, and the rights of the plaintiffs might have been sustained by holding either that the chattel mortgage law did not apply to railroad mortgages, or that engines and cars were fixtures. The court rejected the former ground and placed the decision on the position that the rolling-stock was part of the realty.

In *Stevens v. The Buffalo & N Y. C. R. R.*, 31 Barb. 590, decided in September, 1858, Justices Green, Grover and Marvin held that rolling-stock was personalty, and that a mortgage thereof was required to be filed under the act of 1833. Elaborate opinions were written in support of these conclusions, in which the Hendrickson Case, before cited, and that of *Coe v. Hart*, in the United States Circuit Court, before Mr. Justice McLean, that of *Corey v. The Pittsburgh & F. W. R. Co.*, and *Mitchell v. Winslow*, 2 Story, 690, were examined with the result before mentioned.

In December, 1859, Mr. Justice Allen decided *Beardsley v. Ontario Bank*, 31 Barb. 619. The mortgage was of the railroad, real estate, chattels and franchises of the corporation. It was held that the rolling-stock was not covered by the mortgage, not being part of the realty. The last two decisions were acquiesced in; the first, the case of Hendrickson, was taken to the Court of Appeals in 1863, and resulted in an order for reargument, and subsequently the case was settled. The case now under consideration is reported in 47 Barb. 109, before Justice Sutherland, at Special Term in 1867. He held that rolling-stock does not become part of the realty, and that it passed by the two mortgages in question, as specially named, and not as part of the realty. He also held that mortgages of the corporate property and franchises of railroads should not, as to the personal property covered by them, be deemed to be subject to the provisions of the chattel mortgage act of 1833. At General Term the case came before Justice Ingraham, Sutherland and G. G. Bar-

nard, and the decision appealed from was affirmed, Judge Ingraham giving the only opinion. After declaring himself not prepared to accede to the opinion at Special Term, that rolling-stock is in all cases to be considered as personal property, he holds that the intent of the parties is evident that the rolling-stock should pass as part of the realty, and that such a construction should be given to the transaction. He further holds that the chattel mortgage act does not apply to a mortgage executed by a railroad company under authority of section 28 of the general railroad act of 1850. That section warrants a mortgage of the corporate property and franchises of a railroad company to raise moneys for completing, finishing or operating its road. Such a mortgage was intended by the Legislature, the learned judge says, to be treated as a mortgage of the road and its accessories, and, therefore, need not be filed as a chattel mortgage. While upon each proposition involved, a majority of judges appear to have been against the claim that rolling-stock may be effectually mortgaged without filing, under the act of 1833, the question still remains open for decision.

In respect to the legal methods of disposition, all property is distributed by law under the head either of real or personal; and in order effectually to be disposed of, the act of disposition must conform to the mode appropriate to the kind of property. What method shall be sufficient to transfer property is matter of positive regulation by law; and it is not in the power of parties to waive or alter, by their private agreement, any of these regulations. These regulations have been adopted with regard not only to the interests of the parties immediately concerned, but also with regard to the interest of others in ascertaining the ownership of property. In regard to realty, a conveyance by metes and bounds of a parcel of land carries with it everything which the law recognizes as part of the realty, whether it was originally personal in its nature or not, as fully and completely as by the most minute enumeration and specification. It draws to itself and binds everything afterward made part of the land by any method of annexation or affixing which the law recognizes as effectual, whether actual or constructive in character. *Murdock v. Gifford*, 18 N. Y. 30; *Mott v. Palmer*, 1 Comst. 564; *Leroy v. Platt*, 4 Paige, 77.

In view of these well settled and universally recognized rules, the cases — such as *Prim v. Emery*, 32 N. H. 484, and *Pinnock v. Coe*, 23 How. 117, which, as well on grounds of reason as authority, labor to maintain that after-acquired rolling-stock is bound by a previous mortgage, that in terms is declared to bind such after-acquired property — point irresistibly to the conviction that rolling-stock is not

part of the realty. No one ever doubted that a mortgage of land bound a house subsequently built upon it; nor that it bound anything originally personal which became afterward part of the land. The labored attempt to prove that rolling-stock, acquired after the date of the mortgage, will be bound by it, shows how strongly the incongruity is perceived of treating it as part of the realty.

The general doctrine is, that things originally personal in their nature remain personal, though used in connection with land. All the implements of agriculture have their use only in the cultivation of land; and yet they are never thought to be part of the realty. Some element of annexation, usually physical in its character, is the common criterion for determining whether things personal in their origin have lost that quality and become part of the realty. Generally, the connection is appreciable by the senses; so that what belongs to the land and what is personal may be determined by inspection alone. Cases of constructive annexation are few, and rest upon peculiar and obvious reasons of their own. Thus keys, which must be movable to answer their end, and which are a necessary part of the fixed locks to which they are adapted; sashes and window frames, and the old example of an upper mill-stone, removed to be picked, illustrate the same principle. Deer in a park, rabbits in a warren, doves in a dove cot, and fish in a pond, depend on a different reason. In these conditions they are reckoned not property at all; but any of them, caught and secured, becomes at once personal property. Williams on Personal Property, 19. In respect to all cases of constructive annexation, there exists both adaptation to the enjoyment of the land and localization in use as obvious elements of distinction from mere chattels personal. Even in respect to cases of actual annexation to the realty and consequent change of character from chattel personal to realty, it is held that there ought to be the concurrence of actual annexation, of applicability to the use to which that part of the realty is appropriated with which it is connected, and lastly an intention on the part of the party making the annexation to make a permanent accession to the freehold. *Potter v. Cromwell*, 40 N. Y. 287; *Voorhies v. McGinnis*, 48 id. 278. Looking now at the rolling-stock of a railroad, it is originally personal in its character, it is subservient to a mere personal trade, the transportation of freight and passengers. The tracks exist for the use of the cars rather than the cars for the use of the track. There is no annexation, no immobility from weight, there is no localization in use. The only element on which an argument can be based to support the character of realty is adaptation to use, with and upon the track. Even in respect to this, were the same contri-

vance adopted by a tenant for use in his trade upon leased lands his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for then unity of ownership in track and cars and independence of roads upon each other seemed to render it possible to consider rolling-stock part of the realty without introducing great inconvenience. At the present time, independent companies exist, owning no tracks, whose trains run through State after State on the railroad track of other companies. It is no uncommon sight to see the cars of half a dozen companies formed into a single train and running from New York to Illinois and Missouri. It is impossible to deal with such property as part of the realty without introducing anomalies and uncertainties of the gravest character. Call cars and engines part of the realty; where shall they be taxed? Real estate is to be taxed at its site. What is the site of a railroad train running from New York to Buffalo in a day? Shall it be taxed in each town where the assessors catch sight of it rushing by at thirty miles an hour? Or if a judgment be docketed in one county on the line, will its lien attach on each car as it is whirled past? And how shall conflicting liens in such cases be marshaled? The difficulties which follow on admitting that rolling-stock can be part of the realty are partly disclosed in *Minnehaha Co. v. St. Paul Co.*, 2 Wall. 609. There the court is supposed to have adjudged that a company owning a long line of railroad and all the rolling-stock upon it may assign particular portions of rolling-stock to particular parts of the road and mortgage such parts of the road with their particular portion of rolling-stock; that whether this had been done was a question of intention, and that in the case before the court it had been done. But upon examining the case it will be found that it was so decided by the District Court in another suit, the decree in which bound the parties then before the court, and concluded them so that the question spoken of could not be adjudicated (p. 636). To this judgment three of the justices dissent, and in expressing their views say, "we agree that the rolling-stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is, in technical language, a fixture to the road, so far as in its nature and use it can be called a fixture. But it is a fixture extending over the entire track of the road. It is not a fixture upon any particular division or portion, but attaches to every part or portion."

While I can see that views like these are accommodated to railroads in the character of mortgagors in their relation with the holders

of their bonds, they cannot be allowed to prevail without introducing inextricable confusion and uncertainty in respect to the laws of taxation and of judgment liens, and great embarrassment in dealing in respect to this class of property. It is vastly better that changes of this sort, if thought to be needed, should be introduced by legislation. In my judgment, the want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling-stock of a railroad. For want of that element, rolling-stock cannot be subjected to the laws regulating taxation and liens on real property. For a statement of all the decided cases to 1869, I refer to Redfield on Railways, vol. 2, p. 507, sec. 235, and notes.

Taking it, then, to be the law, that rolling-stock of a railroad does not become part of the realty so as to pass by a conveyance of the land as part thereof, the next question is whether the law of 1833 requires a mortgage of such property to be filed where no change of possession takes place. That the case falls within the language of the law, is plain. It is universal in its requirement. If this case is to be excepted, it must be either on account of the character of the mortgage or of the property mortgaged, or on account of some provision of the statute law taking away the necessity of filing. [*The court finds no ground for exception by reason of character of mortgage or property mortgaged, and proceeds as follows:*]

Nor does the statute authority, conferred by the act of 1850 to mortgage for certain purposes corporate property and franchises, touch the question. The statute is silent as to the manner in which the power shall be exercised. It might as well be argued that a mortgage filed as one of personal property should, by this filing, operate to give priority as one of land, without being recorded, as to maintain the converse of the proposition. The power is given, but to be effectually exercised the method must be pursued which is appropriate to the kind of property. What is real, must be dealt with as real; what is personal, as personal. This view of the statute is confirmed by the subsequent statute of 1868 (chap. 779, p. 1747), which enacts that mortgages by railroad companies of real and personal property need not be filed as chattel mortgages, if recorded as real estate mortgages, in each county in or through which the road runs. * * *

Judgment reversed.¹

¹ In some states statutory or constitutional provisions have set aside decisions holding rolling-stock realty. See Const. of Illinois.—Ed.

2. SEVERANCE OF A CHATTEL WHICH HAS ONCE BEEN ANNEXED.

a. Severance by owner of land.

(1.) ACTUAL.

(a.) With intent that severance shall be permanent.

HARRIS v. SCOVEL.

85 MICHIGAN, 32. — 1891.

MORSE, J. — This is an action of trover for the conversion of 2,000 fence rails, commenced in Justice's Court, and subsequently appealed to the Circuit Court of Wayne county. Plaintiff recovered judgment in both courts.

The plaintiff, in the partition of real estate, February 6, 1886, became the owner of a piece of land 175 feet wide and 1,601 feet in length. There was then a fence on the land which, before the partition, made a lane. She sold the land to defendant October 3, 1888. The deed of conveyance was a warranty deed in the ordinary form. Having no use for a lane on the premises, about a year before she sold to the defendant the plaintiff took down the fence, and piled up the rails on the premises, intending, as she testifies, to remove them to a farm that she owned in Dearborn. She had drawn 84 posts upon this land, and made some preparation to build a board fence as a division fence between her land and that of others, as, at the time partition was made, it left the premises allotted to her open and unfenced. She testified, against objection, that at the time she made the agreement with defendant to sell him the land she reserved the rails. There was no reservation in the deed. The rails, prior to being piled up by plaintiff, had been in this lane fence nearly fifty years. Plaintiff had no use for the lane after the partition. Defendant testified that plaintiff, when making the agreement to sell, wanted to reserve the rails, but he would not consent to it, and bought the place as it was.

The circuit judge submitted the question to the jury, instructing them that the rails piled upon the premises, and not being in any existing fence at the time of the sale, were personal property, and that, unless they found that the plaintiff sold the rails to the defendant, — agreed that they should go with the land, — she was entitled to recover. The court was right, and the judgment must be affirmed. Rails piled up, under the circumstances that these were, are personal property. There can be no claim that fence rails are of necessity part of the realty unless they are in a fence, and even in such case,

they may remain as personalty, if such be the agreement between the parties interested at the time the fence is built. *Curtis v. Leasia*, 78 Mich. 480.

The contention is made that plaintiff is estopped from claiming these rails, because, following the description by metes and bounds of the premises in her warranty deed to defendant, the deed continues as follows:

"Being the same premises which were assigned by said commissioners in partition to Mary E. Harris, . . . together with all and singular the hereditaments and appurtenances thereunto belonging," etc.

It is argued that she thereby conveyed these rails, because they were a part of the realty when she received it in partition. We do not consider this statement in the deed to be, or to have been intended to be, a covenant that the premises were to be conveyed to defendant in exactly the same condition as to fences, timber, and growing crops as they were when she received them. Such a construction would be absurd. If the rails must pass under the warranty, because of this clause, then she must also account, under such warranty, to the defendant for all the timber standing or crops growing upon the premises when she received them by partition, which she may have removed since that time and before the sale to defendant. The deed cannot, in reason, be so construed.

Affirmed, with costs.

(b.) *Without intent that severance shall be permanent.*

GOODRICH v. JONES.

2 HILL (N. Y.), 142. — 1841.

TROVER by Jones against Goodrich for taking and converting manure and boards, alleged to be the property of Jones.

Jones contracted to sell a farm to Goodrich and later conveyed a part thereof to Goodrich, and the residue, with consent of Goodrich, to one Vose. When the deeds were executed the boards were on Vose's part. They had all been in a fence on that part and some still remained so; though a good many of them were displaced, some let down and and some blown down. After the transfer Goodrich converted to his own use both boards and manure.

Judgment by the justice for Goodrich. On *certiorari* by Jones the Common Pleas reversed this judgment on the ground that the manure was personal property and did not pass to the vendee. Goodrich brings error to this court.

By the court, COWEN, J. — The Common Pleas appear to have taken the same view of Goodrich's or rather Vose's title to the boards, as did the justice. There cannot be a doubt that they were right. Fences are a part of the freehold; and that the materials of which they were composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature. *Vid. Walker v. Sherman*, 20 Wend. 639, 640.

With regard to the manure, we have held that even as between landlord and tenant, it belongs to the former; in other words, it belongs to the farm whereon it is made. This is in respect to the benefit of the farm, and the common course of husbandry. The manure makes a part of the freehold. *Middlebrook v. Corwin*, 15 Wend. 169. Nay, though it be laid up in heaps in the farm-yard. *Lassell v. Reed*, 6 Greenl. 222; *Daniels v. Pond*, 21 Pick. 367. The rule has always been still stronger in favor of the vendee as against vendor, and heir as against executor. In *Kittredge v. Woods*, 3 N. H. Rep. 503, it was accordingly decided, that manure lying in a barn-yard passes to the vendee. *Vid. also Daniels v. Pond*, before cited.

The case of *Kittredge v. Woods*, was very well considered; and the right of the vendee to the manure, whether in heaps or scattered in the barn-yard, vindicated on principle and authority I think quite satisfactorily.

There are several English dicta which conflict with our views of the right to manure, as between landlord and tenant, and that of the court in New Hampshire, as between vendor and vendee. And *Vid. 2 Kent's Com.* 346, note c, 4th ed., and *Carver v. Pierce*, Sty. 66. But they may all be considered as repudiated by *Middlebrook v. Corwin*, *Vide*, the introductory remarks of Mr. Justice Nelson, 15 Wend. 170.

The judgment of the Common Pleas must be reversed; and that of the justice affirmed.

Judgment reversed.

VOORHIS v. FREEMAN.

2 WATTS AND SERGEANT (Pa.), 116. — 1841.

[Reported herein at p. 224.]

(2.) CONSTRUCTIVE SEVERANCE BY SALE, EXCEPTION, MORTGAGE OR AGREEMENT.

(a.) *Sale or exception: by parol or in a deed.*

LEONARD v. CLOUGH.

133 NEW YORK, 292. — 1892.

EARL, Ch. J. — The material facts in this case are as follows: Prior to March 29, 1884, Adaline Clough owned a lot of land in the city of Auburn, upon which there was a small barn, and on that day she conveyed the lot by an ordinary warranty deed to the defendant, Robie Clough, who owned the adjoining lot on the northerly side of the lot thus conveyed. On the 1st day of April, 1884, Robie Clough, by an ordinary warranty deed, conveyed the same lot to her daughter, Mary Gilbert, with the exception of a strip six feet by twelve rods reserved from the northerly side of the lot. About one-third of the barn was upon the strip thus reserved, and thus the dividing line between the two lots after that conveyance ran through the barn, leaving about one-third thereof upon the land of Robie Clough and two-thirds thereof upon the land of Mary Gilbert. At the time of the execution of the deed by Robie Clough to Mrs. Gilbert and immediately thereafter she said to Mrs. Clough and her husband: "Now pa; and ma, the barn is yours; there can nobody interfere with you," and Robie Clough and her husband have ever since been in the occupancy of the barn. On the 28th day of October, 1886, Mrs. Gilbert by an ordinary warranty deed, conveyed the lot to Julia M. Sherwood, and at the time of that conveyance Mrs. Sherwood was informed that the barn belonged to Mrs. Clough and there was a parol reservation of the same. On the 1st day of November, 1886, Mrs. Sherwood, by an ordinary warranty deed, conveyed the lot to Mrs. Eunice Nellis, and at the time of that conveyance Mrs. Nellis was informed by parol that Mrs. Clough owned the barn and that it did not pass. On the 8th day of November, 1888, Mrs. Nellis, by an ordinary warranty deed, conveyed the lot to the plaintiff, and at the time of that conveyance he was informed by parol that the barn belonged to Mrs. Clough and did not pass with the conveyance. After he had purchased the lot, Mrs. Clough informed him that she claimed the barn and intended to move it from the lot, and he told her not to move it. After that the defendants moved the barn from the lot, and then the plaintiff brought this action to recover for the value of so much of the barn as stood upon his lot and claimed to recover treble damages.

The barn was a wooden structure, worth less than \$200, and rested upon four large stones at the corners and smaller stones at other places.

Upon the trial the plaintiff objected to the parol evidence given by the defendants to show the parol reservation of the barn at the times of the several conveyances of the lot. But the court overruled the objections and received the evidence. The court below held that the evidence was competent; that the barn after the conveyance by Mrs. Clough to her daughter became and remained personal property, and that she had a lawful right to remove the same, and judgment was entered upon the verdict in favor of the defendants.)

We think a few plain principles of law require a reversal of this judgment. This barn at the time of the conveyance by Mrs. Clough to Mrs. Gilbert was a part of the realty, and there could be no parol reservation of it. The grantor could no more reserve the barn by parol than she could reserve trees growing upon the land, or a ledge of rocks or a mine or a portion of the soil. As between the grantor and grantee it is very clear that the grantor would not have been permitted to show that the barn was reserved by parol, as that evidence would have contradicted the deed which was absolute in form. If the grantor had removed the barn the grantee could have sued her for trespass and she could not have defended by showing a parol reservation of the barn. If it had been claimed in such a suit that it was part of an oral agreement or reservation that the barn should not pass, that fact could not have been shown, as it would have contradicted the deed. The deed contained covenants of warranty which covered the entire title to the real estate, and the grantor could not in such a suit have shown by parol that any part of the real estate was not covered by the covenants. So, too, if it be claimed that what was said by Mrs. Gilbert to Mrs. Clough immediately after the deed was delivered constituted a parol gift of the barn to her father and mother, the gift could not be operative because the barn at that time was a part of the realty. It had never been severed from the realty and had never been by any acts of the parties or the owners made personal property, and the parol gift of a portion of the real estate could not be upheld without violating the statute of frauds. The one-third of the barn which rested upon the lot owned by Mrs. Clough was and remained realty, and it is impossible to perceive how by mere words the other two-thirds could be converted into personalty. Can trees and other portions of real estate be converted into personalty by a mere parol gift and without severance?

It is clear that after the conveyance from Mrs. Clough to Mrs.

Gilbert the barn remained a part of the realty, and was covered by the deed and the covenants of warranty therein contained; and so the barn passed to each successive purchaser, and no grantor could dispute that the grantee took title to the barn; and thus the title to so much of the barn as stood upon this lot was finally vested in the plaintiff. All the deeds contained covenants of warranty. Those covenants run with the land, and each successive grantee could have the benefit of all the prior covenants. The plaintiff is in privity of estate with Mrs. Clough, and his rights are the same as they would have been if he had been her immediate grantee. He holds under her deed, and in an action by him for a breach of her covenants she could not dispute that the barn was a part of the realty. And in this action against her for removing the barn she cannot dispute that it passed under her deed. His rights are the same as Mrs. Gilbert's would have been if she had disputed Mrs. Clough's right to the barn, and, before she had conveyed, had sued her for removing it.

A careful scrutiny of the cases cited on behalf of the defendants shows that there is absolutely no authority for their contention in a case like this. If at the time of the conveyance of Mrs. Clough the barn had been personal property in the ownership of some other person, and the grantees had been notified of that fact, the title to it would not have passed by the successive conveyances. If this barn had been placed upon the lot by some third person with the consent of the owner and with the understanding that such third person could at any time remove it, it would have remained personal property and would not have passed to a purchaser under any form of conveyance providing such purchaser had notice of the fact. But where the land and the buildings thereon belong to the same person, then the buildings are a part of the real estate and pass with it upon any conveyance thereof. In such a case the grantor can retain title to the buildings only by some reservation in the deed or by ~~some agreement in writing which will answer the requirements of the statute of frauds.~~ Any other rule would be exceedingly dangerous, and would enable a grantor, in derogation of his grant, upon oral evidence, to reserve buildings and trees and other portions of his real estate, and thus, perhaps, defeat the main purpose of the grant. For these views the case of *Noble v. Bosworth*, 19 Pickering, 314, is a very precise authority.

We are, therefore, of opinion that the judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

TYSON *v.* POST.

108 NEW YORK, 217. — 1888.

ANDREWS, J.— The question whether the defendant Post acquired title to the plant and machinery of the marine railways embraced in the plaintiff's mortgage, as security for the \$6,200 paid by him to the plaintiffs at the request of Carroll, to enable the latter to complete the first payment on the contract with the plaintiffs for the purchase of the land, does not depend upon the character of the property, whether real or personal, when placed upon the mortgaged premises. There can be little doubt, however, that the machinery, shafting, rollers and other articles became, as between vendor and vendee, and mortgagor and mortgagee, fixtures and a part of the realty. *McRae v. Central Nat. Bank*, 66 N. Y. 489. But as by agreement, for the purpose of protecting the right of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures, *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 Id. 542, so also, it would seem to follow, that by convention, the owner of land may reimpress the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity and the reconversion does not interfere with the rights of creditors or third persons. The plant and machinery in question were personal property when placed on the land, and the only issue presented is, did the plaintiffs agree with Post that he might take the title to the plant and machinery for his security, free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpressing the property with the character of personalty. In determining this question it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll), and the mortgage back embraced, or was intended to embrace, the plant and machinery. Post was not a party to the instruments and is not concluded by them. The rights of Post depend wholly upon this agreement with the plaintiff, and if they received his money upon the agreement that he should have the plant and machinery, with the right to remove them without restriction as to time, the agreement was valid although by parol, and even if it contradicts the legal import of the mortgage; it being an agreement between different parties, it is not within the rule which forbids parol evidence to contradict a written instrument. The only point of disagreement between the parties relates to a restriction

alleged to have been placed on the time within which Post should exercise the right of removal. The plaintiffs concede that the right of removal was given to Post, but they allege that it was subject to the limitation that the right should be exercised before any proceedings were taken to foreclose the mortgage. The defendant, on the other hand, claims that the right was unrestricted and absolute. The paper executed by the plaintiff on the closing of the transaction contains the restriction claimed by the plaintiffs. But we think the evidence sustains the contention of the defendant, that the paper was not delivered to or accepted by him, and that he had no knowledge of its contents.—The question of fact, therefore, depends upon the other evidence bearing upon the actual agreement. It would not be useful to state the evidence in detail. It is sufficient to say that after a careful examination of the testimony, we have reached the conclusion that the claim of the defendant is most consistent with the conceded facts and is supported by a preponderance of evidence.

The order of the General Term should, therefore, be affirmed, and judgment absolute directed in accordance with the stipulation.

Judgments accordingly.

(b.) *Mortgage: real or chattel.*

TRULL *v.* FULLER.

28 MAINE, 545. — 1848.

TROVER for a shingle machine and clap-board machine.

In April, 1840, Jacob Chamberlain gave plaintiff a mortgage on the machines in question, then being upon his land. This mortgage was not recorded as a real estate mortgage, but was regarded as a mortgage of personalty. In Oct., 1840, one Ingalls obtained a judgment against Chamberlain on which a levy was made on the real estate, including said machines as a part thereof. Defendant claims under the execution and judgment.

TENNEY, J. — It is competent for the owner of real estate to sell upon good and sufficient consideration, fixtures thereon, which would pass under a conveyance of the realty, if they were not excepted. The purchaser would be entitled to sever the same within the time stipulated, or if no time was agreed upon, within a period, which under all the circumstances, and according to the character of the subject of the purchase, would be deemed reasonable. But without a severance, or some indication, actual or constructive, that they

had been sold, they would, as between the purchaser and attaching creditors, or subsequent purchaser of the real estate to which they attached, be considered as still a part of the freehold.

A conveyance of real estate to be valid, excepting against the grantor, his heirs, devisees and those having actual notice, must be by deed acknowledged and recorded in the office of the register of deeds in the county where the estate is situated. Rev. St. c. 91, secs. 1, 24 and 26. These provisions are substantially the same as those of the statutes of 1821, c. 136, sec. 1.

It follows, that to convey that which constitutes a part of the real estate, but which by a severance may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required, unless a severance takes place. Against those who can legally insist upon these formalities, the interest attempted to be sold does not become personal property till there is a severance in fact, or until all that is required to convey real estate is perfected; before its former character can be changed by a sale, the sale must be such, as is necessary to convey property of that character; by a performance of a part only of what is required to pass a title to real estate, it does not cease to be what it was, prior to the first steps taken towards a conveyance.

This construction is not only necessarily inferred from the provisions of the statute, but upon a different construction, the registration law would be but an imperfect security to the grantees of real estate. It is often the case, that the most valuable portion of the estate referred to, in a deed of conveyance, are the buildings and fixtures thereon; and it is understood, that the title which a grantee obtains by a deed of land, is whatever the registry shows to be that of the grantor, unless he has actual notice of a different state of the title. This embraces not only the soil, but whatever is attached thereto, making a part of the freehold. If the owner could, without a severance and without the forms required, for the transfer of real estate, transmit machines in a mill or factory, as personal chattels, when they are so situated as to make a part of the freehold, while held by him, he could in the same manner convey the mill or factory or any buildings standing upon the land described in the deed by which he should subsequently convey the land to another, having no notice of the previous sales of the buildings.

The registry in the town clerk's office of mortgages of personal property, is intended to be of that property which was personal before it was mortgaged; it is unnecessary that the instrument which is the evidence of an absolute sale of chattels should be recorded at all; and it could not have been designed that a mort-

gage of that, which was a part of the realty, before the mortgage was executed, should be recorded in the office of the town clerk, instead of the registry of deeds; nothing short of the latter could be constructive notice to attaching creditors or subsequent purchasers.

The machines which are in controversy, in this suit, have been decided to be a part of the real estate in a former hearing of this case. There is no evidence that they were severed from the freehold, before the levy, under which the defendant claims, or that he was notified of the mortgage to the plaintiff. The mortgage was not recorded in the office of the register of deeds of the county where the land was situated, but it was recorded in the town clerk's office, in the town where the mortgagor resided, before the levy. In every respect, the plaintiff treated the machines as personal chattels, and not as partaking of the character of a part of the real estate on which they were placed. The steps taken were insufficient to give him title as against the creditor, who made the levy upon the real estate.

This view renders it unnecessary to consider whether there was a valid attachment upon the writ in the action, which resulted in the judgment on which the levy was made.

Plaintiff nonsuit.

(3.) WHEN LANDOWNER MAY NOT SEVER FIXTURES.

WITMER'S APPEAL.

45 PENNSYLVANIA STATE, 455. — 1863.

BILL to restrain defendants from selling certain machinery severed by one Henry Thoma from his real estate. It is alleged that the articles were so attached to the realty as to be a part thereof and subject to certain liens thereon, and that Thoma severed the same therefrom in collusion with Witmer and other execution creditors to enable them to levy thereon as chattels, the prior liens being more than the entire premises were worth.

The decree below required the defendants to replace the machinery and enjoined them from selling the same. From this decree Witmer appeals.

WOOWARD, J. — In affirming this decree, we wish to be understood as neither affirming nor denying the broad proposition that equity will, at the suit of a mere judgment-creditor, interpose to restrain such acts of a judgment-debtor, in possession as owner of real estate, as would constitute waste at common law. A judgment-creditor is

not within the protection of our Act of Assembly of 29th March, 1832, Purdon, 1008, until he has brought his debtor's land to liability to sale on a *venditioni exponas*; but whether, independently of the statute, he is entitled to protection in equity before levy and condemnation, is the main question decided by the learned judge below, and the precise question which we do not mean to decide.

On another ground, there is not the least difficulty in affirming the decree. That is the ground of fraud, to which, there can be no question, the equity jurisdiction extends. The case disclosed by the bill and answer is that of a plaintiff with judgments to a large amount against a defendant conceded to be insolvent, and the real estate on which these judgments are liens admitted to be insufficient for their security. It consisted of about forty acres in Union township, Lebanon county, with a steam grist and saw-mill thereon; which mills contained a steam engine, boilers, and other machinery necessarily connected and used together, essential to the working of said mills, and so annexed, fixed, and imbedded in the structure of said mills as to be part of the freehold. The defendant admitted that he detached the steam engine and converted it into personalty, for the purpose of enabling certain of his creditors to levy upon it, and sell it in satisfaction of their claims. He claims to have done this on his own mere motion, and without confederacy with the creditors for whose benefit it was done; but he admits that they levied on it as personalty, and thus appropriated to themselves the benefits of his act, if they did not help him to perform it. They were subsequent judgment-creditors to the plaintiff in this bill, and had no legal right to be first paid out of the debtor's property. If the real estate, before severance of the engine, was inadequate to secure prior lien-creditors, it is manifest the severance, which sensibly impaired the value of the estate, was a great wrong done to them. The learned judge pronounced it a palpable fraud and an illegal preference of creditors. When the principle was pressed upon him, that equity will not ordinarily restrain the sale of chattels, after they have been severed from the freehold, he put himself distinctly on the ground that the acts of Thoma were a fraud in law, intended and calculated to give a later judgment-creditor an advantage over an earlier one, and that all the parties defendants were participants in the fraud, and cannot take advantage of their own wrong."

This was the true ground of the decree, and it is upon this ground we affirm it.

It is due, however, to the very able argument that has been submitted on the part of the plaintiff in error, that we should notice its main positions.

It is maintained, in the first place, that it is the right of an owner of realty, though insolvent, to disannex fixtures and to convert them into personalty, with the view of paying the debt of a *bona fide* creditor.

The abstract right to sever fixtures is, unquestionably, inherent in the full dominion over land which ownership confers, and though an insolvent owner may not assign his property in trust, so as to create a preference among his creditors, yet he may, by encumbrances confessed or by absolute and direct conveyances, prefer one creditor to another. *Worman v. Wolfsberger's Executors*, 7 Harris, 61; *Breading v. Boggs*, 8 Id. 37; *Cowanhoven v. Hart*, 9 Id. 495; *Uhler v. Maulfair*, 11 Id. 381; *Siegel v. Chidsey*, 4 Casey, 279; *York County Bank v. Carter*, 2 Wright, 446.

But after the liens have attached, may he commit waste for the purpose of preferring creditors? This is the real question here. The wrong complained of consisted, not so much in converting the fixtures to the use of subsequent creditors, as in the damage done to the freehold, which was the only security of the prior creditors. When their liens attached, the engine formed part of the freehold, and was bound by them. Although a judgment-creditor has no estate in the lands of his debtor, it cannot be said that he has not an interest which may be defended. He may seize them in execution, and then our statute entitles him to estrepement to stay waste, and on conversion of the land into money, he has a right, secured by another statute, to take the money in preference to the owner or encumbrancers, however meritorious, who are subsequent to himself. In *Gray v. Holdship*, 17 S. & R. 415, it was held that a mechanic's lien against a brewery in which a boiler had been distrained for rent, and severed, would hold the boiler, as against a purchaser of it as a chattel. In *Voorhees v. Freeman*, 2 W. & S. 119, and *Pyle v. Pennock*, Id. 390, the detached rolls of a rolling-mill were held to be part of the freehold, and bound by the lien of a mortgage; and in *Hoskin v. Woodward*, ante, 42, it was held that a mortgage of a machine-shop included a lathe therein erected, and that a sale and removal of the lathe was such a violation of the rights of the mortgagee, that he might follow and recapture it from the purchaser. "He may even treat it as personalty as against the wrongdoer, for the wrongful act cannot be alleged by the wrongdoer as a measure of shelter for himself," said the chief justice, in delivering the opinion of the court.

True, these were cases of mortgage, but in respect to an interest in the land of the debtor, what is the difference in Pennsylvania betwixt a mortgagee and a judgment-creditor?

The mortgagee has no estate in the land, any more than the judg-

ment-creditor. Both have liens upon it, and no more than liens. This was expressly asserted in *Asay v. Hoover*, 5 Barr. 35, and has been substantially, if not expressly, affirmed in many cases. *Rickert v. Madeira*, 1 Rawle, 228; *Edmonson v. Nichols*, 10 Harris, 79; *Wilson v. Shoenberger's Executors*, 7 Casey, 299.

As to estate and interest, then, no substantial difference exists between these two classes of creditors; diversities that do exist, have reference to the extent and duration of the liens and the remedies for enforcing them. If a mortgagee have an interest in the mortgaged premises, which may be defrauded by a severance and sale of a fixture, so, we may conclude, has a judgment-creditor. The fraudulent character of the severance must be determined by the circumstances of each case. So long as the debtor uses his estate for its ordinary purposes, according to its nature, he cannot be impeached for fraudulent waste. As was said in *Hoskin v. Woodward*, he may sell, in the usual way, the "lumber, firewood, coal, ore, fruit, or grain," produced by his land, without violating the rights of lien-creditors. But as to the machinery, which is a constituent part of a mill or manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such a mill or manufactory, the rule is different. { To dismantle such an establishment on the eve of bankruptcy is to destroy its customary use and to defraud lien-creditors, whether by judgment or mortgage. Though not waste under our statute, it is so at common law, and, like other acts contrary to law, is restrainable in equity.

The other argument of the plaintiffs in error is akin to the former, that before a creditor can question the disposition of a debtor's property, he must have completed his title by judgment and execution. This is true as to personal property, and for this reason, that the execution only, and not the judgment, is a lien on chattels. English cases were cited to show that it is true also as to real estate in England, and for precisely the same reason that a judgment there is no lien on land. It is the execution which establishes the legal relation between the creditor and the debtor's land, as here it is the execution which establishes the legal relation between the creditor and the debtor's goods. But our statutes bring judgment-creditors, as the contract of mortgage brings mortgagees, into direct relation with the debtor's lands, and because the law creates the relation, equity will protect it — will protect it not from such reasonable use and enjoyment of the lands by the owner as are usually incident to unencumbered ownership, but will protect it from such wanton and injurious acts as are of the nature of waste.

The decree is affirmed.

b. Severance by stranger or by the forces of nature.

ROGERS v. GILINGER.

30 PENNSYLVANIA STATE, 185. — 1858.

TROVER by Rogers and another, assignees of Beek against Gilinger and others, purchasers at sheriff's sale of realty of Beek, to recover value of ruins of a house alleged to be personal property and to have been converted by defendants. Judgment below for defendant. Plaintiffs sue out this writ of error.

STRONG, J. — The owner of a lot of ground upon which had been erected a large frame building, conveyed the property to assignees in trust for the benefit of creditors. Prior to the assignment, a judgment had been recovered against the assignor, which was a lien upon the real estate conveyed. Two days after the assignment had been made, a storm of wind demolished the building, leaving the foundation and floors nearly entire, but breaking superstructure¹ so that its materials could not be replaced, or used in the construction of a similar building. While in this condition the whole was levied upon and sold under executions founded upon the judgments against the assignor, and the voluntary assignees now claim that the ruins of the frame building did not pass at the sheriff's sale; that they were personal property, and that the purchaser under the *venditioni exponas* having used them, is responsible to the assignees in an action of trover.

It may be premised that the assignees stand precisely in the shoes of Beek, the first owner. If he could not assert against the purchaser at sheriff's sale, supposing no assignment had been made, that the fragments of the building were personalty, neither can they. It may also be remarked that the purchaser under the judgment has obtained all upon which the judgment was a lien.

Now clearly Beek, the first owner, could not have torn down the building, and converted the materials from realty into personalty, without diminishing the security of the judgment, impairing its lien, and wronging the judgment-creditor. Though the statutory writ of estrepement might not have been demandable until after levy and condemnation of the property, yet equity would have enjoined against any such wrong. The building, as such, constituted a large part of the creditor's security, and his lien embraced every board and rafter which made a constituent part of the structure. Nor

¹Superstructure was "severed from its supports and broken up." — ED.

were the rights of the assignees any more extensive. They were mere volunteers. They took the property as land only, encumbered as a whole, and in every part, by the lien of the judgment. Their title was in one sense subordinate to the right of the judgment creditor to take all which passed to them in satisfaction of his debt.

In *Herlakenden's Case*, 4 Rep. 62a, it was resolved that if a lessee pulls down a house, the lessor may take the timber as a thing which was parcel of his inheritance. So in *Bowles' Case*, 11 Rep. 81b, it was held that if the lessee cut down timber, the lessor may take it. Though severed, it is a parcel of the inheritance.

Nor will the tortious act of a stranger be allowed to injure the reversion. 2 M. & S. 494; 1 Term. Rep. 55; *Garth v. Sir John Cotton*, 1 Vesey, Sr. 524. These principles are reasserted in *Shult v. Barker*, 12 S. & R. 272; 7 Conn. 232; 3 Wendell, 104. Nor will a severance by the owner of that which was a part of the realty, unless the severance be with the intent to change the character of the thing severed, and convert it into personalty, prevent its passing with the land to a grantee. Thus it was held in *Goodrich v. Jones*, 2 Hill, 142, that fencing materials on a farm which have been used as part of the fences, but are temporarily detached without any intent to divert them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser.

Is the rule different when the severance occurs not by a tortious act, nor by a rightful exercise of proprietorship, without any intent to divert the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice no one (4 Co. 86b), yet the maxim is not true if a tempest be permitted to take away the security of a lien-creditor, and transfer that which was his to the debtor or the debtor's assignees. If trees are prostrated "*per vim venti*," they belong to the owner of the inheritance, not to the lessee. *Herlakenden's Case*, *ut supra*. He takes them as a part of the realty. True, he may elect to consider them as personalty, and this he does when he brings trover for their conversion, but until such election they belong to him as a parcel of the inheritance. If a tenant hold "without impeachment of waste," the property in the timber is in him; but if there be no such clause in his lease, and he remove from the land trees blown down, such removal is waste. That could not, however, be, unless, notwithstanding the severance, they continue part of the realty, for waste is an injury to the realty.

I am aware that it is said to have been held that if an apple tree be blown down, and the tenant cut it, it is no waste. 2 Rolle Abr. 820. That may well be, for the falling of the tree is through the

act of God, not of the tenant, and the cutting of the fallen timber is but an exercise of the tenant's right to estovers; but if he remove from the land fallen timber, it has been ruled to be waste.

What then is the criterion by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be that which was real shall continue real until the owner of the freehold shall by his election give it a different character. In *Shepherd's Touchstone* 90, it is laid down that, "that which is parcel or of the essence of the thing, although at the time of the grant it be actually severed from it, does pass by a grant of the thing itself, and therefore by the grant of a mill, the mill-stone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof although at the time of the grant they be actually severed from it."

It must be admitted that the case before us is one almost of the first impression. Very little assistance can be derived from past judicial decision. There is supposed to be some analogy between the character of these fragments of the buildings and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested. Severance had never been contemplated. One of the best definitions of fixtures is that found in *Shean v. Rickie*, 5 Mees. & W. 171. They are those personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, or his personal representatives, though the property in the freehold may have passed to other persons. Yet even fixtures, which but imperfectly partake of the character of realty, go to the purchaser, at sheriff's sale of the land, though they have been severed tortiously, or by the act of God. Thus, where a copper kettle had been detached from its site in a brewery by one not the owner, had remained detached for a long period, and while thus severed, had been pledged by the personal representatives of the owner, it was still held to have passed by a sheriff's sale of the brewery under a mechanic's lien, filed before the severance. *Gray v. Holdship*, 17 S. & R. 413.

Without, however, discussing the question further, it will be perceived that in our opinion the broken materials of the fallen building

must be considered as a parcel of the realty as between the assignees and the purchaser at sheriff's sale, and consequently that they passed by the sale to the purchaser.¹

The judgment is affirmed.

c. Sale of fixtures on execution.

RICE *v.* ADAMS.

4 HARRINGTON (DEL.), 332. — 1848.

HARRINGTON, J. — The property levied on by this execution, so far as the present motion appears, consists of real fixtures placed upon the premises by the owner of the property, and by him attached to the freehold. They became by his act a part of the foundry, not for a temporary purpose, but as a fixed establishment; and, as such, were used by the defendants in copartnership, the owner of the premises being one of the partners. Having thus acquired the character of real property by such a union and connection with the realty as unquestionably made them, in his hands, a part of the freehold, subject to real estate liens, and not liable to be seized as chattels, this character could not be changed otherwise than by actual severance; nor could they be transferred before severance except as a part of the realty, and by forms of conveyance suited to real property. The parol sale, therefore, to Adams, Betts & Hodgson, evidenced by the written memorandum without date, even if made before the entry of Orrick & Campbell's judgment, would not prevent the lien of that judgment, nor subject these fixtures to seizure on plaintiff's execution as the personal chattels of the defendants in preference to the judgment of Orrick & Campbell. We are, therefore, of opinion that the rule in this case should be made absolute; and we do not consider this as in any degree conflicting with adjudged cases in relation to trade fixtures set up by tenants, for their own use and convenience, to facilitate the carrying on their business.²

¹ See also *Goodrich v. Jones*, *supra*, p. 255. — ED.

² Adams was owner of land and annexed the engine, etc. He then transferred the machinery, but not the land, to the firm of which he was a member. The Orrick & Campbell judgment was against the landowner. — ED.

3. THE INTENTION OF THE PARTY ANNEXING AS BEARING ON THE QUESTION OF REMOVABILITY.

a. Relative importance of this test.

McREA *v.* CENTRAL NATIONAL BANK OF TROY.

66 NEW YORK, 489. — 1876.

ACTION by plaintiff as real estate mortgagee against defendants, who are judgment-creditors of the mortgagor, and the sheriff holding executions on their judgments, to restrain them from selling on such executions certain machinery which plaintiff claims to be part of the realty. The further facts sufficiently appear in the opinion. The plaintiff succeeded in the trial court and on an appeal to the General Term. Defendant appeals to this court.

RAPALLO, J. — The court found as facts that the articles of machinery described in the complaint were fixtures and part of the freehold, and as facts showing that they were fixtures: First, that the building in which the machinery was, was erected for the purpose of a twine factory, and machinery specially adapted to it and used with it; second, that the original intention of this annexation was to make this machinery permanently a part of the building and the freehold; and, third, that the mortgage under which the plaintiff claims title was to secure to him the payment of the purchase money of the premises described therein, and was taken by him and given to him with the intention of holding the machinery in question as part of the realty, and not as personal property.

In supplemental findings made at the request of the defendants and inserted in the case on settlement, the court found, as further facts, that each of the machines, except two, was a machine complete in itself, which received no support from the walls, ceilings or roof of the building, and would operate, with the proper power applied to it, wherever it was placed, and that all the machines could be taken apart without injury to themselves or to the building in which they were placed, except such injury as would result from the loosening of the fastenings, and could, without injury, be put together again and operated in any place where there was sufficient room for them to stand and where the necessary power could be applied. That none of the machines, except the two iron softeners, were attached to the building except as follows: Some of them were fastened to the floor at the end where the belt went on, by angle bolts made for the purpose, which held the feet of the machines to the floor; these bolts went down through the floor, and were held

by nuts screwed on below the floor. Others were held by nails of similar construction; others by common nails, and one or two by cleats of wood, nailed down on each side of the machine; they were also attached to the gearing. That the bolts, nails and cleats were so placed for the purpose of steadying the machines and preventing them from being moved or lifted up by the action of the belt. But to this finding the court added that that was not the only purpose.

On these findings, assuming them to be sustained by evidence, I think it clear on all the authorities cited, that the conclusion that, as between the present parties, the machines were fixtures and part of the freehold was correct. The rule declared by statute (2 R. S. 83, secs. 6 and 7), as between the personal representatives and the heirs of a deceased party, is not controlling in cases between vendor and vendee. *Potter v. Cromwell*, 40 N. Y. 287; *Voorhees v. McGinnis*, 48 Id. 278; *House v. House*, 10 Paige, 158. That enactment makes the mode of annexation the test whether the property retains its character of personalty, and gives to the executor or administrator things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support. But, as between vendor and vendee, the mode of annexation is not the controlling test. The purpose of the annexation, and the intent with which it was made, is in such cases the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it. If the article is attached for temporary use with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold, he may. *Crane v. Bingham*, 3 Stockton, N. J. 29; *Potter v. Cromwell*, 40 N. Y. 296, 297. The mode of annexation may, it is true, in the absence of other proof of intent, be controlling. It may be in itself so inseparable and permanent as to render the article necessarily a part of the realty, and in case of less thorough annexation, the mode of attachment may afford convincing evidence that the intention was that the attachment should be permanent; as, for instance, where the building is constructed expressly to receive the machine or other articles, and it could not be removed without material injury to the building, or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. These are tests which have been frequently applied in determining whether the annexation was intended to be temporary or permanent, but they are not the only

ones, nor is it indispensable that any of these conditions should exist. In the case of *Potter v. Cromwell*, 40 N. Y. 287, before referred to, this court, after a full examination of the numerous authorities, gave its approval to the criterion of a fixture as stated in *Teaff v. Hewitt*, 1 McCook, 511, viz., the union of three requisites. First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold. By the application of that criterion this court, with only one dissenting voice, decided that a portable grist-mill for grinding flour, placed in a building which had been used as a tannery, and was provided with steam power previously placed in the building to grind bark for the tannery, became part of the freehold, as between a judgment-creditor and a purchaser of the realty. It was found by the referee that the grist-mill was placed there by the owner of the realty for the purpose of being used as a permanent structure for a custom grist-mill for the neighborhood, and on that ground it was held by this court to have become part of the realty, notwithstanding the fact that it was not attached to the walls of the building, but annexed, as in the present case, only to the floor. It had been built elsewhere, and was constructed in such a manner as to be readily taken apart without injury to itself or to the building, and moved from place to place. There was a very slight difference in the mode of annexation from that in the present case, to wit: That to support the floor, upright posts were placed under it resting on the cellar floor, while in the present case the building was constructed expressly for the purpose of receiving machinery of the description which was placed there, and of sufficient strength to render additional support unnecessary, although, in the present case, some of the machines weighed three or four times as much as the portable grist-mill. The case of *Murdock v. Gifford*, 18 N. Y. 28, which is mainly relied upon by the appellant here, was distinguished by showing that, in that case, not only was there an entire absence of any finding that the looms were placed in the building and attached thereto for the purpose of becoming a permanent part of it, but that that fact was expressly negatived by the finding that the attachment was for the sole purpose of keeping them steady in their places — a fact which the court, in the present case, although requested expressly, refused to find. Numerous other cases are referred to, where, notwithstanding similar attachments, the property was held to be personalty; but it appears that in all these cases the object of the attachment excluded the

intention of rendering them permanent fixtures. The object, and not the method of the attachment, appears to be considered the controlling feature. "The principles applicable as between vendor and purchaser must vary with the varying circumstances of each case. The question of intention enters into and makes an element of each case. The circumstances are to be taken into account to show whether the erections were made for the permanent improvement of the freehold or for the temporary purpose of trade." *Farrar v. Chauffetete*, 5 Denio, 527. These principles are recognized in the case of *Voorhees v. McGinnis*, 48 N. Y. 278. The annexation in that case, it is true, was of a much more complete character than in the present case, or in that of *Potter v. Cromwell*, 40 N. Y. 287, but the intention of the parties in making the annexation is recognized as one of the tests, and it is conceded that the circumstances that the machinery may or may not be removed without injury to the building or to itself is not now deemed to be controlling, and Washburn on Real Property, vol. 1, p. 8, is cited, in which the author says: "It may be stated that whether a thing which may be a fixture becomes a part of the realty by annexing it depends, as a general proposition, upon the intention with which it was done."

That the machinery in question was adapted to the use for which the building was constructed is conceded, and, without further pursuing the authorities, I will briefly refer to those cited in the opinion of my learned brother, Allen, J., in support of the proposition that these were not fixtures. *Hellawell v. Eastwood*, 6 Exch. W., H. & G., 295, was a case between landlord and tenant. The alleged fixtures, presumably, were put in by the tenant, as they were distrained for rent. The object and purpose of the annexation was stated by the court not to have been to improve the inheritance, but merely to render the machines steadier and more capable of use as chattels.

Walker v. Sherman, 20 Wend. 636, was partition, and although the machines in dispute had been for many years in the building, the difficulty was that they were not affixed or fastened to the building in any manner, and the commissioners treated them as personalty; but other machinery in the same factory, which was fastened to the building, was treated as realty. (See pp. 637, 638.) This case holds, in respect to machinery, that the two characteristics of adaptation to the enjoyment of the realty and annexation to it must concur, but that where the former characteristic is present, the slightest fastening will be sufficient to constitute annexation. (See pp. 651, 653, 655.) It is enough that it is permanently or habitually attached. In *Vanderpoel v. Van Allen*, 10 Barb. 157, the machines merely stood

upon the floor, without being attached in any way, except by the belts which were used for motion and not for fastening, except as to some of the pieces, in respect to which cleats were used to make them stand level, and there was no evidence of any intention to make them part of the freehold, but all the facts tended to the contrary. *Murdock v. Gifford*, 18 N. Y. 28, has already been referred to, and only establishes that the mode of attachment shown in that case was not of itself sufficient to make the machines fixtures, where the purpose of the attachment was solely for the more convenient use of them as chattels, and in the absence of any intention that it should be permanent.

The finding of the court that, in the present case, the original intention of the annexation was to make the machinery permanently a part of the building is not, I think, unsupported by evidence. The building was proved to have been erected especially for the purpose of a twine factory, and with reference to holding this description of machinery. The machines were of great weight, many of them weighing from one to four tons. They were all permanently fastened to the floor of the building, and it is conceded that they were adapted to the purposes for which the building was erected. The plaintiff testified that they were placed there for permanent use. The fair interpretation of this evidence is that they were placed there for permanent use in that building; they constituted part of the twine factory, and about two-fifths in value of the entire establishment; and it appeared in evidence that although they were capable of removal they would be of less value if taken out and sold than if they remained where they were, as part of the factory. From this evidence the court was, I think, justified in finding that they were intended as a permanent part of the structure, quite as much so as the portable grist-mill in the case of *Potter v. Cromwell*, 40 N. Y. 287. The dealings between the plaintiff and his vendee, also showed that they were regarded as fixtures which passed with the land; and although, if the property had in its own nature a determinate legal character, either as realty or personalty, the manner in which the parties treated it would not change that character; yet when, as in this case, the character of the property is not so fixed, but depends upon the intention with which it was annexed, the conduct of the party who annexed it has an important bearing, as throwing light upon that intention. He evidently understood that it was part of the realty, which he could not have done if he had placed it on the premises for temporary use merely, and with the intention that it should remain personalty. When contracting for the sale of the property, he described it as the real estate situate in Johnsville, viz.,

the twine factory and flax-mill, etc., etc., with the machinery, etc., and sold the whole for a gross sum of \$28,000. By this contract he includes the machinery under the general head of real estate, and in fulfillment of that contract he tendered a conveyance describing the land only, and took back a mortgage for \$21,000 of the purchase-money, describing the land only, although the land and buildings, without the machinery, were worth a much less sum than the amount of the mortgage. The fact that at the request of the purchaser he afterwards executed a supplementary bill of sale is not of much significance. It is found by the court that there were some tools and machinery which were loose and are not claimed in the action. The bill of sale also includes fixtures, which necessarily passed with the deed. It was not a necessary instrument, as whatever was personally would have passed by delivery; but it was probably given because it conformed to the intention of the plaintiff and was a simple confirmation of what he believed he had already done, and was requested by the purchaser or his adviser.

After it has been so repeatedly declared by the courts that the character of articles of the description now in controversy attached to a building, whether they are to be regarded as realty or personalty, is to be determined by the intent of the party attaching them, it would be peculiarly unjust to depart from that doctrine in a case like the present, where the owner of the land and buildings, who himself made the annexation, and necessarily knows the intent with which it was made, afterwards sells the whole establishment and takes for the purchase-money a mortgage manifestly intended to cover all the property sold, but which would be a totally inadequate security if the property which he had annexed were not treated as a part of the realty. There can be no equity in such a case in favor of a mere judgment-creditor of the vendee as against the mortgagee.

On the whole case I think the findings of fact are sustained by evidence, and that the decision of the court below should be affirmed, with costs.

FOLGER, J.—I think that, either from the evidence or the findings, the grantor and mortgagee placed the machinery in the building for a permanent purpose and for the better enjoyment of his estate. *Walmsley v. Milne*, 7 C. B. (N. S.) *115; that there did concur actual annexation of the machinery; applicability to the use to which that part of the real estate was appropriated, with which it was connected; and an intention of making the annexation so as to make a permanent accession to the freehold. *Hoyle v. P. and M. Railroad*, 54 N. Y. 314, 324.

I therefore concur in the opinion of RAPPALO, J.

ALLEN, J. (dissenting).—The question presented by this appeal is, whether the plaintiff, as mortgagee of real property, or the defendants, as execution creditors of the mortgagor have the better legal right to hold the machinery mentioned in the pleadings as security for their respective debts. The property in controversy is in its nature personal, subject to a levy and sale upon execution, and would not ordinarily pass under a conveyance or mortgage of realty. It can only be classed with, and treated as, a part of the realty upon which it may be or in connection with which it is used by annexation thereto, either actual or constructive. It belongs to that class of property which, under some circumstances, may be annexed to real property and become what is known in the law as a fixture, so as to pass under a conveyance of the lands and as part of them, in conformity with the maxim, "*Quicquid plantatur solo, solo cedit.*" Whether a chattel has, by annexation, become a part of the realty depends upon circumstances, and very much upon the intent of the party by whom the annexation has been made, as such intent can be gathered from what is said and done at the time—the character of the chattel and the purposes for and the manner in which the annexation is made. If the chattel is not a necessary accessory to the building, and is placed in position merely for the purpose of using it for manufacturing or trading purposes, and not with a view to the permanent benefit of the realty, it will not, ordinarily, become a part of the realty. Where the object of affixing the chattel to the freehold is for its more convenient use as a chattel, as shown by its nature and the use to which it is put, it will retain the character which it had before it was annexed. The law of fixtures has been the subject of much discussion in the courts and by elementary writers, and any attempt to reconcile the views of judges or commentators, or to deduce from them any fixed or certain standard or rule by which to determine whether, in any given case, a chattel has lost its character as such and become a part of the freehold, would be vain. So a discussion at any length of the general principles of the law of fixtures, or a review of the authorities, would not be profitable, in view of all that has been written upon the subject. We are relieved from the necessity of a consideration of the general rules applicable to this branch of the law by adjudications heretofore made, which have, in this State at least, become a rule of property, and cannot properly be disregarded by us, and which are decisive of the questions involved in this appeal. The chattels and machinery, the subject of the controversy in this action, were not so annexed to the building as to become a part of it, or necessary to its support, but they were susceptible of removal without material injury to themselves or

the realty. The only fastenings were such as were required to keep the machinery steady while in operation. The fastenings were only for that purpose, and the only connection with the motive power and other permanent machinery was by bands and straps, by means of which it was operated. It was not a part of, or necessary to, the stationary and permanent machinery. It was not peculiarly fitted for or adapted to, the building in which it was, but was equally capable of being used in any other building having strength to support it, and motive power for its operation. It was of the same general character of machinery as was used for the same purpose elsewhere, and its value was not impaired by removal.

The mortgage under which the plaintiff claims, follows the grant by the plaintiff to the mortgagor and is of the realty described by metes and bounds without mention of the machinery. The evidence that the purchase by the mortgagor of the plaintiff was of the land together with the "machinery, tools, and fixtures" belonging to the vendor, for a sum in gross, does not tend to prove that the machinery, any more than the tools, was a part of the realty. On the contrary, the fact that both are mentioned independently and separately is some indication that it was supposed neither would be included in the sale of the lands without express mention. Aside from the evidence admitted under objection of the purpose and intent of the plaintiff to take security upon the machinery, fixtures and tools, as well as the land, which we think was incompetent, there was no evidence that the plaintiff at the time he put the machinery in the mill had any intent other than to use it for the purpose to which it was adapted so long as it should be convenient or profitable, or that he intended to connect it permanently with the realty with a view to enhance its value. In other words, there was no evidence to justify a finding that the machinery was put in the building except for use as a chattel. If the property in controversy was not described in the mortgage or covered by it as part of the property mentioned and described therein, the purpose and intent of the mortgagee could not vary the legal effect of that instrument, or make it operative upon property not within its terms. The case is clearly within the principle, and cannot be distinguished from several well considered cases, in which the question has arisen between owners or mortgagees of the freehold and creditors. In *Hellawell v. Eastwood*, 6 Exch. W. H. & G. 294, it was adjudged, that machinery for the purpose of manufacture (*i. e.*, mules used for spinning cotton), fixed by means of screws, some into the wooden floors of a cotton-mill and some by being sunk into the stone flooring and secured by molten lead, were distrainable for rent. Fixtures are not the

subjects of a distress for rent. In *Walker v. Sherman*, 20 Wend. 636, machinery in a woolen factory, consisting of carding machines, picking machines, looms, etc., although used for eleven years or more, and passed from one owner of the factory to another as parts of the factory, were treated as personal property and as not belonging to the realty by commissioners in partition, and their decision and action was affirmed by the Supreme Court upon an elaborate review of all the authorities bearing upon the question. In *Vanderpoel v. Van Allen*, 10 Barb. 157, the question was between mortgagees of the realty and judgment-creditors of the mortgagors who had levied upon the machinery in a cotton factory and other mills, being the premises mortgaged to the plaintiffs. The machinery in controversy there was the same as that in controversy here, and was placed and fastened to the building substantially in the same manner. It was held by Judge Brown, that the property was not part of the realty or within the denomination of fixtures, and that the judgment-creditors were entitled to a decree dissolving the injunction and establishing their right to the property in dispute. *Murdock v. Gifford*, 18 N. Y. 28, was also a controversy between mortgagees and creditors, involving the same question, and it received the same solution as in *Vanderpoel v. Van Allen*, *supra*. Cases have been since decided in this court distinguished by their circumstances from those referred to, and the circumstances which have been deemed sufficient to take them out of the principles adjudged in *Murdock v. Gifford*, are pointed out by the judges pronouncing judgment; but in no case that has come under my observation has the authority of the case last mentioned been questioned. Many other cases in this State, in other States and England, coincide with the rule as stated in *Murdock v. Gifford*. There is nothing in this case to distinguish it from that and we are not at liberty, by reason of any supposed equities in favor of either party, to unsettle the law so well established in this State by taking distinctions immaterial and without substance for the purpose of arriving at a different result. These machines were not, as said before, fitted to this building and insusceptible of use elsewhere, neither were they accessories necessary to the enjoyment and use of the building in which they were. The learned judge erred in holding that the several articles were fixtures, and the facts found by him in support of such findings, so far as they were authorized by the evidence were entirely insufficient to make them a part of the freehold.

For affirmance: CHURCH, Ch. J., RAPALLO, FOLGER and MILLER, JJ. For reversal: ALLEN, ANDREWS and EARL, JJ.¹

¹ For citations and discussions of this case, in cases reported herein, see pp. 235 and 260.—ED.

b. The actual intent of the annexer.

SNEDEKER *v.* WARRING.

12 NEW YORK, 170. — 1854.

[*Reported herein at p. 231.*]

McKEAGE *v.* HANOVER FIRE INSURANCE CO.

81 NEW YORK, 38. — 1880

[*Reported herein at p. 245.*]

c. The "reasonably presumable intent" in annexing, as inferred from the surrounding circumstances.

(1.) WHAT IS MEANT BY "REASONABLY PRESUMABLE INTENT."

THE STATE SAVINGS BANK *v.* KERCHEVAL.

65 MISSOURI, 682. — 1877.

SUIT to enjoin the removal of a frame building.

Defendant Kercheval conveyed his lands to a trustee to secure a debt due plaintiff. Thereafter he employed defendant, Allen, to erect an office building on the premises. This structure was a temporary affair, built with intention that it should be removed. Kercheval becoming insolvent, transferred it, in settlement of account, to Allen, who is now about to remove it.

The court below granted a perpetual injunction. Defendant appeals.

HENRY, J. — The questions for consideration here are: 1st. Was the building, which it is alleged the defendants were about to remove, personal property?

2d. If not, would an action for damages have afforded an adequate remedy.

It must be admitted that the law in regard to fixtures is in a somewhat chaotic state. It is frequently difficult to determine, upon principle, whether an article of property is a fixture or not; there is a most embarrassing conflict in the adjudged cases. On grounds of public policy, to encourage trade, manufactures and agriculture, many things are regarded as chattels in controversies between landlords and tenants, which would unquestionably be held as fixtures as

between vendor and vendee; and the same rule prevails between mortgagor and mortgagee, as between grantor and grantee. In determining whether a building is part of and passes with the land, a good deal depends upon the object of its erection, the use for which it was designed. The intention of the party making the improvement, ultimately to remove it from the premises, will not, by any means, be a controlling fact. One may erect a brick or a stone house, with an intention, after brief occupancy, to tear it down and build another on the same spot, but that intention would not make the building a chattel. "The destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor, whether oral or written." *Snedeker v. Warring*, 2 Kernan, 178. In *Goff v. O'Conner*, 16 Ill. 422, the court said: "Houses in common intentment of the law, are not fixtures, but part of the land. . . . This does not depend, in the case of houses, so much upon the particular mode of attaching or fixing, and connecting them with the land, upon which they stand or rest, as upon the uses and purposes for which they were erected and designed." In *Cole v. Stewart*, 11 Cush. 182, the building was intended by the owner to be temporary, and was built with a view to ultimate removal. In a contest between the mortgagee, whose mortgage was executed subsequent to the erection of the house, and a purchaser of the building from the mortgagor, it was held to be a fixture. In the light of these cases, and many others which we have examined, we do not regard the fact, that the building in question was erected as a temporary building, and with an intention of ultimate removal, at all decisive as to whether it became a part of the realty or not.

The manner in which a building is placed upon land, whether upon wooden posts, or a rock, or brick foundation, does not determine its character. As was said by Parker, J., in *Snedeker v. Warring*, above cited: "A thing may be as firmly fixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection." In *Teaff v. Hewett*, 1 Ohio St. 511, it was held that: "The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose and use for which the annexation has been made," is a controlling circumstance in determining whether the structure is to be regarded as a fixture or not. In the case of *Benjamin F. Butler, Adm. v. Page*, 7 Met. 42, Shaw, C. J., delivering

the opinion of the court, said: "All buildings erected and fixtures placed on mortgaged premises by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will, therefore, inure to the benefit of the mortgagee so far as they increase his security for his debt, and to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor." In controversies between mortgagor and mortgagee the rule is more favorable to the mortgagee in relation to fixtures than that which is applied as between landlord and tenant, and, applying the principles announced in the cases which we have cited, which we believe to be sound and salutary, we must hold that the building in question was a part of the realty, and that neither the mortgagor, nor the purchaser from him has a right to remove it. It becomes a part of the plaintiff's security for its debt.

The remaining question is, did the facts alleged in the petition warrant the court in restraining the parties by injunction from removing the building. It is not essential that the injury threatened shall be irreparable, to warrant a resort to the remedy by injunction. Our statute provides, sec. 24, page 1032, Wag. Stat., that "the remedy by writ of injunction shall exist in all cases, when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court, an adequate remedy cannot be afforded by an action for damages." Would an action for damages here have afforded an adequate remedy, is the question, and not whether the threatened injury would have been irreparable. The building was erected to be used in connection with, and as an office, for the mill. It was erected to supply the place of an office formerly used, which had been appropriated to another purpose. Its immediate and constant use was of importance to the milling business. The value of the building which a jury might have given as damages would not have been sufficient compensation to the owner for its removal. The defendant Allen may have been solvent, amply able to respond in damages for his trespass, but it does not therefore follow that he could not be restrained from severing from the land a house which belonged, not to him, but to the owner of the land. If a man of large fortune, so wealthy as to place beyond a doubt his ability to pay any damages which might be assessed to me for his trespass, should determine and threaten to tear down my dwelling over my head, will it be said that a court of equity would be powerless to restrain him from executing his threats and that I would have no remedy but to suffer the wrong and sue for damages? There are inconveniences and per-

plexities to which one may be subjected by a trespass such as we are considering, for which a jury could not, under the rules of law, fully compensate him, and we think the provision of our statute broad enough, however the law may have been before its enactment, to authorize a resort to injunction proceedings in such cases. The judgment of the Circuit Court is affirmed.

Affirmed.

(2.) HOW THE "REASONABLY PRESUMABLE INTENT" IN ANNEXING IS ASCERTAINED.

(a.) *From the nature of the chattel annexed.*¹

(b.) *From the mode and degree of annexation.*²

(c.) *From the apparent appropriation of the chattel to the use or purpose of that part of the realty with which it is connected.*³

(d.) *From the relation of the annexor to the chattel and to the land.*⁴

4. THE APPARENT APPROPRIATION OF THE CHATTEL TO THE USE OR PURPOSE OF THAT PART OF THE REALTY WITH WHICH IT IS CONNECTED. FIXTURES BY DESTINATION.

VOORHIS *v.* FREEMAN.

2 WATTS AND SERGEANT (PA.), 116. — 1841.

[Reported herein at p. 224.]⁵

5. THE RELATION OF THE ANNEXOR TO THE CHATTEL AND THE LAND AS BEARING ON THE "REASONABLY PRESUMABLE INTENT" IN ANNEXING.

A. The chattel-owner has no interest in the land.

a. The chattel-owner is annexor.

(1.) HE ANNEXES WITHOUT LICENSE OF, OR AGREEMENT WITH, LANDOWNER.

RITCHMYER *v.* MORSS.

3 KEYES (N. Y.), 349. — 1867.

DAVIES, Ch. J. — The plaintiff claims in this action to recover the value of a certain building located upon the lands of the defendants,

¹ See *supra et infra, passim.*

³ See p. 283, *infra.*

² See p. 234, *supra.*

⁴ See p. 283, *infra.*

⁵ See also *Snedeker v. Warring*, p. 231, *supra*, and *Farrar v. Stackpole*, p. 227, *supra*, and compare *McKeage v. Insurance Co.*, p. 245, *supra*, and *Hoyle v. R. R. Co.*, p. 248, *supra*. — ED.

which he claims as owner, and which was taken possession of and removed by defendants. The building was erected by one Vroman in the fall of 1849, at which time the land upon which it was erected was owned by Alonzo C. Paige and others. It was a good frame building, as described by the plaintiff, fifteen by sixteen feet, ten feet posts, nicely inclosed with pine siding, pine shingles, a good cornice on one end, painted white, with two coats; one door outside and one inside; two windows, one in the front end and one in the side, and a window in the back end; there was a partition in it lathed and plastered, counter and shelves in the front part of the building. The building stood on a foundation of loose stones, with a back chimney in it. The plaintiff purchased it on the 21st of November, 1859, having previously occupied it for six years. The defendants removed it in December, 1860. The plaintiff testified he did not know by whose authority the shop was built there; did not know for whose benefit Vroman built it; he did not know that Vroman occupied as tenant of anybody when he erected the building.

The defendants then proved that on the 16th day of June, 1860, they entered into a written contract with Paige and Potter, then the owners of the land upon which said building was located, and agreed to pay therefor the sum of \$2,500, on the execution of a good and sufficient deed therefor, and that the defendants took possession of said land under said contract. That they were in possession under that contract at the time the shop was removed; that there were several other buildings on this lot at the time they bought, and the defendants took possession of the whole lot and all the buildings, including this shop; that the defendants subsequently received a deed for said premises pursuant to the terms of their contract; that the defendants have occupied all the premises since the contract to them.

The judge charged the jury that as matter of law the plaintiff was entitled to recover, to which charge the counsel for the defendants then and there duly excepted. The judge further charged that the only question for the jury to consider was the question of damages, and to this the defendants also excepted.

I think the learned judge at the circuit was in error in holding as a matter of law that upon this testimony the plaintiff was entitled to recover. That testimony showed, in brief, that the plaintiff had become the purchaser of a building erected upon land owned by the defendants, and that the defendants had taken possession of the building and removed it, as they clearly had a right to do if it was attached to the freehold and passed under the contract and conveyance to them. That it did so pass is established by authority. *Mott*

v. *Palmer*, 1 N. Y. 564. In that case Judge Bronson said: "The word 'land' includes not only the soil but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences. This is but common learning, and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and fences than there is that it will carry growing trees and herbage upon or mines and quarries in the ground."

The cases relied upon to take this case out of this well-recognized and firmly established rule of law do not apply to the facts as proven on the trial of this action. In the first place, it was not established that this building was erected upon any agreement between Vroman and the then owners of the fee of the land that it was to be considered strictly a personal chattel. Second, it was not proven that the building was erected by a tenant for the purposes of his trade and business, or that the relation of landlord and tenant ever existed between Vroman and the defendant's grantors, or between them and the plaintiff. The first proposition was necessary to establish to make applicable the doctrine of the case of *Smith v. Benson*, 1 Hill, 176. In that case, Cowen, J., said: "There both parties agreed to consider it (the building in question) as in a state of severance from the freehold, and no one had ever thought of its being so fixed as to be irremovable. *Prima facie*, such a building would be a fixture and irremovable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them by an express agreement. They have in effect stipulated that the placing this building on the ground should work nothing more toward changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainder-man. And surely the parties may, by express agreement, do the same thing and even more." Equally inapplicable is the doctrine of *Ombony v. Jones (ubi supra)*, as the second proposition above stated was not established by proof.

The rule to be gathered from the cases is there stated thus by Judge Grover: "That the tenant may remove during his term all erections made by him for the purpose of trade that can be removed without injury to the land or something attached thereto." But in the case at bar no tenant sought to exercise any such right during his term. There is an utter failure to establish the first foundation for invoking the aid of such a principle, viz.. that the relation of

tenant at any time existed. When that fact was proven, it then would have become needful to show that the building in question was erected by the tenant for the purposes of trade or his business, and that he exercised his right of removal during his term.

Upon the facts proven on this trial, there can be no doubt that the defendants were the owners of the building in controversy, and it follows that the plaintiff is not entitled to recover its value. The learned judge erred in charging the jury that as a matter of law upon the facts proven, the plaintiff was entitled to recover. The judgment must be reversed and a new trial ordered, costs to abide the event.¹

(2.) CHATTEL-OWNER HAS LICENSE OF, OR AGREEMENT WITH LANDOWNER.

MOTT *v.* PALMER.

1 NEW YORK, 564. — 1848.

ACTION for breach of covenant of seisin. Judgment below for plaintiff (Palmer.) Mott appeals. The opinion states the facts.

RUGGLES, J. — In December, 1841, Mott conveyed to Palmer a farm of land in Columbia county, by a deed containing the following covenant:

“And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance.”

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which stood on the land when the deed was executed, but which did not belong to Mott, the grantor. The facts were, that the fence was erected on Mott's land in 1840 by one Brown, (who owned the adjoining land,) under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land, with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a jus-

¹ PARKER, J., in a concurring opinion says, with regard to this building: “It is undisputed that Vroman, who built it, was not the owner of the land on which it was built, either in fee or as tenant for life or for years; nor is there any evidence tending to show that he built it pursuant to any agreement or understanding whatever with the owner of the land. So far as appears, he was a trespasser in erecting it upon the land where it was placed.” —ED.

tice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the court below and rejected by the court, it was afterwards given by the defendant Mott.

The question now is whether in this action brought by Palmer, the grantee, against Mott, his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey everything described in his deed; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, county of Columbia, bounded, etc., with the appurtenances," etc. The word land, when used in a deed, includes not only the naked earth, but everything within it and the buildings, trees, fixtures and fences upon it. *Goodrich v. Jones*, 2 Hill, 143; *Walker v. Sherman*, 20 Wend. 639, 640, 646; *Green v. Armstrong*, 1 Denio, 554; Com. Dig. Grant, E.; Co. Litt. 4a; 2 Roll. 265. A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the grantee unless the reservation be in writing. *Noble v. Bosworth*, 19 Pick. 314. If the fence had belonged to Mott it would have passed by his deed; not by force of the word appurtenances contained in the deed, but without that word, and as part of the land. Trees, buildings, fixtures, and fences on a farm are corporeal in their nature, and the subject of seisin, like the land itself, of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and therefore it is that a building or fence belong-

ing to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another. *Shep. Touch.* 206; 1 *Inst.* 48b. And it is a corporeal inheritance. 10 *Vin.* 202. Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord. *Holmes v. Tremper*, 20 *Johns.* 30; *Miller v. Plumb*, 6 *Cowen*, 665; *Doty v. Gorham*, 5 *Pick.* 489. *Herlakenden's Case*, 4 *Co. R.* 63, affords an instance in which one man owned the land and another the growing trees upon it. In *Rogers v. Woodbury*, 15 *Pick.* 156, Putnam, J., in speaking of a house which a man had erected on land which did not belong to him, said "it might or might not be parcel of the realty. If the owner of the land owned the building, it would be so. If he did not, and the owner of the building had no interest in the land, the building would be personal property." *Smith v. Benson*, 1 *Hill*, 176, was the case of a dwelling-house and grocery belonging to one man, although standing on the land of another; and in *Russell v. Richard*, 1 *Fairf.* 431, the owner of land on which another man had erected a saw-mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is, that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, buildings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone and loam might also be converted into personal property by such a sale, and carried off the land, without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one-half the farm, that half would not have been part of the thing granted, because it would not have passed by the deed. But the fence was within the description of the thing granted as clearly as

the land itself; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was within the description of what the grantor professed to convey, that doubt can be solved in a moment by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it; although it could not have so passed if it had not been within the description.

It all comes to this: The grantor undertook to convey it as part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the Supreme Court must therefore be affirmed.¹

REESE *v.* JARED.

15 INDIANA, 142. — 1860.

PERKINS, J. — The facts in this case are substantially these: Jared employed Reese to erect a house on a certain lot of ground, and was to pay him therefor by conveying to him a certain other lot. Reese was to furnish the materials.

Reese built the house, and then discovered that in the agreement under which it was built, there were mistakes in the numbers of the lots to be built upon, and to be taken in payment. Reese, apprehending loss to himself, and with a view to prevent it sold, while yet in possession thereof, the house he had erected for Jared, to one Schmall, and moved it on to a lot of his, placing it upon a permanent brick foundation.

Jared then sued Reese and Schmall, not for the value of the house, but to recover possession of the specific article; the house itself. It does not appear that Schmall was aware of the fact, that Reese had no right to sell and remove the house.

When the lumber, out of which the house in question was constructed was growing in the tree, it was real estate. While at the saw-mill, in the log and lumber, it was personal estate. When erected into a house, on a permanent foundation, on Jared's lot, it

¹ See, however, *Climer v. Wallace*, 28 Missouri, 556. — 1859. — ED.

became real estate again. When traveling on rollers from Jared's to Schmall's lot, it became, a second time, personal estate; and when fixed on a permanent foundation on Schmall's lot, it returned again to its original character of real estate. Whose real estate? Kent lays down that, "If A. builds a house, with his own materials, upon the land of B., the land, said Pothier, is the principal subject, and the other is but accessory; for the land can subsist without the building, but the building cannot subsist without the land on which it stands; and, therefore, the owner of the land acquired, by right or accession, the property in the building. It is the same thing, if A. builds a house on his own land with the materials of another; for the property in the land vests the property in the building by right or accession, and the owner of the land would only be obliged (if bound to answer at all) to answer to the owner of the materials for the value of them." 2 Kent, 362. He further says, that "The English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser." Id. 363. According to the above quoted authority, the recovery in this case should have been the value of the house, not the house itself; and as the jury, in their verdict, did not find the value of the house, we cannot correct the judgment rendered, for want of data, and it must be reversed.

b. The landowner annexes the chattel of another.

LANSING IRON AND ENGINE WORKS *v.* WALKER.

91 MICHIGAN, 409. — 1892.

TROVER for a portable saw-mill.

Plaintiff agreed to sell to one Myers a portable saw-mill, title and right of possession of same to remain in plaintiff until fully paid for;

¹ The nature of the chattel and the mode and degree of its annexation may be such as conclusively to change its legal character from personal to real. If this is not the case then (a) the chattel-owner may never have assented to part with either title or possession; (b) he may have intended to part with possession, but not with title, as in bailment or conditional sale; (c) he may have acquired (technical) title from the landowner by chattel mortgage before the annexation.

In any of these cases (a, b, c,) the question may arise between the chattel-owner and (1) the grantee, devisee, heir or mortgagee of the landowner, or (2) the execution creditor of the landowner; and such third person may or may not have had notice of chattel-owner's title. The chattel mortgage may or may not have been properly filed or registered.

Cases where landowner has sold chattel or given chattel-mortgage thereon after annexation come under head of "Severance," *supra*. See supplementary note, *infra*, to p. 290. — ED.

Myers to have possession subject to proper care of the machinery and compliance with the terms of the contract.

Myers set up the mill upon a farm in which he owned an undivided interest. Thereupon Myers quit-claimed the farm to defendant Walker. Verdict and judgment below for plaintiff. Defendant appeals.

MCGRATH, J. (after stating facts). — The case is ruled by *Adams v. Lee*, 31 Mich. 440, and *Robertson v. Corsett*, 39 Id. 777.

In *Adams v. Lee*, the court say: "All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty; for to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter, cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest be personalty. It must be the one thing or the other. And the position which is taken by Lee in this case involves this absurdity: That Kaufman, at the time when he and Kinney were severally the owners of an undivided half of the land, might have sold that, and, as a necessary consequence, transferred an undivided one-half of the machinery also, though the whole of the machinery belonged to Kinney as exclusive owner. This would be the necessary result if the machinery was real estate, for there could be no such a thing as attaching it to an undivided interest in the land only."

In *Morrison v. Berry*, 42 Mich. 389, the ownership of the land and of the thing affixed was in one and the same person. It was there held that the annexation of the thing to the freehold was not the wrongful act of the landowner, but that, by act and intervention of the claimant, the article became a part of the freehold.

In *Knowlton v. Johnson*, 37 Mich. 47, T. owned the land and mill. S. was the lessee. The water-wheels were a part of the structure. Plaintiffs furnished the water-wheels to S., with the understanding that they were to be put in the mill, and there used; and, against the objection of T., the old wheels were taken out and the new put in.

Six months afterwards S. surrendered his lease, and T. leased to M. T. finally sold the mill property to defendant, and plaintiffs brought trover. The court say:

"The plaintiff deliberately agreed that the water-wheels should be converted in all outward appearance into real property, and they thereby put it in the power of Trimmer to make sale of the wheels as part of the mill."

In the present case the contract of sale provided for the use of the machinery, not only in the township of Sandstone, but in adjoining townships. Myers was not the sole owner of the land upon which it was placed, but he was sole owner of the interest in the machinery, and operated it solely in his own behalf. The structure covering the boiler and engine was but a temporary one. The machinery in question did not consist simply of a pulley, shaft, or wheel which was to be attached to other machinery already a part of a saw-mill, and, as such, a part of the realty, but it was a complete outfit, designed by the agreement to be portable. There was nothing done by plaintiff indicative of an intent to permit the machinery to be so annexed to realty as to change its character. The state of the title to the realty, and the conduct of Myers regarding the machinery, negatived any intent on his part to allow his interest in the machinery to be absorbed by the owners of the realty, or to permit it to be merged. The circumstances of the purchase by defendant clearly indicate that he took the entire interest in this machinery, while he took but an undivided interest in the realty. He afterwards operated the machinery as sole owner.

It was held in *Wheeler v. Bedell*, 40 Mich. 693, 696, that there is no universal test by which the character of what is claimed to be a fixture can be determined in the abstract; neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned.

In *Coleman v. Manufacturing Co.*, 38 Mich. 30, 40, the court, commenting upon a line of authorities which seem to regard the manner of the attachment to the realty as the test, say:

"This, however, is a very extreme view, and is hardly compatible with the tenor of our own previous decisions. It seems to overlook or ignore one test, and frequently the most important test, namely, the intent of the party making the annexation." See, also, *Manwaring v. Jenison*, 61 Mich. 117.

The judgment is affirmed.

TIFFT *v.* HORTON.

53 NEW YORK, 377. — 1873.

ACTION to recover damages for alleged conversion of a boiler and engine.

Plaintiff sold a Mrs. Brown an engine and boiler to be put up in the latter's elevator. A chattel mortgage was given for the machinery before it was delivered. There was a clause in the chattel mortgage that the property should remain personal until paid for, notwithstanding mode of annexation in elevator. They were then affixed.

Defendants claim title under their real estate mortgages executed by Mrs. Brown before the engine and boiler were set up on the premises. Judgment below for plaintiff. Defendants appeal.

FOLGER, J. — It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is, that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is, where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as, where the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached. *Id.*

It may in this case be conceded, that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express that they should be and remain personal property until the notes given therefor were paid; and by the same agreement, power was given to the plaintiff, to enter upon the premises in certain contingencies, and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold, should not change or take away the character of them as

chattels, until the price of them had been fully paid. And as parties may by their agreement, expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves, the agreement in this case was fully sufficient to that end.

But it is contended, that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the land; and that here the defendants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied, that as a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become subject to the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose, before foreclosure and sale, to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engines had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiff, on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement, upon the covenants in his conveyance of the lands. *Mott v. Palmer*, 1 N. Y. 564, and see *Ford v. Cobb*, *supra*.

A prior mortgagee, who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim, as subject to the lien of his mortgage, personal property brought onto the premises with permission of the owner of the lands, and not at all affixed thereto. Nor can either claim personal property as so subject, from the mere fact of the affixing, where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is, that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained. *Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, *supra*; *Farrar v. Chauffetete*, 5 Den. 527; *Ford v. Cobb*, *supra*.

Another consideration makes it clear, I think, that in this case, the absence of a concurrent intention on the part of the prior mortgagees is of no weight. As above stated, as a general rule, all fixtures

put upon land by the owner thereof, became a part thereof, and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels. *Winslow v. Mer. Ins. Co.*, 4 Metc. 306. The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest of a tenant in the land is temporary, that he affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold, and in agreement with known usages. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that improvements which he makes thereon, by the annexation of chattels, he makes for himself, for prolonged enjoyment, and to enhance permanently the value of his estate. *Winslow v. Mer. Ins. Co.*, *supra*. These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all with the relation to the lands, or with the purpose of the landlord, or the vendee, or the mortgagee, though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts. *Lancaster v. Eve*, 5 C. B. N. S. *717. So in *Elliott v. Bishop*, 10 Exch. *496; s. c. in error, 11 Exch. 113, it is recognized that the express agreement of a tenant may prevent him from exercise of his right to detach his annexations; which is the same as to say that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose which would otherwise arise, is repelled. So in *Potter v. Cromwell*, 40 N. Y. 287, and cases cited, it is conceded that if the intention of the vendor of lands be to retain, in chattels annexed thereto, their character as personal property, such intention will prevail. So in *Voorhees v. McGinnis*, *supra*, it is conceded that if the intention of the mortgagor of lands had been that chattels annexed were to be removable, the prior mortgagee could not have

held them against the receiver of the goods, etc., of the mortgagor. See, also, *Crane v. Brigham*. 11 N. J. Eq. (3 Stockton), 29, 35; *Teaff v. Hewitt*, 1 Ohio St. (McCook), 511-531. The general rule governing the right of parties in chattels thus annexed to the real estate rests, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different; not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees.

Though the defendants became the purchasers of the land on the foreclosure of the mortgages, and were the owners of it in fee, and probably in actual possession of it, and of the boilers and engines annexed to it, before this action was brought or demand made of them for these chattels, yet they are to be considered in this case only as prior mortgagees of it. Such is the effect of the stipulation made by them that the sale upon the decrees should not in any manner change the legal rights of the plaintiffs in this action; but for this, it would have been necessary to have determined the effect upon the rights of the parties of the sale on foreclosure, and the change of title and possession of the lands, and the application to that state of facts of the principle laid down in *Lane v. King*, 8 Wend. 584, and kindred cases.

It appears that the boilers and engines cannot be removed without some injury to the walls built about them, and which are a part of the real estate; yet this fact will not debar the plaintiffs. The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building, or other part of the real estate to which they were attached; nor will it destroy or of necessity injure the chattels themselves; nor will the injury to the walls about them be great in extent or amount. So that the limitation hereinbefore stated does not apply.

It is proper to add, that the English case cited and much relied upon by the defendants has not been overlooked. *Walmsley v. Milne*. 7 C. B. N. S. *115. I do not gather from it that the decision

was placed upon the ground (as the defendants claim), that the mortgagee of the land did not expect or understand that the chattels annexed were removable or to be removed. The opinion of the court seems summed up in the concluding sentence: "We think, therefore, that when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been vested by the mortgage deed in the mortgagee." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this State. He is regarded as the owner and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. See case last cited, page *133; *Butler v. Page*, 7 Metc. 40.

The judgment should be affirmed, with costs to the respondents.

BINKLEY *v.* FORKNER.

117 INDIANA, 176. — 1888.

SUIT to foreclose a chattel mortgage.

One Kemper purchased a parcel of real estate, giving a mortgage thereon for the purchase price. He had already bought an engine and other machinery of Hadley, Wright & Co., to be used on the land, and given this chattel mortgage therefor, agreeing orally that the machinery should be treated as personal property until paid for. The machinery was then annexed to the premises, but it appeared in evidence that the machinery could be removed without material injury to the building, except to the masonry which supported engine and boiler, and without detriment to the machinery, and that the value of the real estate would not be appreciably diminished otherwise than by the absence of the machinery.

Later on a second mortgage was placed on the land in which the mortgagor also mortgaged and warranted all machinery, describing it, and provided that none of said machinery should be removed until the mortgage should be paid. All the mortgages were duly filed or recorded.

MITCHELL, J. — * * * The controversy here is between the appellant, Binkley, the assignee of the notes secured by the chattel mortgage to Hadley, Wright & Co., and the Eckarts and the Dubois County Bank, who were made parties defendant by Binkley, to a suit

brought in the Superior Court of Marion county to foreclose the chattel mortgage.

On the one hand the insistence is, that, notwithstanding the annexation of the machinery to the real estate, as already described, it retained the character of personalty in consequence of the prior chattel mortgage, and the contemporaneous agreement that it should be treated as personal property until the notes given for the purchase price to Hadley, Wright & Co. had been paid.

Admitting that Hadley, Wright & Co. held a valid chattel mortgage upon the machinery prior to its annexation to the realty, the result to which the argument leads, on the other hand, is, that, because the machinery was annexed to the freehold by the owner, and was peculiarly adapted to be used in connection with the building in which it was placed, the law will raise a conclusive presumption that the owner intended it as a permanent accession to the land. Hence the conclusion insisted upon is, the character of the machinery as personal property came to an end when it was annexed to the land, and that of realty became inevitably fixed upon it.

The question thus presented has been the subject of much discussion, and the result deducible from the reported cases is not in every respect harmonious, or of so definite and precise a character as could be desired. Very much depends upon the relation which the persons between whom the question arises sustain toward each other, whether it be that of personal representative and heir of a deceased person, landlord and tenant, vendor and vendee, mortgagor and mortgagee or some other, which may give a peculiar character to the case. While some rules of general application have been formulated, in the very nature of the subject each case must in some degree be controlled by the varying circumstances peculiar to it.

The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 511, 530; *Potter v. Cromwell*, 40 N. Y. 287; *Ewell*, Fixtures, 21; *Tyler*, Fixtures, 114; *McRea v. Central Nat'l Bank*, 66 N. Y. 489.

According to the elementary rule of the common law, whatever is annexed to the freehold becomes, in legal contemplation, a part of it, and is thereafter subject to the same incidents and conditions as the soil itself. But the diversity of trade and the development of manufactures required that the strict rules of the common law be

measurably relaxed, and it may now be said that the nature of the articles and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article, which may or may not be a fixture, becomes part of the realty by being annexed to the freehold. ¶The purpose or intention of the parties, the effect and mode of annexation, and the public policy in relation thereto, are all to be considered.

When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is to be annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intention of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into, and a part of, the realty by the act and manner of annexation. *Taylor v. Watkins*, 62 Ind. 511; *Yater v. Mullen*, 24 Ind. 277.

Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty notwithstanding their annexation. In such a case the mental attitude of the parties cannot modify the legal effect resulting from the annexation. *Campbell v. Roddy* (N. J.), 14 Atl. Rep. 279; *Henkle v. Dillon*, 17 Pac. Rep. 148; *Jones, Chat. Mortg.*, section 125.

But when chattels are of such a character as to retain their identity and distinctive characteristics after annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement. *Rogers v. Cox*, 96 Ind. 157; *Price v. Malott*, 85 Ind. 266; *Hendy v. Dinkerhoff*, 57 Cal. 3; *Haven v. Emery*, 33 N. H. 66; *Ewell, Fixtures*, 66; *Malott v. Price*, 109 Ind. 22.

Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to, or placed in, a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold. *Eaves*

v. *Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Campbell v. Roddy*, *supra*; *Henkle v. Dillon*, *supra*.

Except where the rights of innocent purchasers are involved, it is the policy of the law to uphold such contracts in the interest of trade.

The execution of a chattel mortgage by the owner of the land, upon machinery which he afterwards places in a building thereon, is regarded as an unequivocal declaration of his intention that the act of annexation shall not change or take away the character of the machinery as personalty, until the debt secured by the mortgage has been fully paid. *Tift v. Horton*, *supra*.

A provision in a chattel mortgage that, upon default of payment of the mortgage debt, the mortgagee may take possession of the mortgaged chattels and sell the same, if anything beyond the mortgage itself was needed, is equivalent to an express agreement that the property shall continue to be regarded as personalty.

Having reached the conclusion that, when the nature of the property admits of it, parties may by convention fix its character as personalty as between themselves, after it is annexed to the freehold, and that a chattel mortgage, such as the one under consideration, is equivalent to an express agreement in that respect, the case would be of easy solution but for the intervention of the rights of others than the immediate parties to the chattel mortgage.

It remains to be considered whether the chattel mortgage from Kemper to Hadley, Wright & Co. was effectual to preserve the character of the mortgaged chattels as against the purchase-money mortgage given by Kemper to Eckart Bros., and the subsequent mortgage to the bank. What are the rights of a mortgagee of chattels of the description of those in question, who consents that the mortgaged property may be taken out of the county in which his mortgage is recorded, and that it may be annexed to real estate in such a manner as that, in the absence of an agreement or intention to the contrary, the act of annexation, *ipso facto*, makes the property accessory to the freehold?

In some jurisdictions, as will appear from the authorities already cited, the rule seems to be that an agreement between the owner of land and the vendor of chattels, which are to be annexed thereto, concerning the character of the chattels, is valid, not only between the parties, and against a prior mortgagee of the land, but also against a subsequent mortgagee or purchaser without notice, while in others an essentially different effect is attributed to such an agreement. Thus, in *Tift v. Horton*, *supra*, and *Ford v. Cobb*, *supra*, it

was held by the Court of Appeals, in the State of New York, that neither a precedent nor subsequent mortgagee of real estate could defeat the claim of one holding a chattel mortgage upon property which had been annexed to the mortgaged premises under an agreement that it should continue to be regarded as personalty.

These cases hold that the agreement between the holder of the chattel mortgage and the owner of the land, that the chattels shall retain their character as personalty, rebuts the presumption that they were intended as permanent accessories to the land, and binds both prior and subsequent mortgagees.

In *Pierce v. George*, 108 Mass. 78, a chattel mortgage was taken upon certain machinery in contemplation that the machinery was to be fastened to a building and annexed to real property owned by the mortgagor, and it was held that a subsequent mortgagee of the real estate could hold the chattels as a part of the land. So it was held by the same court, in *Hunt v. Bay State Iron Co.*, 97 Mass. 279, that an agreement between the owner of iron rails and a railroad company, that the rails should retain their character as chattels after they had been fastened to the roadbed, would be unavailing as against a previous mortgagee of the road or a purchaser without notice. See, also, *Stillman v. Flenniken*, 58 Iowa, 450.

There is, therefore, no general rule which declares that machinery, upon which there is a chattel mortgage, becomes necessarily subject to an existing mortgage upon real estate to which it may afterwards be annexed with the consent of the mortgagee, to the exclusion or postponement of the prior chattel mortgage.

A prior mortgagee cannot occupy the attitude of an innocent purchaser. The interests and rights of the holder of a chattel mortgage upon property which is annexed to real estate upon which there is an existing mortgage, must be determined by the practical application of equitable principles to the rights of the respective parties.

Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real estate mortgagee as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon. As was said by the Court of Errors and Appeals of New Jersey, in *Campbell v. Roddy*, *supra*, "Where

the articles are of such a character that their detachment would involve a destruction of or a dismantling of an important feature of the realty, such annexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation."

Unless the detachment of mortgaged chattels would materially affect the security of the real estate mortgagee, by depreciating the value of the mortgaged property, or by dismantling it of an important feature existing at the time the mortgage was taken, the precedent real estate mortgage only attaches to the actual interest which the mortgagor has in the personal chattels subsequently annexed at the time of their annexation. *Campbell v. Roddy*, *supra*; *United States v. New Orleans Railroad*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235.

Or if, as in *Bass Foundry, etc., v. Gallentine*, 99 Ind. 525, the introduction of the new machinery involved the dismantling of a mill upon which a prior mortgage existed, so as to impair the security thus afforded, a claim upon the machinery so introduced would not prevail over the prior real estate mortgage.

In the present case it appears that the removal of the engine and boiler and other machinery would not injure or impair the value of the real estate or the building thereon. There can be no reason, therefore, so far as the Eckart Brothers are concerned, why a court of equity should practically destroy the security of the appellant, so long as the preservation of his rights are not prejudicial to those of the Eckart Brothers. As is in effect said in the well considered case already quoted from, if the detachment of the articles so annexed would occasion no damage to the realty, then the lien upon them can be enforced by a court of equity in the same degree as if they had remained chattels according to the agreement. If the detachment would occasion some diminution in the value, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted by the chancellor according to the equity of the case.

The distinction between chattels whose completeness and identity as separate and distinct articles may be preserved, notwithstanding their annexation, and those which necessarily become absorbed or merged in the realty by being annexed, must be kept in view. *Porter v. Pittsburgh Steel Co.*, 122 U. S. 267, 283; *Dunham v. Railway Co.*, 1 Wall. 254; *Galveston Railroad v. Cowdrey*, 11 Wall. 459.

This disposes of the case so far as it relates to the precedent mortgagees. As to the holder of a chattel mortgage who consents to have the mortgaged chattels placed in such an attitude in relation to real estate as that subsequent innocent purchasers and mortgagees are liable to be misled by the owner of the land to which they are

annexed, there seems to be no equitable ground upon which his title should be enforced as against such purchasers or mortgagees.

The peculiar character of the subsequent mortgage executed to the bank in the present case, renders it unnecessary, however, that we should enlarge upon this feature of the subject. Recurring to the statement of the case, it will be seen that, after describing the real estate upon which the factory and machinery were situate, the engine, boiler, and other machinery are particularly and specifically enumerated as being also and in effect separately mortgaged. Coupled with this was the further stipulation that the mortgagor should not remove any of the machinery enumerated from the land on which it was then situate, until the mortgage debt was fully paid.

This feature of the mortgage was entirely unnecessary and meaningless, except upon the theory that the parties recognized and treated the engine and boiler and other enumerated articles as something distinct from the realty, in short, as personal property. This being so, the rule, which requires that effect shall be given to every part of a contract according to the manifest intention of the parties as expressed by the language employed, also requires us to hold that the intention of the parties to what is known as the bank mortgage, was to regard the machinery as personal property, and to include it in the mortgage as such. They took their mortgage, therefore, subject to the prior chattel mortgage of the appellant on the personal property. * * *

The conclusions thus reached result in a reversal of the judgment.

The judgment is accordingly reversed.

RICHARDSON *v.* COPELAND.

6 GRAY (MASS.), 536. — 1856.

SHAW, C. J. — This is an action of tort, in the nature of trover, to recover the value of a steam engine and boiler. To maintain this action, the plaintiff must prove property in himself, and a conversion by the defendant.

Upon the facts stated, the court are of opinion that the engine and boiler, having been erected on the premises of Josiah Richardson, of which he was then the owner in fee, subject to several mortgages, became annexed to the freehold. *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. This real estate comprised a manufactory occupied and carried on by said Richardson, and the engine was erected to furnish

power for such manufactory. The steam boiler was permanently set in brick work, and could not be removed without taking down the brick work, and the engine was permanently annexed to the buildings. This permanent annexation of the engine and boiler to the freehold, *de facto*, rendered them part of the realty; and his agreement with the builders to give them a mortgage thereon as personal property, as against all those who took title to the estate in fee, was inoperative and void. No title to these articles passed as personal property to the mortgagees, which they could assert against a third party. The engine and boiler thus remained part of the realty till Josiah Richardson became insolvent, and the estate passed to his assignees, subject to the right of the mortgagees of the real estate; it was rightly sold by order of the commissioner, on their petition, and a good title passed to Harlow, the purchaser. He afterwards severed them, and thus reconverted them into personal property, as he lawfully might, and sold them to the defendant, who thereby took a good title.

The evidence of usage was rightly rejected; it could not be received to control the operation of law, arising from the actual annexation of the engine and boiler to the freehold. If it be said, it might have tended to show the intent of the parties; the answer is, that the intent of the parties was manifest enough from the agreement of the parties and the mortgage. But the difficulty was (by mistake of the law, no doubt), that this intention was one which the law could not carry into effect, that of hypothecating a portion of the realty, as personal property, without severance.

The fact that Harlow had full knowledge of the history of the mortgage, did not impair his right to be a purchaser.

It is to be observed, as a fact important to the present case, that the engine and boiler were purchased and set up in the factory by one who himself owned the freehold. Had they been so bought and placed by a tenant on leased premises, the case might have presented a different question.

Judgment for the defendant.

B. The chattel-owner, annexing, has an interest in the land.¹

a. The annexer is the general owner of the land or is on his way to become such.²

(1) THE QUESTION ARISES BETWEEN REAL AND PERSONAL REPRESENTATIVES OF THE ANNEXER.

(a.) *Between executor or administrator and the persons succeeding to the decedent's real estate.³*

BISHOP v. BISHOP.

11 NEW YORK, 123. — 1854.

ACTION upon a promissory note.

In 1844 Lyman Bishop gave to one Blackman a mortgage upon his farm. Thereafter Bishop planted a hop-yard on the farm, and in 1849 died, still owning the farm, and while the hop-poles in question in this action were in use in the yard. Plaintiff, as executrix, sold the hop-poles, as personal property of the estate, to defendant, and the note in suit was given for the price thereof. At the time of such sale the hop-poles were in heaps in the hop-yard. Later on the farm was sold on the mortgage to one Nichols, who took possession of the hop-poles which he found on the place. Defendant alleges that Nichols got title to the hop-poles and that the consideration of his note has failed. The decisions below were in favor of defendant. Plaintiff appeals.

GARDINER, CH. J. — The only question presented in this case is whether the hop-poles, at the time of the sale to the defendant, were personal property, or to be deemed part of the realty. This question, I think, is settled by the facts stated in the answer, to which the plaintiff has demurred. If hop-poles can constitute a portion of the real estate, the defendant acquired no title to those purchased by him, conceding the truth of the answer. Assuming, as we must, the truth of the facts alleged by the defendant in his answer, the hop-poles were, at the time of the sale, a part of the realty. Of course, no title passed to the purchaser, and the note in question was wholly without consideration.

¹ "Annexations in *suo solo*." — ED.

² As by adverse possession or under a contract for the purchase of the land. — ED.

³ For the special rule in New York as to what "fixtures" are to be deemed assets, see § 2712 Code Civ. Pro., subdivisions 4 and 9, and the case of *Walker v. Sherman*, p. 218, *supra*. — ED.

The root of the hop is perennial, continuing for a series of years. That this root would pass to a purchaser of the real estate, there can be no question. The hop-pole is indispensable to the proper cultivation of this crop. It is distinctly averred, and admitted, that the poles belonged to the yard upon these premises, that they were used for the purpose of cultivation, and were removed from the place where they were set, in the usual course of agriculture, with a view to gather the crop, and without any design to sever them from the freehold; but, on the contrary, with the purpose of replacing them, as the exigency of the new growth required. In a word, they were to be permanently used upon the land, and were necessary for its proper improvement.

If the poles had been standing in the yard at the time of the sale, all admit that they would have formed a part of the realty. But by being placed in heaps for a temporary purpose, they would not lose their distinctive character, as appurtenant to the land, any more than rails, or boards, from a fence in the same condition, would become personal property. Indeed, the case cannot be distinguished from *Goodrich v. Jones*, 2 Hill, 142, where it was held that manure in heaps in the yard, and that fences, constitute a part of the freehold; and where the materials of which the fence is composed were temporarily detached, without any intent to divert them from their original use, it would work no change in their nature.

The opinion, in the case cited, was pronounced by Justice Cowen, who was himself an advocate for the doctrine of corporeal annexation, as being in general the true criterion of a fixture. *Walker v. Sherman*, 20 Wend. 655. But all that was claimed by the learned justice, in his elaborate opinion in *Walker v. Sherman*, was that the chattel should be "habitually attached to the land, or some building upon it." It need not, he adds, "be constantly fastened." I think, according to this principle, that hop-poles which are put into the ground every season, and continue there until they are removed to gather the crop, and which are designed to be thus used, in the same yard, for the same purpose, until they decay by lapse of time, may without impropriety be considered as "habitually attached to the land," although "not constantly fastened to it."

The judgment of the Supreme Court should be affirmed.¹

¹Of the other judges, four concurred in this opinion. Denio and Johnson, JJ., dissented, regarding the hop-poles as mere tools or implements and so chattels. — ED.

(b.) *Between execution creditor of annexer and his grantee or mortgagee.*

SNEDEKER v. WARRING.

12 NEW YORK, 170. — 1854.

[*Reported herein at p. 231.*]

(2.) **BETWEEN GRANTOR AND GRANTEE; MORTGAGOR AND MORTGAGEE.
BETWEEN TENANTS IN COMMON.**

FARRAR v. STACKPOLE.

6 MAINE, 154. — 1829.

[*Reported herein at p. 227.*]

WALKER v. SHERMAN.

20 WENDELL (N. Y.), 636. — 1839.

[*Reported herein at p. 218.*]

PEIRCE v. GODDARD.

22 PICKERING (MASS.), 559. — 1839.

WILDE, J., drew up the opinion of the court. — This action is submitted on an agreed statement of facts, by which it appears that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterwards he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed, he, for a valuable consideration, sold the last-mentioned lot and house to the defendant.

There are two counts in the declaration, one, for the conversion of the newly erected house, and the other, for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist, that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not, therefore, acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added by right of accession;

and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house cannot admit of a doubt; but it does not follow that the property in the new house vested in the plaintiff.

The rules of law, by which the right of property may be acquired by accession or adjunction, were principally derived from the civil law, but have been long sanctioned by the courts of England and of this country as established principles of law.

The general rule is, that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser, who wilfully takes the property of another, can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. 2 Kent's Comm. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law, that if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners, but the builders. *Mole de Jure Mar.* lib. 2, c. 1, sec. 7.

Another similar exception is laid down by Chancellor Kent in his Commentaries, which is directly in point in the present case. If, he says, A. builds a house on his own land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them. 2 Kent's Comm. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said, that if timber be taken and made into a house, it cannot be reclaimed by the owner; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held, that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed; and it

was held, that he had a right so to do. But it was also held, that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff, for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the year books, 5 Hen. 7, 16; and I am not aware of any modern decision or authority in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 Fairfield, 429, cited by the plaintiff's counsel, was decided on the ground, that the building in controversy was personal property and had never become a part of the freehold. In the present case it cannot be questioned, that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport, for the conversion of the new house. And it is equally clear, that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building was the tortious act of Davenport, for which he alone is responsible.

Plaintiff nonsuit.

(3.) BETWEEN LAND-CONTRACT-VEENDEE ANNEXING, AND HIS VENDOR.

THE MICHIGAN MUTUAL LIFE INSURANCE CO. *v.* CRONK.

93 MICHIGAN, 49. — 1892.

MONTGOMERY, J. — The defendant, on the 18th day of June, 1887, contracted in writing to purchase of one William L. Jenks the N. W. one-quarter of S. W. one-quarter of section 19, township 7 N., range 16 E. The contract was in the usual printed form, and contained a covenant on the part of the defendant that he would not commit, or suffer any other person to commit, any waste or damage to said lands or appurtenances, except for firewood or otherwise for his own use, or while clearing off the lands for cultivation in the ordinary manner. Immediately after entering upon the lands he erected a small dwelling-house thereon, and lived in it for two years. He then made default in his payments, and the plaintiff,

to whom the contract had in the meantime been assigned by Jenks, terminated the contract, and required the defendant to surrender possession. The house was a one-story frame house, 20 by 26, and suitable for the purposes of a dwelling house, to be used upon the land in question. After the removal of the house from the premises, it was placed upon a 40 across the street, and plaintiff, after demand, brought replevin. The circuit judge directed a verdict for the plaintiff, and the defendant appeals.

Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was therefore real estate; second, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party.

We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442; *Milton v. Colby*, 5 Metc. (Mass.) 78; *Iron Co. v. Black*, 70 Me. 473; *Tyler*, Fixt. 78. It being severed from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of *Morrison v. Berry*, 42 Mich. 389, and *Wagar v. Briscoe*, 38 Id. 587, do not apply.

The house remaining personal property in the wrongful possession of defendant, it follows that no homestead rights, which consist in an interest in lands, attached.

The judgment is affirmed, with costs.

b. Annexer is tenant for life.

OVERMAN *v.* SASSER.

107 NORTH CAROLINA, 432. — 1890.

CASE submitted without action.

Eliza Sasser and Amanda Cassely were the owners of a tract of land in common. Mrs. Sasser died and her interest in the land descended to the defendants as her heirs, her husband, Eli Sasser, becoming tenant thereof for his life by the curtesy. Thereafter Eli Sasser

and others annexed certain machinery to this real estate for the purpose of running a mill and a cotton-gin.

The life tenant died bequeathing these annexations to his second wife and others, and plaintiff, as executor of his will, now seeks to recover them from the remaindermen.

Judgment below for the executor. The remaindermen appeal.

CLARK, J. — In the great case of *Elwes v. Mawe*, 3 East, 38, 2 Smith Ldg. Cases, Lord Ellenborough holds the doctrine of fixtures to depend largely in its application, upon the relations of the parties, which he divided into three classes.

1. Executor and heir. As between them, the common-law rule, that whatever is affixed to the freehold becomes a part of it and passes with it (*quicquid plantatur solo, solo cedit*) is observed in full vigor. In this class fall also mortgagor and mortgagee, vendor and vendee, as to whom the strict rule of the common law is still in force. *Foote v. Gooch*, 96 N. C. 265.

2. Between executor of tenant for life, or in tail, and the remainderman, in which case the right to fixtures is considered more favorable for the executor.

3. Between landlord and tenant, in which case, in favor of trade, and to encourage industry, the greatest latitude is allowed, so that all fixtures set up for better enjoyment of trade are retained by the tenant, though this does not include fixtures used for agricultural purposes. Where, however, they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. Williams on Personal Property, 16, note, and numerous cases cited.

The reason of the distinction is pointed out by Pearson, C. J., very succinctly in *Moore v. Valentine*, 77 N. C. 188. When additions are made to the land by the owner, whether vendor, mortgagor or ancestor, the purpose is to enhance its value, and to be permanent. With the tenant the additions are made for a temporary purpose, and not with a view of making them part of the land, hence for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the freehold, if affixed for purpose of trade, and not merely for better enjoyment of the premises. *Pemberton v. King*, 2 Dev. 376.

In the present case, it is agreed that "the engine, cotton-gin and condenser were attached to the mill by the tenant by the curtesy after his term commenced; and not solely for the better enjoyment of the land and farm, but for the purpose of milling corn and ginning cotton for the neighborhood, as well as himself, and for the mixed purpose of trade and agriculture."

His Honor properly held that they belonged to the executor of the life tenant as against the remaindermen. This case comes under the second class mentioned by Lord Ellenborough, and there are few adjudications on that class, but the ruling of the court below is sustained by that of Lord Hardwicke in *Lawton v. Lawton*, 3 Atk. 13, and in *Dudley v. Wood*, Amb. 113, and the observation of Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl. 260. There are subsequent cases which all seem to follow the above precedents. Tyler on Fixtures (ed. 1877), 490, 491, 496, 503.

In our own reports, *Pemberton v. King*, 2 Dev. 376; *Feinster v. Johnson*, 64 N. C. 259, and *Railroad v. Deal*, 90 N. C. 110, which recognized the right of tenant to remove, were cases between tenant and lessor, while *Bryan v. Lawrence*, 5 Jones, 337; *Latham v. Blakely*, 70 N. C. 368; *Deal v. Palmer*, 72 N. C. 582; *Bond v. Coke*, 71 N. C. 97; *Foote v. Gooch*, 96 N. C. 265, and *Horne v. Smith*, 105 N. C. 322, which adjudged the fixtures to have become part of the freehold, all came under Lord Ellenborough's first class, *supra*.

This is the first instance in which the rule as to fixtures between executor of tenant for life and the remainderman has come before the courts of this State. It assimilates that between landlord and tenant, the principal difference, perhaps, being that the executor can remove such fixtures within a reasonable time after the death of the life tenant, whereas, between landlord and tenant, the tenant cannot go on the premises to remove the fixtures after the termination of his lease without being a trespasser, except in those cases where the duration of his term is not fixed, but uncertain, or where there is an agreement that he may remove after the expiration of the lease.

No error.

c. Annexer is tenant for years.

(1.) TRADE FIXTURES.

VAN NESS v. PACARD.

2 PETERS, (U. S.) 137.—1829.

MR. JUSTICE STORY delivered the opinion of the court. — This is a writ of error to the Circuit Court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house

erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial it appeared that the plaintiffs in 1820, demised to the defendant, for seven years, a vacant lot in the city of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot he erected thereon a wooden dwelling house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade, and he gave evidence, that upon obtaining the lease he erected the building above mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed, and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out-of-doors; and carpenter's work was done in the house, which was in a rough, unfinished state and made partly of old materials. That he also erected on the lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant further offered evidence to prove that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs' objected to this evidence; but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the exam-

ination of the witnesses by the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the city of Washington which authorized a tenant to remove such a house as that erected by the tenant in this case; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage; and after their testimony was given, he prayed the court to instruct the jury that, upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant could be justified in removing the house in question; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The court was divided and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is that whatever is once annexed to the freehold becomes part of it, and cannot afterward be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Mawe*, 3 East's R. 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided, that in the case of landlord and tenant there had been no relaxation of the general rule in cases of erections solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant they became a part of the realty and

could never afterward be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Mawe*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exceptions of buildings and other fixtures for the purpose of carrying on a trade or manufacture

is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII., 13a. and b., where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation, during the term, he may afterward remove them. That doctrine was recognized by Lord Holt in *Poole's Case*, 1 Salk. 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any custom) in favor of trade and to encourage industry. In *Lawton v. Lawton*, 3 Atk. R. 13, the same doctrine was held in the case of a fire-engine set up to work in a colliery by a tenant for life. Lord Hardwicke there said that since the time of Henry VII. the general ground the courts have gone upon of relaxing the strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "one reason which weighs with me is its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light it comes very near the instances in brew-houses, etc., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, etc., is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade even after the expiration of his term if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord Hardwicke said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or

stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Mawe*, 3 East's R. 38, Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns before Lord Kenyon, *Dean v. Allalley*, 3 Esp. 11; Woodfall's Landlord and Tenant, 219, is to the same effect.

Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, "that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we are prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house as well as for a trade superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Barons Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R. 29, proceeds upon principles equally liberal,

and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Mawe* in respect to erections for agricultural purposes. In our opinion the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop. 2 Starkie on Evidence, part IV., 453. In the very class of cases now before the court the custom of the country has been admitted to decide the right of the tenant to remove fixtures. Woodfall's Landlord and Tenant, 218. The case before Lord Chief Justice Treby turned upon that point. Buller's Nisi Prius, 34.

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration; open, indeed, to such commentary and observation as the court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof of a usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court, and it is affirmed.¹

¹ For a class of cases in which tenant cannot remove trade fixtures, see *O'Brien v. Kusterer*, *supra*, p. 237. — ED.

LINAHAN v. BARR.

41 CONNECTICUT, 471. — 1874.

CARPENTER, J.—The sole question in the first case is, whether a tenant who erected a building on leased property had a right to remove the same at the termination of his lease. The circumstances were these: — The premises consisted of a store in the city of Bridgeport. The store burned down, leaving a vacant lot. The lease had then about two years to run. The landlord offered the tenant fifty dollars to surrender his lease, but he declined, saying that he was about to erect another building on the land, that he knew that it would belong to the landlord, that he did not intend to remove the same at the expiration of his lease, and that the rent which he should receive during the term would pay the cost of construction. The building was one-story high, built of brick, with glass front, and stood on the foundation walls of the burned building, except the rear, which was an unbroken brick wall from the cellar bottom.

The respondent claims under the lessee, and insists that the building was a trade fixture which might lawfully be removed by the tenant.

A question is made whether the declarations of the tenant were admissible in evidence. We entertain no doubt on that question. They tend directly to show the intention of the party in erecting the building; and intention in these cases is always a material inquiry. Had the parties agreed that the tenant might build and remove the building, no one would doubt that that fact might be shown for the purpose of proving that it was the personal property of the builder. The intention and understanding of the parties at the time are necessarily involved in the inquiry.

In this case it is apparent that both parties intended that the building, at the termination of the lease should belong to the owner of the land. This is evident, in the first place, from the materials used, and the manner of construction. It was attached to the freehold in the same manner that buildings ordinarily are which are designed to be permanent. This, although not conclusive, is an important consideration. In the next place, the interview between the parties at the time very clearly shows that neither party expected or intended that the building should be removed. In view of all the circumstances we think the court below was clearly right in holding that the building was a part of the realty. *Ombony v. Jones*, 19 N. Y. 234; *Shepard v. Spalding*, 4 Met. 416; *Curtis v. Hoyt*, 19 Conn. 154; *Landon v. Platt*, 34 Conn. 517; *Capen v. Peckham*, 35 Conn. 88.

The second case was a summary process to recover the possession of the leased premises. The only question before the justice seems to have been whether the plaintiff in error, who claimed the building by purchase from the original lessee, was the lessee of the complainant. The court found that he was, and rendered judgment against him.

We fail to discover any question of law in the case which this court can review.

The defendant claimed that the occupation of the premises while he was claiming the ownership of the building, and while the injunction against his removal of it was in force, was not an acceptance of a proposition by the plaintiff to lease the premises to him at a certain rent named. The justice found that he had become a lessee of the premises, that is, that his conduct was such an acceptance.

This was a question of fact. But even if it can be regarded as a mixed question of law and fact, we cannot see that the justice violated any principle of law in deciding as he did.

There is no error in either judgment.

HOLMES v. TREMPER.

20 JOHNSON (N. Y.), 29. — 1822.

SPENCER, CH. J., delivered the opinion of the court. — The question arising upon the pleadings has never been decided in this court. * * *

It is admitted, in this case, that the defendant erected the cider-mill and press, at her own cost, during her tenancy, for the purpose of making the cider on the farm. I confess, I never could perceive the reason, justice or equity of the old cases, which gave to the landlord such kind of erections as were merely for the use and convenience of the tenant, the removal of which neither defrauds nor does the least injury to the landlord. The rule anciently was very rigid; but I think it has yielded materially to the more just and liberal notions of modern times. In *Lawton v. Lawton*, 1 Atk. 13, the question arose between the tenant for life and a remainderman. The subject of controversy was a fire-engine, set up by the tenant for life, for the benefit of a colliery; and the point was, whether it should be considered as personal estate. It appeared, that, in building sheds for securing the engine, holes were left for the ends of timber, to facilitate removal, and they were capable of being removed. Lord Hardwicke, after observing that the rigor of the law was relaxed upon this subject, pronounced it a mixed case between enjoying the

profits of the land, and carrying on a species of trade. He adverted, with evident approbation, to a decision of Chief Baron Comyns, at the assizes at Worcester, in which the subject of discussion was a cider-mill, and the question was between the executor and the heir. In that case, it was decided, that though cider is part of the profits of the real estate, yet it was personal estate, notwithstanding, and should go to the executor. Lord Hardwicke, in the principal case, decided, that the fire-engine was personal estate; and he makes a very strong distinction between the rights of a tenant from year to year, as between him and the landlord, and between a tenant for life and remainderman. In *Lawton v. Salmon*, 1 H. Bl. 259, in the notes, Lord Mansfield stated the change that had taken place in the law, as between landlord and tenant. He observed that many things may now be taken away which could not be formerly; such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant. This, he adds, is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited.

In the case of *Culling v. Tufnal*, Chief Justice, in 1694, Bull. N. P. 34, the tenant had erected a barn on the premises, and put it on pattens and blocks, but not fixed in, or to the ground, and removed it off; he was held to be justified, because it was usual to remove such buildings in that part of the country. But Buller states, that the question would now be determined in favor of the tenant without difficulty, for that, of late years, many things are allowed to be removed by tenants, which were not formerly; and he specially instances cider-mills, which the tenant may now remove. In *Dean v. Allalley*, 3 Esp. Rep. 11, Lord Kenyon held, that the law would make the most favorable construction for the tenant, where he had made necessary and useful erections, for the benefit of his trade or manufacture; and he said it had been held so, in case of cider-mills, and in other cases; and he should not narrow the law, but hold erections of that sort, made for the benefit of trade, or constructed as the sheds were in that case, to be removable at the end of the term. In the case of *Elwes v. Mawe*, 3 East, 38, the buildings erected by the tenant, and which he removed, were of brick and mortar, and tiled, and the foundations were one foot and a half deep in the ground; and Lord Ellenborough said, that these were fixtures, and not removable, as between landlord and tenant. This case does not call for any expression of our opinion on the correctness of that decision, nor do we intend to approve or disapprove of it. It is very materially different from the present case. Lord Ellenborough refers to the decision of Chief Baron Comyns, in the

case of the cider-mill, he says he may have considered it a mixed case, between enjoying the profits of the land, and carrying on a species of trade, and as considering the cider-mill as properly an accessory to the trade of making cider; and I can see no good reason why it may not thus be considered, for cider is an article of trade. He refers, also, to the case before Chief Justice Treby, and admits that the tenant might remove the barn on pattens and blocks; for, he says, they were not fixed in or to the ground, and so they were not fixtures.

The plea here states, that the mill and press were annexed to, and parcel of, the farm; but it does not state how they were annexed; whether the mill was let into the ground or not. It states a mere matter of law, and not of fact. But it is immaterial whether the mill was let into the ground or not. The tenant, in my judgment, had an unquestionable right to remove it, as personal property.

The plaintiff's counsel supposes that the tenant could not remove this mill after the end of the term. It is true, that if she entered upon the plaintiff's possession, and took away the mill, she would be a trespasser on the soil, and answerable for breaking the close; but leaving the mill there, if it belonged to her, would not work any change of the property; and in this action, the trespass for entering on the premises is not in question; and when it is said that the removal must be within the term, or else he will be a trespasser, it means only a trespasser as regards the entry.

Judgment for the defendants.

(2.) AGRICULTURAL FIXTURES.

STORY, J., IN *VAN NESS v. PACARD*.

2 PETER'S (U. S.). 137. — 1829.

[*Reported herein at p. 312*].¹

(3.) DOMESTIC FIXTURES.

GAFFIELD *v.* HAPGOOD.

17 PICKERING (MASS.), 192. — 1835.

[*Reported herein at p. 323*].

¹ This case is on trade fixtures, but see at pp. 314 and 317 the discussion of *Elwes v. Mawle*, 3 East (Eng.), 38, with regard to agricultural fixtures. See also *Holmes v. Tremper*, *supra*. — ED.

(4.) TIME OF REMOVAL OF FIXTURES BY TENANT.

GAFFIELD *v.* HAPGOOD.

17 PICKERING, (MASS.), 192. — 1835.

TROVER to recover the value of a fire-frame placed by one Bliss in a house leased by him. Bliss sold the fire-frame to plaintiff and removed from the house leaving it there in place. When plaintiff went to remove it defendant (in possession under the landowner) forbade its removal. Nonsuit ordered below. Plaintiff appeals.

PUTNAM, J. — The fire-frame was without doubt personal property before it was fixed to the freehold. But afterwards it became a part of the house, and would have passed by a deed of the house as a door or window of the house would have passed, provided there were no exception in the deed to the contrary. But although it is to be considered as a fixture, yet the lessee during the continuance of his lease might have removed it. *Lawton v. Lawton*, 3 Atk. 16, *in notis*. But he must remove it during the term. He cannot lawfully do it afterwards. In *Lee v. Risdon*, 7 Taunt. 188, Gibbs, C. J. says, unless the lessee uses the privilege of severing fixtures during the term he cannot afterwards do it; adding, "and it never was heard of that trover could be afterwards brought."

While it remained fixed to the freehold, it is clear that if one had unfixed and taken it away at one time, it would not have been a felony, but a trespass. The case of *Penton v. Robert*, 2 East, 88, might seem to recognize the right of the tenant to remove a fixture after the expiration of the term. That was trespass for breaking a close and removing a building. It was brought by a landlord against the tenant. The defendant made no defense to breaking and entering the close, and the plaintiff recovered a shilling for that, but the defendant pleaded a justification for removing the building as set forth in the declaration, that it was a building erected by him on the premises for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, etc. The justification was held sufficient. The relation of landlord and tenant must have been considered as having continued and as still existing in respect to the demised premises notwithstanding the first term had expired. The defendant, as it seems to me, might and ought to have pleaded the general issue as to breaking and entering the close and a justification as to the rest.

If the fixture should not be removed during the term, and the tenant should quit, and the landlord should take possession afterwards, the law is very clear, that the fixture becomes a part of the

freehold, and that the party who was tenant cannot legally take it away afterwards.

And there are no facts stated in the present case which will vary this well-established rule of law.

The circumstance that the owner of the estate offered it for sale with a reservation of the fire-frame for the tenant, who was then in possession, is of no avail; because the sale was not made. The tenant sold the fire-frame to the plaintiff on the day before he left the premises. The vendee could not be in a better situation than the tenant was. He might, as has been said, have severed the frame from the chimney while his tenancy continued, but he left the premises, with the frame attached and fixed by brick and mortar to the house. It is very certain that thereupon it became the property of the owners of the freehold.

There are various annexations to the freehold estate, which, if the tenant make them at his own expense, cannot be removed by him during the term. As if he put glass into the windows; Co. Litt. 53a; and the reason given is, that the glass is become part of the house. It shall go to the heir and not to the executor, for as is said in *Herlakenden's Case*, 4 Co. R. 62, if they (the windows) be open to tempests and rain, waste and putrefaction of the timber would follow. So I apprehend it would be, if the tenant should shingle the house, or put another story upon it. Such necessary or even expensive reparation or addition would, at this day, be considered as given to the owner of the freehold.

But the law has accommodated itself to the existing advanced state of society, and the tenant may, during the term, take away chimney-pieces, and even wainscot, if put up by himself; Co. Litt. *ubi sup.* (Hargr. note 5); which, as the law stood before and at the time of Lord Coke, he could not have been permitted to do.

The reason of the relaxation of the rule is found in the public policy and convenience, which permit the tenant to make the most profitable and comfortable use of the premises demised, that can be obtained consistently with the rights of the owner of the freehold. The inheritance is not to be prejudiced.

The law upon this subject was very much discussed in *Elwes v. Mawe*, 3 East, 38, by the court and bar; and such annexations made with regard to trade, were recognized; but such as were made in regard to agricultural improvements were still left to the operation of the old law; with what correctness of inference, it is not necessary in the case now under consideration to decide. For this case is clear of all difficulty, and is decided in favor of the defendant for the reasons before suggested.

Plaintiff nonsuit.

LOUGHRAN *v.* ROSS.

45 NEW YORK, 792. — 1871.

ACTION for breach of covenants of seisin and of quiet enjoyment contained in a deed of certain real estate made in January, 1866, by defendant to plaintiff. Prior to May, 1865, the premises had been occupied under a lease for a term of years by tenants who had erected certain buildings thereon. On the expiration of that lease defendant had leased one of the lots to the former tenant (or to one occupying under him) for one year by parol, and had demised the other lot by written lease to the former tenant for a term of three years, to become a lease from month to month in case of sale of the premises.

After conveyance to plaintiff and before the 1st of May, 1866, the buildings were removed by the tenants under claim of right. This removal and alleged right of removal constitutes the breaches of covenant relied upon by plaintiff. The trial court dismissed the complaint. This is an appeal from an order of the General Term affirming such disposition of the cause.

ALLEN, J. — It is not claimed by the defendant that the tenant occupying the premises for the terms ending on the 1st of May, 1865, having erected the buildings during their terms of tenancy, might not, during the continuance of their terms and their occupancy under the first leases, have removed the buildings; and the plaintiff does not deny, that after the expiration of the terms, and the tenants had ceased to occupy as tenants, their right to remove the buildings would have been lost; that a surrender of the premises would have been an abandonment of the claim to the buildings, and they would have become the property of the landlord as a part of the realty. The material question in the case is, as to the effect of the second letting and occupation under it, after the expiration of the first leases, upon the rights of the tenants and the ownership of the building. The rule is, that whatever fixtures the tenant has a right to remove must be removed before his term expires, except when the time at which the term will end is uncertain, depending upon a contingency, and it may be determined unexpectedly to the tenant, in which case he may be entitled to a reasonable time for removing fixtures after the expiration of the tenancy. *Ellis v. Paige*, 1 Pick. 43; *Reynolds v. Shuler*, 5 Cow. 323. The rule may be subject to the further qualification, that the right to remove the fixtures is not lost to the tenant so long as his possession as tenant continues; and the claim of the plaintiff is, that this qualification

includes and saves the right of a tenant continuing in possession under a new lease. The right of the tenant to remove is a privilege conceded to him for reasons of public policy, and may be waived by him, and will be regarded as abandoned by any acts inconsistent with a claim to the buildings as distinct from the land, and upon abandonment of the right by the tenant, fixtures erected by him immediately become the property of the landlord as a part of the land. A surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it. In respect to the lot of which there was a written lease for the new term, the tenant expressly covenanted to surrender the premises, at the end of the term, "in as good state and condition as a reasonable use and wear thereof will permit, damages by the elements excepted;" and this covenant relates to and includes the buildings then on the premises, and if they are excluded from its operation it can have no effect. It follows that the tenant becoming a party to that lease, and occupying under it, is estopped from claiming the buildings as his own, for he has covenanted to surrender them, as a part of the premises and included within the general description, to the landlord at the end of the term, in good repair. Such is also the implied undertaking of the tenant taking a new lease by parol. Elementary writers are very well agreed that, when a tenant continues in possession under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seized of the land with the fixtures, had demised both to him. Taylor's *L. and T.* 91; Gibbons' *Law of Fixtures*, 42; and Grady's *Law of Fixtures*, 98. And it would seem that the position is warranted by authority. When the tenant continues in possession after ejectment brought

by the landlord, under an arrangement with him, and with his assent to a stay of execution, the tenant's right to remove buildings from the premises, erected by himself during his lease, is gone. *Fitzherbert v. Shaw*, 1 H. Black. 258. The court held that there was an implied agreement that the tenant should deliver up the premises in the same condition as they were in when the agreement was made. The same was held in *Heap v. Barton*, 12 C. B. 274, Jervis, Ch. J., saying: "If the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so." The general form of expressing the right of the tenant to remove fixtures, is that they must be removed within the term; that is, the term during which they were erected, and unless the lessee uses, during the lease, the privilege to sever them, he cannot afterwards do it. *Lee v. Risdon*, 7 Taunt. 188; *Lyde v. Russell*, 1 B. & Ad. 394. But it may be done so long as the possession continues, although the term may have ended, if there has been no new agreement. *Penton v. Robert*, 2 East, 88. A case somewhat analogous in principle to this was that of *Thresher v. Proprietors of the East London Water Works*, 2 B. & C. 608, in which it was decided that a lessee, who had erected fixtures, for the purposes of trade, upon the demised premises, and afterwards took a new lease, to commence at the expiration of the former one, which new lease contained a covenant to repair, was bound to repair those fixtures, unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise, and a doubt was expressed whether any circumstances, *dehors* the deed, could be alleged to show that they were not intended to pass.

Alderson, B., in *Weeton v. Woodcock*, 7 M. & W. 14, says: "The rule, to be collected from the several cases decided seems to be this; that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself a tenant," and the right to remove the fixtures was denied to the assignees of the tenant, although they retained the possession, the plaintiff having made an entry to enforce a forfeiture. See also *Minshall v. Lloyd*, 2 M. & W. 450; *Shepard v. Spaulding*, 4 Metc. 416. The tenants, holding under a new demise, had not the legal right to remove the fixtures put by them on the premises during a former term, there being no mention of the right in the second lease. The offer to prove that, by custom in the city of New York, tenants had a right to remove buildings, did not go beyond the right conceded by the defendant. The evidence, therefore, if otherwise competent, could not have aided the plaintiff.

The difficulty is, that the conceded right was abandoned and lost by its non-exercise during the tenancy under which the buildings were erected. The remedy of the plaintiff was against the persons wrongfully removing the buildings, and not on the defendant's covenant.

Judgment affirmed.

PECKHAM, J., IN *LEWIS v. OCEAN NAVIGATION AND PIER COMPANY*.

125 NEW YORK, 341 (349). — 1891.

* * * If the evidence under discussion had been received and submitted to the jury, the fact of a waiver of this right to claim a forfeiture might have been found, and the case would then be that of a tenant with a right to remove a fixture at the termination of his lease, holding over after such termination, and on being evicted by summary proceedings on account of such holding over, claiming and being refused the right to take such fixture with him. The defendant claims the tenant has no such right after the termination of the tenancy. He urges that the right must be exercised during the running of the term, and if delayed longer than that time, even though the tenant remain in possession he cannot remove the fixture. I think no such absolute rule exists in this State. In *Dubois v. Kelly*, 10 Barb. 496, it was held that the right which a tenant has by agreement with the landlord to remove such buildings as he may erect for the purpose of his tenancy, remains with the tenant after his term expires and while he still remains in possession of the premises. In *Ombony v. Jones*, 19 N. Y. 234, although the opinion in the *Dubois Case* was somewhat criticised upon the question as to what things a tenant had, in the absence of agreement, a legal right to remove from the land to which they had been affixed, yet the question as to the time of such removal (while the tenant still remained in possession) was not criticised or discussed. It has not been denied, that I can find, in any case here. The title of the landlord to fixtures which the tenant has left after the expiration of the term and after his delivery of possession, and which the tenant would otherwise have had the right to remove, is based upon the presumption of abandonment by the tenant to the landlord. No such presumption can attach so long as the tenant remains in possession. In *Loughran v. Ross*, 45 N. Y. 792, it was held that where a tenant had a right to remove fixtures erected by him on the demised premises, yet if he accepted a new lease of the premises including such fixtures without

reservation or mention of any claim to them, and entered upon a new term under the new lease, he lost the right of removal, even though his possession had been continuous. The decision in that case was placed upon quite technical reasoning, supported it is true by some authorities, but it is not one of those cases whose principle should be extended. The taking of a new lease where nothing is said as to the fixtures is equivalent, it is said, to a surrender of the premises as they exist to the landlord, and a taking of the premises from him in the same condition, which at the end of the lease the tenant is bound to surrender. What can be said on the other side of this question has been urged by Mr. Justice Cooley in *Kerr v. Kingsbury*, 39 Mich. 150, and in *Second National Bank v. Merrill Co.*, 69 Wis. 501. See also title "Fixtures," vol. 8, page 63, Am. & Eng. Enc. of Law. But where there has been no acceptance of a new lease, and the tenant has simply continued in possession after expiration of his term, the better authority seems to be decidedly in favor of his right to remove the fixtures while he remains in possession in his character as tenant. Taylor's *Landlord and Tenant* (8th ed.), sec. 551; *Penton v. Robert*, 2 East, 88; *Weeton v. Woodcock*, 7 Mees. & W. 14; *Dubois v. Kelley*, *supra*. *Penton v. Roberts* has been somewhat unfavorably criticised in England, but the particular point in question has not been directly overruled that I have seen. Although the plaintiff was holding over subsequent to September, 1885, yet he was, nevertheless, still in possession by reason of the original leasing. And even in the case of *Loughran v. Ross*, *supra*, Judge Allen says, the removal may be made so long as the possession continues, although the term may have ended, if there has been no new agreement. See also *Clark v. Howland*, 85 N. Y. 204. There is no reason why the right should be lost before he quits possession as tenant, even though he holds over. The rule is based upon a question of public policy, which suggests that the tenant shall remove during his term, *i. e.* while in possession as a tenant, whatever he has the right to remove at all, so that the landlord may be himself protected and so that the tenant shall not be permitted, after his surrender of possession, to enter upon the possession of the landlord or his succeeding tenant and remove what he might have taken before, but which by leaving he has tacitly abandoned, and which the landlord may already have let to his succeeding tenant. A regard for such succeeding interests requires the adoption of a rule necessitating the removal of fixtures during the time of possession, but not in all cases during the running of the term. * * *

TALBOT *v.* CRUGER.

151 NEW YORK, 117. — 1896.

GRAY, J. — The plaintiff seeks to recover damages, which she claims to have sustained "through the fraud and deceit of the defendants in procuring from her a surrender of her house by falsely representing to her that the paper they presented to her for execution, and which she signed, was a lease of the land on which the house stood." The defendants are the agents of a former owner of the land and a purchaser of the land at a judicial sale. The plaintiff, in her complaint, alleged that by agreement with Mrs. Field, in August, 1888, she became a tenant from year to year of certain lands in New York city, at a certain yearly rental, and that at the same time she became the owner, by purchase at an execution sale, of certain buildings which had been placed upon the lands by a former tenant. It seems that in May, 1891, and as the result of certain judicial proceedings, the lands were directed to be sold and were purchased by defendant Coffey. Coffey, finding the plaintiff in occupation and claiming to own the buildings, complained to the defendants Cruger & Co., who had been the agents of Mrs. Field, and they endeavored, at first to get a lease from Coffey to plaintiff and, not succeeding in that, then obtained the signature of plaintiff to a writing surrendering her house for the compensation of \$25. She says she was unable to read the paper and did not have its real purport made known to her and supposed she was signing a new lease of the property. She elects to affirm the transaction, however; but insists upon her right to maintain her action for damages, upon the ground that by the fraudulent devices of the defendant she was cheated out of that which was her personal property.

This appeal must be determined by the question of whether the plaintiff had any property in the buildings upon the land, and for that we are limited to the case. They consisted in a house, shed, closet, and fence, and under the general rule would partake of the incidents and properties of realty. That is the general maxim of the law, and if there be an agreement with the owner of the land, by which the tenant's distinct ownership of the buildings is recognized and his right to remove them conceded, it must, of course, be proved by him. The legal presumption based upon the rule must be disproved by affirmative evidence on the part of the tenant. The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy, and, being in the nature of a privilege, it must be exercised before the expiration of the term, or before he

quits possession. If the right to remove other fixtures exists by virtue of some agreement, then it must be exercised in like manner. By entering upon a new lease, in which the tenant's rights are not reserved, the rights which may have existed under the former tenancy are determined, and this is true even where there is a continuous holding of the premises, but not under the same lease. A tenant may remain in possession after the old lease has expired; but unless he reserves the right under the new lease to remove the fixtures upon the land, the right will be deemed to have been abandoned and they will become the property of the landlord. Taylor's Landlord and Tenant, secs. 551, 552; *Loughran v. Ross*, 45 N. Y. 792; *Watriss v. First National Bank*, 124 Mass. 571.

In this case, the plaintiff claims to have become the owner of the buildings by purchase, and that through an arrangement between Hyland, who had erected them, and Mrs. Field, the then owner of the land, it was agreed that they should be and remain Hyland's personal property and subject to his right to remove them. Assuming these facts to be true, there is the difficulty that the plaintiff did not prove that she herself made any agreement with the landowner, when she became the tenant of the premises. Hyland, or the plaintiff, very possibly, may have been entitled to exercise the right of removal before the expiration of Hyland's tenancy; but it would not necessarily follow, when the plaintiff went into possession under a lease from the landowner, that that right continued in force. It was incumbent upon her to establish that she had made some arrangement with Mrs. Field, which conceded to her such interests and rights of ownership in the buildings as would authorize her to claim them as her distinct property and to remove them from the land while her tenancy lasted. There is no evidence as to the terms of the plaintiff's tenancy under Mrs. Field and even if Cruger & Co., who acted as Mrs. Field's agents, regarded, or treated the plaintiff as the owner of the buildings, that does not prevent them from objecting thereafter that she was not, and that she was bound to prove the fact in such an action as this. (The case comes down to this, that, although the plaintiff at some prior time had become the owner of the buildings, she did not show that by the terms of the lease of the land to her, or by any agreement she made with the lessor, her rights were saved from the operation of the general rule, which vests in the owner of the land the property in fixtures not removed before the expiration of the term, or the surrender of possession; and that, during her own yearly tenancy, she at all times remained the owner of these buildings and had the right to remove them as her property. In the absence of such proof, the plaintiff

was in no position to assert this claim for damages. Unless she owned the buildings, which she says the defendants, by fraudulent devices induced her to surrender possession of, she could not be damaged by what they did in the matter. In this view of the case, the direction of a verdict for the defendants was correct. There was no foundation for a recovery by the plaintiff.

The principal assignment of error in the rulings of the trial judge was with respect to his exclusion of evidence to show what was the arrangement between Hyland, who, when tenant, put up the buildings in question, and the then agent of Mrs. Field. Assuming that the arrangement comprehended his right to remove the buildings, that fact would not aid the plaintiff. The material fact for her to prove, in order to establish that she had an interest in the buildings, which had not been lost, was that she had made an arrangement with the owner of the land which preserved to her the right of removal. It was immaterial what Hyland had the right to do, as long as he had not exercised it, or if it had not been extended to her. No other question demands further consideration and, for the reasons given, the judgment should be affirmed, with costs.

KERR *v.* KINGSBURY.

39 MICHIGAN, 150. — 1878.

SUIT to foreclose a mortgage given by defendant Kingsbury to complainant's testator. Complainant claims certain buildings erected prior to the mortgage as part of the realty; defendant Lyon claims the same buildings as "tenant's fixtures," under certain leases.

The original leases were given to expire ten years from June 1, 1871. Lessees were to have thirty days after the termination in which to remove any buildings they might erect. In February, 1874, defendant Kingsbury deeded the land to G. P. K. This deed was not recorded. In March, 1874, defendant gave the mortgage in question. In January, 1876, G. P. K. gave the tenants a new lease for five years and five months, including also certain lands not covered by the original leases. The tenants became insolvent and made an assignment to Lyon for the benefit of their creditors. Decision for Lyon. Complainants appeal.

COOLEY, J. * * * In brief, the claim on the part of the complainants that when Kingsbury & Bennett, in January, 1876, accepted from G. P. Kingsbury a new lease, they in contemplation of law surrendered the existing leases, and not having asserted and exercised

a right to remove the erections made previously, they thereby abandoned them to their landlord, and could not assert or transfer to any one else the right to remove them afterwards. This is the principal question in the case.

The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W., 14.

But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: "If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord."

There are some authorities which lay down this doctrine. *Merritt v. Judd*, 14 Cal. 59, is directly in point. That case is decided in reliance upon previous decisions which do not appear to us to warrant it. *Fitzherbert v. Shaw*, 1 H. Bl. 258, was a case in which ejectment having been brought against the tenant, he entered into an agreement that judgment should be signed at a certain time with stay of execution for a period; and the decision that the tenant

could not afterwards remove fixtures was based upon the agreement. *Lyde v. Russell*, 1 B. & Ad. 394, only asserts the general rule that where the tenant surrenders possession without removing his fixtures he loses his right. *Thresher v. East London*, 2 B. & C. 608, was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., to leave and yield up, etc. *Shepard v. Spaulding*, 4 Met. 416, has some apparent analogy to the present case, but it is only apparent. There the tenant surrendered to his landlord without removing the fixtures in controversy, but undertook to assert the right under a lease made several years afterwards, and which he took when he was as much a stranger to the premises as if he had never occupied them. It is manifest that none of these cases affords any support to the conclusion in *Merritt v. Judd*. And we have been unable to discover in *Landon v. Platt*, 34 Conn. 517; *Davis v. Moss*, 38 Penn. St. 346, or *Haflick v. Stober*, 11 Ohio (N. S.), 482, to which our attention is called in this case, anything important to this discussion.

The case of *Loughran v. Ross*, 45 N. Y. 792, is in accord with the case in California. In that case Mr. Justice Allen, speaking for the majority of the court, says: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises." This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable.

In *Davis v. Moss*, 38 Penn. St. 346, 353, it is said by Mr. Justice Woodward that "if a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." This in our opinion is perfectly reasonable, and it is as applicable to other

tenancies as it is to those from year to year which are implied from mere permissive holding over. * * *

We think the decree below was correct, and it must be affirmed with costs.

WHITE *v.* ARNDT.

1 WHARTON (Pa.), 91. — 1835.

ACTION for rent by Abraham Arndt against William White.

Jacob Arndt devised the premises in question to his wife for life, remainder in fee to this plaintiff. Mrs. Arndt remarried, and together with her husband, in July, 1829, leased the premises to White for a term of three years. The life tenant died in December, 1829. White continued in possession of the premises until April 1, 1832. This action is for the last quarter's rent.

On the trial White offered to prove that he had erected certain buildings upon the premises under an agreement with the life tenant that he should have liberty to remove some of them and that the others should be taken by the owners of the land at a valuation, etc. Under objection, this evidence was excluded. Arndt sold the premises at public auction in February, 1832. White offered to prove that at time of the sale he desired to give notice of his claim to the buildings, which Arndt would not permit. Excluded. Verdict for plaintiff below. White brings the case on error to this court.

ROGERS, J. — It is a general rule of the common law, that whatever is annexed to the inheritance during the tenancy, becomes so much a part of it, that it cannot be removed by the tenant, although the improvements may have been made at his own expense. As in *Warner v. Fleetwood*, 4 Rep. 63, glass put in by the tenant, or wainscot fastened by nails, was held part of the inheritance. To this rule there are certain exceptions, nearly as old as the rule itself, as between landlord and tenant, that whatever buildings or other fixtures are erected for the purpose of carrying on trade or manufactures, may be removed by the tenant during the term. The cases upon this subject are collected by Lord Ellenborough, in *Elwes v. Mawe*, 3 East, 38, and by Mr. Justice Story, in *Van Ness v. Packard*, 2 Peters' Rep. 145. As to substantial improvements, they are usually made a consideration for extending the term of the lease; or some collateral agreement is made, so as to allow of some compensation to the tenant. The latter was the course adopted by the parties to this contract. The tenant, White, erected on the premises several improvements, among which was a stable.

and two shops, which it is said greatly enhanced the value. It was agreed at or about the time of the erection of these improvements, between White and Mr. and Mrs. Lloyd, who had an estate for life, that White was to have the liberty of selling or removing the stable, and that the barber's shop, and other small buildings erected by him were to be taken at a valuation; and that if a valuation should not be agreed on, White was to have the privilege of removing the materials of the shops. As between the parties to this contract, this agreement was a good consideration; and any violation of it on the part of Lloyd would have subjected him to an action. And I am inclined to believe, on the authority of *Van Ness v. Packard*, that if the estate of Lloyd had continued until the end of the term, White would have had a right to remove the buildings from the premises, without the consent of the owner of the remainder notwithstanding the general principle, that whatever is annexed to the freehold, becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The exception in favor of trade, which is founded on public policy, and intended to encourage manufactures and the improvements of the country, may well apply to this case; for the question does not depend upon the size or form of the house, or the manner in which it is built; but the only inquiry always is, whether it was intended for purposes of trade or not; and I cannot believe that the nature of the business, whether agricultural or mercantile, can make any difference. But while these principles are conceded, I am unwilling to extend them beyond the duration of the estate which the tenant for life has in the premises, so as to subject the owner of the fee to payment for the buildings, or to compel him to allow them to be removed. In the case at bar, Lloyd's interest was in right of his wife, who had a life estate. On her death, the interest in possession vested in Arndt, the owner of the remainder in fee.

The death of Mrs. Lloyd put an end to White's lease. Now, there is no principle better established by authority, than that, even, as between landlord and tenant, fixtures must be removed during the term. After the term they become inseparable from the freehold, and can neither be removed by the tenant, nor recovered by him as personal chattels, by an action of trover, or for goods sold and delivered. 1 Atk. 477; *Ex parte Quincy*, 3 Atk. 13; *Lamb v. Lamb*, and the note, 2 Peters' R.; *Lord Dudley v. Lord Ward*, Ambl. 113; Co. Lit. 53a; *Brooke, Waste*, 104, 142; *Cooper's Case*, Moore, 177; *Day v. Disbitch*, Cro. E. 374; *Lord Derby v. Asquith*, Hob. 235; 4 Term Rep. 745; 7 Term Rep. 157.

It has been contended by the counsel for the plaintiff in error,

that the tenant for life can bind the remainderman by contract, so as to compel him either to pay for improvements which enhance the value of the property, or to permit them to be removed when it can be done without injury to the inheritance. For this position, they rely on *Whiting v. Brastow*, 4 Pickering, 310, in which it is ruled, that a tenant for life, years, or at will, may at the determination of his estate remove such erections, etc., as were placed on the premises by himself, the removal of which will not injure the freehold, or put the premises in a worse plight than when he entered. In *Whiting v. Brastow*, the tenant removed a padlock used for securing a bin-house, and movable boards fitted and used for putting up corn in bins. That was a case between landlord and tenant, and not between tenant for life and the remainderman; the rule being that, as between the latter, in questions respecting the right to what are ordinarily called fixtures, as between tenant for life or in tail and the remainderman or reversioner, the law is considered more favorable than between landlord and tenant. It is construed most strictly between the executor and heir, in favor of the latter; more liberally between tenant for life, or in tail, and the remainderman, or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. A distinction arises, also, between the cases, from the nature of improvements. In *Whiting v. Brastow*, the court treated the improvements as personal chattels; but this cannot be said of these erections, which are of a permanent, substantial kind, and which surely would not have gone to the executors of Mrs. Lloyd, if the buildings had been erected by her. It would have been waste in the tenant to have removed them; for it is in general true, that when a lessee having annexed anything to the freehold, during his term, afterwards takes it away, it is waste. Co. Lit. 53; Moore, 177; 4 Co. 64; Hob. 234.

Doty v. Gorham, 5 Pickering, 487, merely decides that a shop placed on the lands of the plaintiff, with his permission, was a chattel, and as such may be sold, on an execution against the owner, and that the purchaser has a right to enter on the land and remove the shop. This principle it is not necessary to controvert, as the application of it is not perceived.

It must be remarked, that the agreement does not purport to bind Arndt, the owner of the remainder in fee, and seems to have been made under the belief and with the wish, that the life interest would last as long as the lease, which was but for three years. But if the intention were to bind him, the objection arises, that it is not competent for them to make an agreement, to affect the inheritance.

On the falling in of the particular estate, the remainderman or reversioner is entitled to all the improvements, which the law denominates fixtures, without regard to the manner they are constructed, the persons who may have erected them, or whether they may contribute to enhance the value of the property or not. If the tenant for life, or the person with whom he contracts, wishes to avoid the consequences, the improvements must be removed during the continuance of the first estate; or the assent of the remainderman, or reversioner, must be obtained. There is nothing which shows any assent to the agreement by Arndt. The deposition of Lloyd proves nothing further than that the rent was made known to Arndt, and that he made no objection against White being the tenant for the remainder of the lease. But not a word was said, so far as appears, about this agreement. It is in general true, that where there is a lease for years, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. But that principle cannot fairly be made to apply to this case; for here, although the lease terminated at the death of Mrs. Lloyd, and the tenant continued in possession with the consent of Arndt, yet that would bind the parties to nothing more than what came within the terms of the lease. It would not include the case of a collateral agreement, independent of the lease itself. The agreement on which this case turns, was a collateral agreement, of which it does not appear that Arndt was in any manner apprized, or to which there is not the slightest evidence he assented, either directly, or by necessary implication.

Judgment affirmed.

VI. Manure as incident to land.

I. AGRICULTURAL LANDS.

a. As between grantor and grantee and heir and executor.

(1.) THE GENERAL RULE.

GOODRICH *v.* JONES.

2 HILL (N. Y.), 142. — 1841.

Reported herein at p. 255.]

FAY v. MUZZEY.

13 GRAY (MASS.), 53. — 1859.

ACTION of contract on the probate bond of Elizabeth Muzzey, as administratrix of Benjamin Muzzey, deceased, brought by the administratrix *de bonis non* of said Benjamin. The administratrix was to be charged with two items for the value of certain manure unless this court should think, as matter of law, that she should not be chargeable therewith. The further facts appear in the opinion.

HOAR, J. — 1. The court are of opinion that manure from the barn-yard of the homestead of the intestate, standing in a pile upon his land, although "not broken up nor rotten, and not in a fit condition for incorporation with the soil," is not therefore assets in the hands of his administratrix, and that she is not chargeable therewith as a part of his personal estate. Manure, made in the course of husbandry upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This has been so decided as between landlord and tenant, in the cases of *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222, and *Middlebrook v. Corwin*, 15 Wend. 169. The reason of the rule is, that it is for the benefit of agriculture; that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such is unquestionably the general usage and understanding, and a different rule would give rise to many difficult and embarrassing questions.

The same doctrine was applied, as between vendor and vendee, in *Kittredge v. Woods*, 3 N. H. 503, and in *Goodrich v. Jones*, 2 Hill (N. Y.) 142. The doctrine as to fixtures and incidents to the realty is always most strictly held, as between heir and executor, in favor of the heir, and against the right to disannex from the inheritance whatever has been affixed thereto. *Elwes v. Mawe*, 3 East, 51.

The circumstance that a thing is not permanently affixed to the freehold, but is capable of detachment, and is even temporarily detached from it, is not conclusive against the right of the owner of the land. Thus keys of doors go to the heir, and not to the executor. *Wentworth on Executors*, 62; and in *Goodrich v. Jones*, *ubi supra*, it was held, that fencing materials, which have been used as a part of the fence, accidentally or temporarily detached from it,

~~without any intent of the owner to divest them permanently from that use, do not cease to be a part of the freehold.~~ In *Bishop v. Bishop*, 1 Kernan, 123, the same principle was applied to the case of hop poles, which had been taken up and laid in heaps for preservation through the winter; and it was held, that they would pass by a conveyance of the land.

2. The manure from the hotel stable, which is agreed to have been personal estate, and was included in the inventory, must be accounted for by the administratrix; and it is no sufficient account to say that she has expended it upon the real estate which has since been sold for the payment of debts. There is no way in which it can be made certain that it has increased the amount received from the sale of the real estate; and if this were established, an administrator has no right thus to expend the personal property of her intestate. * * *

Judgment accordingly.

(2.) THE NEW JERSEY DOCTRINE.

RUCKMAN *v.* OUTWATER.

28 NEW JERSEY LAW, 581. — 1860.

HAINES, J. — To an action of assumpsit, the plaintiff in error [Ruckman], who was the defendant below, pleaded payment with a notice of set-off, in which he charged the plaintiff below with a quantity of manure sold and delivered. To sustain this charge, he gave in evidence a deed of conveyance, from the plaintiff to him, of a farm, in the county of Bergen, containing no exception or reservation of manure or of fixtures. And he further proved that the plaintiff, by his consent, remained in the possession of the premises after the execution of the deed, and that, while he continued in such possession, the plaintiff took and carted away the manure, which was lying in and spread over the barn-yard, and not in heaps, at the time of the sale and conveyance of the farm.

The court was requested to charge the jury that the manure so lying in the barn-yard, and not in heaps at the time of the sale and conveyance of the farm, if not reserved by the vendor, passed by the deed with and as a part of the farm. The court refused so to charge, but instructed the jury, in effect, that the title to the manure did not pass by the deed, and that the defendant, as purchaser of the farm, could not claim as of right the manure that had accumulated in the barn-yard. On this the error is assigned, and the judgment sought to be reversed

The question thus presented is, whether, by the deed of conveyance of a tract of land without any clause of reservation, the title to the manure lying in and around the barn-yard, where it had accumulated, passed to the grantee.

By an ordinary deed of conveyance of land nothing passes to the grantee but the real estate and its appurtenances, and whatsoever is so attached or affixed to it, that it cannot be removed without injury to the freehold. Hence the question arises, whether manure so lying in a barn-yard is a part of the real estate, or an appurtenant to it, or so attached to the freehold that it passes with it by virtue of the deed of conveyance.

The question is not to be determined by the rules of law regulating fixtures, for the property in question is in no respect a fixture, an article of a personal nature affixed to the freehold, and which cannot be removed without injury to it, nor is it claimed as such. It is claimed as a part of the freehold itself, an appurtenant to it, and which, for the sake of agriculture and good husbandry, should not be removed.

But, as between the grantor and grantee, I can discover no reason, nor can I find any satisfactory authority for such claim. Manure in the yard is as much personal property as the animals and the litter from which it is produced, as much so as the grain in the barn or the stacks of hay in the meadow. And it is not material whether it lies up in heaps or scattered around the yard; whether as thrown from the doors or windows of the stable; or where it accumulated from the droppings of the cattle. But when it is spread upon the land, and appropriated to it for fertilizing purposes, then, and not until then, does it become a part of the freehold. Posts and rails, designed for the farm, are personal property so long as they remain in piles or otherwise unappropriated; but as soon as they are converted into fence they become a part of the freehold affixed to it, so as to lose the character of personalty. As well may the timber, stones, and other materials brought together for the construction of a building be regarded as a part of the farm before the building is erected, as the manure before it is applied. Between the vendor and the vendee the rule, as to what is personal and what real estate, is the same as between the heir at law and the executor. As between the latter, it obtains with the most rigor in favor of the inheritance and against the right to consider as personal property anything which has been affixed or is appurtenant to the freehold. Yet, as between them, manure has ever been regarded as personal property and sold by the executor without a question of the right to do so. In 1 Williams on Executors, 511, we find it declared

"that dung in a heap is a chattel, and goes to the executor; but if it lies scattered on the ground, so that it cannot well be gathered up without gathering a part of the soil with it, then it is parcel of the freehold." Toller, in his *Law of Executors*, page 150, says: "Manure in a heap, before it is spread on the land, is a personal chattel." In *Carver v. Pierce*, Styles, 66, cited in 11 Vin. Abb. 175, Executor 2, Roll, J., as early as Mich. Term of 23 Charles, held that dung in a heap is a chattel, but if spread upon the land it is not.

Such is the rule of the common law, and also of the ecclesiastical law, and as we have no statute on the subject, it is also the law of New Jersey, and I can find no satisfactory reason in any commentary or in the adjudication of other states for changing the rule.

In 2 Kent's Com. 346, it is laid down that manure lying upon the land, and fixtures erected by the vendor for the purpose of trade and manufactures, such as potash kettles, pass to the vendee of the land. But the author is there treating of fixtures, and refers for authority to cases which, so far as they relate to manure, cannot be sustained on the principles of the common law, as between vendor and vendee, or landlord and tenant, in the absence of some covenant or local custom to control them. *Miller v. Plumb*, 6 Cowen, 665, relates strictly to the question of fixtures, the right to potash kettles, troughs, and leaches. In *Kirwan v. Latour*, 1 Har. & Johns. 289, the right to a still-house apparatus and utensils for carrying on a distillery was a question. *Powell v. Monson*, 3 Mason, 459, relates to the mill-wheel and gearing of a factory, and *Farrar v. Stackpole*, 6 Greenl. R. 154, to the fixtures of a saw-mill. Unless the discriminating commentator can be supposed to have adopted the fallacy of the reasoning in *Kittredge v. Woods*, 3 New Hamp. R. 503, it is fair to presume that, in speaking of manure lying upon the ground, he had reference to such as had been spread upon the land, and appropriated to it.

In *Kittredge v. Woods*, 3 New Hamp. R. 503, decided in 1829, Ch. Just. Richardson, in a very elaborate opinion, held that all manure, whether it be in heaps about barns or made in other places on the land, goes with the land to the vendee. As this is a leading case, which has been followed and relied upon by the courts in nearly all the cases in New England and New York, it may be proper to examine the principles on which it is based.

After discussing the law of fixtures between parties in their various relations, the Chief Justice refers to authorities to show that things which, although not affixed to the freehold, go to the heir as appurtenances to the inheritance, namely, doves able to fly, which

with the dove-cote go to the heir, while young doves in the dove-house not able to fly belong to the executor. He refers, also, to the keys of the doors and to chests containing the title deeds, which go to the heir, and then adds: "We are inclined to think that the principle of these decisions will give to the heir the manure which may be carried out and left upon the field in heap for dressing, or which may be left lying in héaps about the barns upon the land."

But I am at a loss to perceive how the rules for the disposition of such articles can change or modify the equally well-settled rules as to manure. Doves are animals *feræ naturæ*, except when in the care or custody of an owner, as when confined in a dove-cote or pigeon-house, or when in the nest not able to fly. Bouvier's L. Dict. 448, title *Dove*. When not in such care they are not, in contemplation of law, the property of any individual, and are not the subject of larceny. 2 East Pl. Crown, 607, § 41. But young doves, not able to fly or leave the cote, may be the subject of ownership, and as personal property, go to the executors, while those able to fly are not strictly property, personal or real, and go where they please, and alight where they list. If there be any ownership in such birds, it is in the nature of heirlooms, and as such, like hares in a warren, or fish in a pond, go to the heir with the inheritance.

So title deeds are not personal property, and the stealing of them is no larceny, but only a trespass, because they concern the land, or, in technical language, savor of realty, and are considered a part of it by the law; and so they descend to the heir, together with the land which they concern. 4 Bl. Com. 234. They are necessary to secure the enjoyment of the land, and are annexed to, and are called heirlooms, and descend with the inheritance to the heir. 2 Bl. Com. 28; 14 Viner's Abr. 291. And the boxes or chests in which they are contained, and which are necessary to their preservation, go with the deeds, as do the tapes and strings that tie them. On the same principle, the keys of the doors of the house are a part of the inheritance, and go with it. These articles are all regarded as belonging to the freehold, although in fact severed from it. Having been appropriated to the land, like boards which have fallen from the fence or building, or like a mill-stone which has been lifted from its bed for the purpose of being picked, they continue to be a part of it. Hence, I have ventured to characterize the reasoning and deductions of the case as fallacious.

Daniels v. Pond, 21 Pick. 367, decided in 1838, has also been considered as a leading case in relation to manure. In the opinion of the court, expressed by Chief Justice Shaw, it was declared that manure made on a farm occupied by a tenant at will or for years in

the ordinary course of husbandry, consisting of collections from the stable and barn-yard, or of compost formed by an admixture of these with the soil or other substances, is by usage, practice, and general understanding, so attached to and connected with the realty that, in the absence of any express stipulation on the subject, the outgoing tenant has no right to remove it, or to sell it to be removed. This opinion is expressly based on usage, practice, and general understanding, and is consequently of no value in a case where there is no proof of any such usage or practice.

In *Middlebrook v. Corwin*, 15 Wend. R. 170, determined in 1836, Nelson, J., cites the English authorities above referred to as fixing the rule on this subject, and adds, perhaps this rule is to be taken with some qualifications.

The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question; because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. And he concludes a tenant has no right to remove the manure. While this case recognizes the rule of the common law, it seeks to modify it by the consideration of local usage; but it can have no weight against that rule in this case, where there is no evidence of any such usage.

The cases thus referred to and considered are leading cases, and have had their influence on those which followed them, and it is sufficient for the present purpose to say, that although they are entitled to great respect and to much weight where they are applicable, yet that the reasoning and the principle of none of them are such as to induce us to make innovation upon the rule of the ecclesiastical and common law long recognized and maintained by us.

The conclusion is that manure lying in and around the yard, not spread upon the land, is personal property, and does not by virtue of the deed of conveyance pass with the freehold; that there is no error in the charge of the court below, and that the judgment must be affirmed with costs.

b. As between landlord and tenant.

MIDDLEBROOK *v.* CORWIN.

15 WEND. (N. Y.), 169. — 1836.

By the Court, NELSON, J. — It is laid down in several books, that manure in heaps, before it is spread upon the land, is a personal chattel. 11 Viner, 175, tit. *Executors*; Toll. L. of Ex. 150; Matthew's

Ex. 27. It further appears that it is common to insert a covenant in the lease of a farm, to leave the manure of the last year upon it. All this would seem to imply that the article belongs to the tenant, and that without a covenant he might remove it. If a farm is leased for agricultural purposes, good husbandry, which without any stipulation therefor is implied by law, would, undoubtedly, require it to be left; if rented for other purposes, this conclusion might not follow. In *Watson v. Welch*, tried in 1785, in summing up to the jury, the judge said that it was matter of law to determine what was using the land in a husbandlike manner, and expressed the opinion that under a covenant so to work a farm, the tenant ought to use on the land all the manure made there, except that when his time was out, he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising therefrom. Woodf. Landl. & T. 255; 1 Esp. N. P. pt. 2, p. 131. Perhaps this rule should be taken with some qualifications. The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question. 4 East, 154; Dough. 201; Holt, N. P. R. 197; 2 Barn. & Ald. 15; Ald. 746. This is reasonable, because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. What may be good husbandry in respect to one particular soil, climate, etc., may not be so in respect to another. Independently, however, of the usage and custom of the place, the rule of Mr. J. Buller, I apprehend, may be the correct one. In the recent case of *Brown v. Crump*, 1 Marsh. 567, Ch. J. Gibbs said, that he had often heard him (Mr. J. Buller) lay down the doctrine, "that every tenant, where no particular agreement existed dispensing with that engagement, is bound to cultivate his farm in a husbandlike manner, and to consume the produce on it. This is an engagement that arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." Without carrying the doctrine to this extent, we may, I think, safely say, upon authority, that where a farm is let for agricultural purposes, no stipulation or custom in the case, the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture.

Case is the appropriate action for the injury complained of. 1 Chitty's Pl. 142. The tenant having no authority himself to remove the manure, could give none to the defendant. The judgment of the C. P. must be reversed, and that of the justice affirmed.

Judgment accordingly.

c. Separate sale of manure.

STRONG v. DOYLE.

110 MASSACHUSETTS, 92. — 1872.

COLT, J. — It was said in *Fay v. Muzzey*, 13 Gray, 53, that manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This rule is applied in whatever situation or condition the material is before it is finally expended upon the soil. It is till then an incident of the real estate of such peculiar character that, while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it. Such an agreement, though it be unwritten, does not come within the statute of frauds, and is not to be rejected, although contemporaneous with the conveyance of the real estate. An oral contract for the sale of it is valid. In the case of fixtures which are not incorporated with, but merely annexed to the freehold, the rule is well settled that the statute does not apply. Browne on St. of Frauds, § 234; *Hallen v. Runder*, 1 C., M. & R. 266; *Bostwick v. Leach*, 3 Day, 476.

In the case at bar, evidence was offered that the defendant, while negotiating for the farm and before its conveyance to him, made a separate and distinct agreement for the purchase of the manure, to be his only in case he was the highest bidder at public auction; that the plaintiff advertised the sale as agreed, and the defendant at the sale for the first time claimed that the manure belonged to him under the plaintiff's deed, and that it was afterwards spread upon the land by him. The deed was in the usual form, conveying the land only, and reserving only to the plaintiff the right of occupying until the first of April following.

In the opinion of the court, this evidence supports the plaintiff's title to the property in dispute. It proves an independent preliminary agreement, by which it was severed from its relations to the realty before the deed was made. It serves to ascertain the subject-matter upon which the deed was intended to operate. 1 Greenl. Ev., § 286; *Ropps v. Barker*, 4 Pick. 239. Such an agreement, made upon good consideration, with the owner of land before it is conveyed, is, as a mode of severance, as effectual as a sale by the owner to a stranger, or an agreement between landlord and tenant by which the manure becomes personal property. *Noble v. Sylvester*, 42 Vt. 146; *Ford v. Cobb*, 20 N. Y. 344.

This case differs from *Noble v. Bosworth*, 19 Pick. 314, cited by

the defendant. There the owner of land erected a dye-house upon it, in which dye-kettles, firmly secured in brick, were set up. And it was held that a verbal reservation of the kettles, before or at the time of the delivery of the deed of the land, was inadmissible to control the ordinary effect and operation of the deed. The property in dispute had been actually annexed to the building, and intentionally incorporated with the real estate by the owner for the purpose of permanent improvement. While in that condition before severance it was subject to the rules which govern the title and transfer of real estate, and passed by the deed. Here no act of severance was necessary to detach the manure from the land, and the agreement of the parties was sufficient.

Exceptions sustained.

2. LANDS NOT AGRICULTURAL OR NOT TO BE USED FOR AGRICULTURAL PURPOSES.

FAY *v.* MUZZEY.

13 GRAY (MASS.), 53. — 1859.

[*Reported herein at p. 339.*]

NEEDHAM *v.* ALLISON.

24 NEW HAMPSHIRE, 355. — 1852.

BELL, J., delivered the opinion of the court. — It is settled here that manure, as between the buyer and seller, passes with the land, whether it is drawn out upon the land for the purpose of use there, or is lying in heaps, or otherwise, about the barns or yards. *Kittredge v. Woods*, 3 N. H. Rep. 503. The same is regarded as the law elsewhere in this country. *Stone v. Proctor*, 2 D. Chip. 115; *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 379; *Lassell v. Reed*, 6 Greenl. 222; *Middleborough v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Daniels v. Pond*, 21 Pick. 371.

That principle, however, does not reach this case, since there is here no question except in relation to the manure made upon the premises subsequently to the sale, and while the defendant may be regarded as a tenant of the purchaser.

In England, in the case of manure made by a tenant of merely agricultural property, in the ordinary course of husbandry, Chancellor Kent seems to be of the opinion that the custom is for the

outgoing tenant to sell or take away the manure. 2 Com. 347, n., a. He cites *Roberts v. Barker*, 1 C. & M. 809, and the cases of *Higgon v. Mortimer*, 6 C. & P. 616; *Hutton v. Warren*, 1 M. & W. 466; 2 Gale, 71; *Beatty v. Gibbons*, 16 East, 116, support that view, while the cases of *Brown v. Crump*, 1 Marsh. 567; *Putney v. Sheldon*, 5 Ves. 147, 260, n., and *Onslow v. —*, 16 Ves. 173, seem to countenance a different rule, where there is no special contract or custom of the country.

In this country, in some of the States, it has been held that the manure made by the tenant during his term, is his property, which he has the right to remove or sell, and which may be attached and holden as his property for the payment of his debts. *Staples v. Emery*, 7 Greenl. 201; *Southwick v. Ellison*, 2 Iredell, 326.

In others, it is held that in the absence of special agreement, or a special custom, the rules of good husbandry require that the manure made upon a farm, in the ordinary course, should be expended upon it; that such manure is an incident of the freehold, and belongs to the landlord, subject to the right of the tenant to use it in the cultivation of the land; and that the tenant has no right to remove or dispose of it, or to apply it to any other use, either during or after the expiration of his tenancy. *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 397; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*, 6 Greenl. 222; *Daniel v. Pond*, 21 Pick. 371; to which add Kent's Opinion, 2 Com. 347, n., a.

But it is urged upon us, that whatever may be the rule as to agricultural property, it is here immaterial because the tenancy was not for agricultural purposes, in the ordinary course of husbandry. By his deed, the defendant reserved the possession of the property from its date in September, till the first of April following. He owned the hay and stock from which this manure was made. He was under no obligation to keep either upon the place, except for his own convenience, and he was bound by no duties to the purchaser resulting from contract, either express or implied, except that of giving up the possession on the first of April.

It was substantially, so far as this question is concerned, a reservation of the buildings merely, since the season of farming operations was chiefly passed, and the rights of the parties were rather like those of the lessor and lessee of livery stables, or the like, than those of farming tenants. There would seem to be no doubt that as to this kind of buildings there would be no pretense that the lessor would have any claim to the manure, except such as might result from express contract. *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222.

This view strikes us as just and reasonable, and most consistent with the reasonable understanding and expectations of the parties. No one can doubt that this must have been the idea of the defendant; or he would have made his reservation clear in this respect. And it is not easy to imagine that the plaintiff should leave it a subject for a doubt, if he supposed he was to have this manure, and it was so understood. Upon this ground we are of opinion there must be

Judgment for the defendant.

HASLEM *v.* LOCKWOOD.

37. CONNECTICUT, 500. — 1871.

PARK, J. — We think the manure scattered upon the ground, under the circumstances of this case, was personal property. The cases referred to by the defendant to show that it was real estate are not in point. The principle of those cases is, that manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it becomes appurtenant to it. The principle was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure, produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that manure so produced is generally regarded by farmers in this country as a part of the realty and has been so treated by landlords and tenants from time immemorial. *Daniels v. Pond*, 21 Pick. 367; *Lewis v. Lyman*, 22 Pick. 437; *Kittredge v. Woods*, 3 N. Hamp. 503; *Lassell v. Reed*, 6 Greenl. 222; *Parsons v. Camp*, 11 Conn. 525; *Fay v. Muzzy*, 13 Gray, 53; *Goodrich v. Jones*, 2 Hill, 142; 1 Washb. on Real Prop. 5, 6.

But this principle does not apply to the droppings of animals driven by travelers upon the highway. The highway is not used, and cannot be used, for the purpose of agriculture. The manure is of no benefit whatsoever to it, but, on the contrary, is a detriment; and in cities and large villages it becomes a nuisance, and is removed by public officers at public expense. The finding in this case is, "that the removal of the manure and scrapings was calculated to improve the appearance and health of the borough." It is,

therefore, evident that the cases relied upon by the defendant have no application to the case.

But it is said that if the manure was personal property, it was in the possession of the owner of the fee, and the scraping it into heaps by the plaintiff did not change the possession, but it continued as before, and that therefore the plaintiff cannot recover, for he neither had the possession nor the right to the immediate possession.

The manure originally belonged to the travelers whose animals dropped it, but it being worthless to them was immediately abandoned, and whether it then became the property of the borough of Stamford which owned the fee of the land on which the manure lay, it is unnecessary to determine; for, if it did, the case finds that the removal of the filth would be an improvement to the borough, and no objection was made by any one to the use that the plaintiff attempted to make of it. Considering the character of such accumulations upon highways in cities and villages, and the light in which they are everywhere regarded in closely settled communities, we cannot believe that the borough in this instance would have had any objection to the act of the plaintiff in removing a nuisance that affected the public health and the appearance of the streets. At all events, we think the facts of the case show a sufficient right in the plaintiff to the immediate possession of the property as against a mere wrongdoer.

The defendant appears before the court in no enviable light. He does not pretend that he had a right to the manure, even when scattered upon the highway, superior to that of the plaintiff; but after the plaintiff had changed its original condition and greatly enhanced its value by his labor, he seized and appropriated to his own use the fruits of the plaintiff's outlay, and now seeks immunity from responsibility on the ground that the plaintiff was a wrongdoer as well as himself. The conduct of the defendant is in keeping with his claim, and neither commends itself to the favorable consideration of the court. The plaintiff had the peaceable and quiet possession of the property; and we deem this sufficient until the borough of Stamford shall make complaint.

It is further claimed that if the plaintiff had a right to the property by virtue of occupancy, he lost the right when he ceased to retain the actual possession of the manure after scraping it into heaps.

We do not question the general doctrine, that where the right by occupancy exists, it exists no longer than the party retains the actual possession of the property, or till he appropriates it to his own use by removing it to some other place. If he leaves the prop-

erty at the place where it was discovered, and does nothing whatsoever to enhance its value or change its nature, his right by occupancy is unquestionably gone. But the question is, if a party finds property comparatively worthless, as the plaintiff found the property in question, owing to its scattered condition upon the highway, and greatly increases its value by his labor and expense, does he lose his right if he leaves it a reasonable time to procure the means to take it away, when such means are necessary for its removal.

Suppose a teamster with a load of grain, while traveling the highway, discovers a rent in one of his bags, and finds that his grain is scattered upon the road for the distance of a mile. He considers the labor of collecting his corn of more value than the property itself, and he therefore abandons it, and pursues his way. A afterwards finds the grain in this condition and gathers it kernel by kernel into heaps by the side of the road, and leaves it a reasonable time to procure the means necessary for its removal. While he is gone for his bag, B discovers the grain thus conveniently collected in heaps and appropriates it to his own use. Has A any remedy? If he has not, the law in this instance is open to just reproach. We think under such circumstances A would have a reasonable time to remove the property, and during such reasonable time his right to it would be protected. If this is so, then the principle applies to the case under consideration.

A reasonable time for the removal of this manure had not elapsed when the defendant seized and converted it to his own use. The statute regulating the rights of parties in the gathering of sea-weed, gives the party who heaps it upon a public beach twenty-four hours in which to remove it, and that length of time for the removal of the property we think would not be unreasonable in most cases like the present one.

We therefore advise the Court of Common Pleas to grant a new trial.

VII. Sea weed, wreck, stranded property. Mislaid goods.

MATHER *v.* CHAPMAN.

40 CONNECTICUT, 382. — 1873.

SEYMOUR, C. J. — The first count of the plaintiff's declaration is in trespass for the taking and converting to his own use by the defendant of large quantities of sea-weed alleged to be the proper goods and estate of the plaintiffs. This sea-weed was cast upon the shore adjoining the defendant's land, and was there, below high-

water mark, taken by the defendant and converted to his own use. The Court of Common Pleas, against the request of the plaintiffs, instructed the jury, in substance, that sea-weed cast and left upon the shore, (that is, between ordinary high and low-water mark), *prima facie* belongs to the public and may lawfully be appropriated by the first occupant.

To this charge the plaintiffs object, and the principal question in the case arises upon this objection.

A different question arises under the second count, which will be considered in its proper place.

It is conceded that by the settled law of Connecticut the title of a riparian proprietor terminates at ordinary high-water mark. It is also conceded that though his title in fee thus terminates, yet he has certain privileges in the adjoining waters.

Among the most important of these privileges are (1) That of access to the deep sea. (2) The right to extend his lands into the water by means of wharves, subject to the qualification that he thereby does no injury to the free navigation of the water by the public. (3) The right by accretion to whatever lands by natural or artificial means are reclaimed from the sea, subject, however, to certain qualifications not necessary here to be mentioned.

The plaintiffs claim that among the privileges of the riparian proprietor is also that of the exclusive right to the sea-weed which is cast upon the shore and left there by the receding tide.

In respect to the weed cast by extraordinary floods upon the land of the proprietor and there left above ordinary high-water mark, the law of this state is settled, in conformity with what we understand to be the common law of England. The owner of the soil has it *ratione soli*. No other person can then take it without a trespass upon the owner's land, and as owner of the land he is deemed to be constructively the first occupant.

But below high-water mark the soil does not belong to the owner of the upland. The sea-weed in dispute was not taken from the plaintiff's land, and their title, if they have a title, is not *ratione soli*. No trespass on the plaintiff's land was committed by the defendant in taking the weed, for the taking of which recovery is sought in this court.

Upon what ground then can the plaintiffs sustain the title which they claim to the weed? While it was floating on the tide it was *publici juris*. Why, when it is left on the shore by the receding tide, should it become their property?

In Massachusetts and Maine, by virtue of the Colonial Ordinance of 1641, the individual title of proprietors adjoining navigable water

extends to low-water mark. [*Citing and discussing Barker v. Bates, reported at p. 355, below.*]

The cases therefore in Massachusetts and Maine which decide that sea-weed left on the shore belongs to the riparian proprietor have no application here. In New Hampshire the Massachusetts ordinance is adopted as law.

In New York the common-law rule is adopted, as with us, in relation to the boundary line between the public and the riparian proprietor, and it is claimed that, in *Emans v. Turnbull*, 2 Johns. R. 313, the question before us is decided in conformity with the plaintiffs' claim. The judgment in that case is pronounced by a judge of profound learning, whose opinion upon the point now under discussion, if really given, would be entitled to great weight; but we are inclined to think that the sea-weed in that case was cast upon the land of the plaintiff. The main argument at the bar and on the bench relates to the title to the *locus in quo*. Chief Justice Kent says: "If the marine increase be by small and imperceptible degrees, it goes to the owner of the land. The sea-weed must be supposed to have accumulated gradually."

In the case we are called on to decide, the sea-weed could not be regarded as a marine increase of the plaintiff's land, for it had not reached their land and was not attached to it nor connected with it. To be a marine increase it must form part and parcel of the land itself. Being between high and low-water mark, at each returning tide it would be afloat, and even in Massachusetts sea-weed when afloat is *publici juris*, although floating over soil which is private property.

The sea-weed in this suit is not treated as part of the real estate which by small and imperceptible degrees had become part of the plaintiff's land. It is treated as personal property, and the defendant is sued for taking it as such and converting it to his own use. In the case of *Emans v. Turnbull* the plaintiff's title was held good upon a liberal construction of the *jus alluvionis* which implies that the weed had then become part and parcel of the plaintiff's land and must therefore have been above or upon ordinary high-water mark. Title to personal property *jure alluvionis* would be a novelty in the law. 2 Black. Com. 262. Title by accretion is substantially the same as by alluvion. Both are modes of acquiring title to real property.

Title, however, to personal property may be acquired by what in law is called accession, but to acquire title by accession the accessory thing must be united to the principal, so as to constitute part and parcel of it. "*Accessio*" is defined by Bouvier as "a manner of acquiring the property in a thing which becomes united with that

which a person already possesses." The plaintiffs, therefore, seem to us to have no title by alluvion, or by accretion, or by accession, certainly none *ratione soli*, and they cannot be regarded as first occupants by construction merely because of the propinquity of their land to the property in dispute.

The question under discussion does not seem to be fully settled in England. The soil of the seashore is there, as with us, *prima facie* in the public, but it may become private property, and frequently is so, where the adjoining lands are part of the manor. The authority of Bracton is clearly in favor, (1st) of the common right of all to the shores of the sea as part of the sea itself. (2d) In Liber 2, speaking of the right of first occupancy, he says: "*Item, locum habet eadem species occupationis, in iis quæ communia sunt, sicut in mare et littore maris, in lappillis et geminis et ceteris in littore maris inventis.*" Sea-weed must be included within the *et ceteris* of Bracton in this passage, and upon his authority belongs to the first occupant.

The opinion of Lord Hale in favor of the common right to take sea-weed on the shore is shown by the following passage in chapter 6 of Hale, *de Jure Maris*. After speaking of three kinds of shore he says: "This kind of shore, to wit, that which is covered by the ordinary flux of the ocean, may belong to a subject, and may be parcel of a manor, and the evidence to prove it parcel of a manor are commonly these, constant and usual fetching of gravel and sea-weed and sea-sand, between high and low-water mark, and licensing others so to do."

In the case, however, of *Bagott v. Orr*, 2 Bos. & Pul. 472, the court expressed doubts upon the right of the public to come upon the shore and take shells which had been thrown up and left there by the tide.

In the case of *Blundell v. Catterall* there occurs a very learned and interesting discussion upon the right of the public between high and low-water mark, but the precise question now under our consideration is not made the subject of comment.

The case of *Church v. Meeker*, 34 Conn. R. 421, is relied upon by both parties. We think the opinion of Judge Butler in that case must be construed as applicable solely to sea-weed found as it there was above high-water mark.

In the case of *Peck v. Lockwood*, 5 Day, 22, the plaintiff owned a portion of the shore below ordinary high-water mark, and it was held that he could not maintain trespass against the defendant, who entered the premises when the tide was out and dug for shellfish and carried the fish away. That is a strong case in favor of the common right of fishing.

But the right of taking sea-weed would seem to stand on the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean. Neither in the state of nature is the property of any one; the title to both depends upon the first occupancy. It is agreed that while afloat both are alike common; why, when the tide recedes and leaves shellfish and sea-weed on the shore, should the sea-weed belong to the riparian proprietor when confessedly the shellfish remains common property?

We think the charge of the judge in regard to the first count was correct.

BARKER *v.* BATES.

13 PICKERING (MASS.), 255. — 1832.

TRESPASS for taking and carrying away a stick of timber from plaintiff's land.

SHAW, C. J., delivered the opinion of the court. The sole and single question in the present case is, which of these parties has the preferable claim, by mere naked possession, without other title, to a stick of timber, driven ashore under such circumstances as lead to a belief that it was thrown overboard or washed out of some vessel in distress, and never reclaimed by the owner. It does not involve any question of the right of the original owner to regain his property, in the timber, with or without salvage, or the right of the sovereign to claim title to property as wreck, or of the power and jurisdiction of the governments, either of the commonwealth or of the United States, to pass such laws and adopt such regulations on the subject of wreck, as justice and public policy may require.¹ * * *

Considering it as thus established, that the place upon which this timber was thrown up and had lodged, was the soil and freehold of the plaintiff, that the defendants cannot justify their entry, for the purpose of taking away or marking the timber, we are of opinion that such entry was a trespass, and that as between the plaintiff and

¹ The place where the stick of timber was found by defendant was "on the sea-shore, between high and low-water mark" in front of plaintiff's beach. It was contended, on the one hand, that by the common-law rule plaintiff's land extended only to high-water mark. On the other it was insisted that an early Massachusetts ordinance applied, in accordance with which the proprietor of lands adjoining salt water owns to the low-water mark "where the sea does not ebb and flow above a hundred rods." The court held the ordinance applicable. — ED.

the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and therefore that the plaintiff has a right to recover the agreed value of the timber, in his claim of damages.

SHELDON *v.* SHERMAN.

42 NEW YORK, 484. — 1870.

HUNT, J. — There is a large class of cases, in which injury is suffered by a party, where the law gives no redress. If a tree growing upon the land of one is blown down upon the premises of another, and in its fall injures his shrubbery, or his house, or his person, he has no redress against him upon whose land the tree grew. If one builds a dam of such strength that it will give protection against all ordinary floods the occurrence of an extraordinary flood by which it is carried away, and its remains are lodged upon the premises of the owner below, or by means whereof the dam below is carried away, or the mill building is destroyed, gives no claim against the builder of the dam. If the house of A. accidentally take fire, and the flames spread and consume the house of B., the latter has no claim of indemnity upon A. If the horses of A., being properly equipped and driven, become unmanageable, without fault or negligence, run away and injure the property or the person of his neighbor, the latter must suffer the loss. In these cases the injury arises from a fortuitous occurrence beyond the control of man. It is termed "the act of God." The party through whom it occurs is not responsible for it. The party suffering must submit to it, as a providential dispensation. *Ryan v. N. Cen. R. R. Co.*, 35 N. Y. 210; *Anthony v. Harvey*, 8 Bing. 191; Storey on Bail., § 83a, and the learned note. *Auth. post.*

In all these cases, there is no liability on the part of him through whose innocent instrumentality the injury occurs, and his promise to respond to the damages would be without consideration and void.

In the instance before us, the logs were carried down the river and deposited upon the plaintiff's land, without fault on the part of the defendants or of those building or having charge of the boom. The defendants were not responsible for an injury arising from their being thus deposited, and a promise to make it good would be without consideration, and not obligatory. Neither were the defendants unconditionally liable for the injury arising from allowing the logs to remain where deposited. If they chose to abandon their

property thus cast on shore, they had the right so to do, and no one could call them to account. They were not compelled, however, to abandon it, but had the right to reclaim it; like one whose fruit falls or is blown upon his neighbor's ground, the ownership is not thereby lost, but the owner may lawfully enter upon the premises to recapture his property. When he does so reclaim or recapture, his liability to make good the damage done by his property arises. He then becomes responsible. Before he can reclaim or recapture the property thus astray, justice and equity demand that he should make good the injury caused by its deposit and its continuance.

The rule is sensibly expressed by Domat, in the article following, viz.: "1st. He who has found a thing that is lost is bound to preserve it, and to take care of it in order to restore it to its owner. . . . And when he does restore it, he cannot detain any part of it nor demand anything for having found it. But he will recover only what expense he has been at, as shall be explained in the following article. 2d. The person to whom one restores the thing which he had lost, is obliged on his part to repay the money that has been laid out either in keeping the thing or in delivering it to him, as if it was some strayed beast which it was necessary to feed, or that the carriage of the thing from one place to another had obliged the person in whose custody it was to be at some charges; or if any money has been laid out in advertisements or in having the thing cried, in order to give notice to the owner. . . . 3d. The proprietor of a ground on which is thrown the rubbish of a building that has fallen down, or that which a flood has carried away from another's ground, is obliged to suffer him who has had the loss to take away what remains, and to allow him such free access to his grounds as is necessary for that end. But upon the conditions that are explained in the following article. 4th. In the cases of the foregoing article, he who desires to have back the materials of his building that is fallen down, or that which a flood hath carried away from his land and thrown upon another man's ground, is obliged, on his part, not only to indemnify the proprietor of said ground, as to what damage shall happen to be done by taking away the things which have been thrown upon it, but he is moreover bound to repair all the damage which has been already done to the ground by the things since they were cast upon it. But if he chooses rather not to take away anything, he will owe nothing; for, if he abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident, and it is enough that he loses what the accident

has carried away from him. 5th. If he, whose materials or other things have been thrown by these accidents on the estate of another person, be desirous to take them away, he will be obliged, besides the making reparation for the damage sustained by the owner of the ground, to take away as well the unprofitable stuff that can be of no manner of use as that which is useful and which he is desirous to take away, and to clear entirely the surface of the ground on which the things have been thrown." Domat, vol. 1, pp. 334, 335, part 1, b. 2, tit. 9, § 2, arts. 1, 2, 3, 4, 5. Lond. ed. of 1722.

The logs in question were reclaimed by the authority of the defendants and removed from the premises of the plaintiff. No question is made as to Pond's authority to remove the property, whatever may be said of his authority to promise payment. When the defendants thus removed their property, they became at once responsible for the payment of the damages. If they made no express promise to pay them, the law raises the promise and will sustain an action based upon it. "Where there is a legal right to demand a sum of money and there is no other remedy, the law will imply a promise of payment." *Poor v. Guilford*, 6 Seld. 276; *Newton v. Coon*, 3 Denio, 134, 5 Greenleaf R., 519.

The doctrines of Domat are sustained by *Amory v. Flynn*, 10 Johns. R. 102, and *Rider v. Anderson*, 4 Dana, 193. See also Story on Bail. 121, and note 621a. *Nicholson v. Chapman*, 2 H. Black. R. 254, is not analogous, and furnishes no authority to the contrary. Nor is the case of *Beinstead v. Bach*, 2 W. Bl. 1117, or of 2 Strange, 278; 1 M. & S. 290, 20 J. R. 28; 10 Id. 249; 4 Wend., 652, to the point. This is not the case of a gratuitous or voluntary service, for which no compensation can be demanded. The use of the plaintiff's land was compulsory. He never consented to the use. He had not the power to resist. Whether the logs remained upon the premises an unreasonable length of time was a question of fact to be decided by the jury, or by the judge acting in their place, if the question became important. 3 B. & C. 213; 4 B. & Ald. 366, 387; 2 B. & B. 692. The finding in favor of the plaintiff determines this question in his favor, upon the well-settled principle that every fact not expressly found shall be deemed to have been found, and held in such manner as to uphold the judgment 36 N. Y. 340; 32 Id. 464; 28 Id. 532; 22 Id. 425, 323; 21 Id. 551.

The recovery was upon general principles of law, without reference to the statute. It is not necessary to invoke it in his behalf, nor are his rights disturbed by its provisions. The judgment should be affirmed with costs.

Judgment affirmed.

McAVOY v. MEDINA.

II ALLEN (MASS.), 549. — 1866.

DEWEY, J. — It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97; *Bridges v. Hawkesworth*, 7 Eng. Law and Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Exceptions overruled.

VIII. Property in fish and game *ratione soli*.BREESE, J., IN *BECKMAN v. KREAMER*.

43 ILLINOIS, 447. — 1867.

By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situated. Washburn on the Law of Easements and Servitudes, 411, referring to Hargraves' Law Tracts, 5; Woolrych on Waters, 87; *Chalder v. Dickinson*, 1 Conn. 382; *Waters v. Lilley*, 4 Pick. 199; *Hooker v. Cummins*, 20 Johns. 90; *McFarlin v. Essex Co.*, 10 Cush. 304.

This right to take fish within the limits of one's land bounding upon and including a stream not navigable, is so far a subject of distinct property or ownership, that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land, or the land may be granted, while the grantor reserves the fishery to himself.

In this case the record shows, that the plaintiffs below showed either a legal or equitable title to the lands on which the lake was situate, and actual possession and cultivation of the adjacent lands described in the title papers they exhibited.

It appears the lake is a small sheet of water about seven miles from the Kankakee river, and has an outlet to that river. It abounds in fish of a choice kind. The defendants went on it with small boats they had brought with them, equipped with a seine, which they dragged in the lake, against the will and protest of the owners of the land.

This entering upon the land and fishery, which was exclusive in the plaintiffs, was a trespass upon their premises, for which the action of trespass lay, independently of the question of ownership in the fish. The plaintiffs had, therefore, a clear right to recover for the trespass. * * *

STERLING *v.* JACKSON.

69 MICHIGAN, 488. — 1888.

CHAMPLIN, J. — This is an action for trespass upon land covered with water, situated on fractional section 11 north of private claim, township 7 south, range 9 east.

The declaration alleges that defendant broke and entered plaintiff's close, and with his boat, oars, and paddle, in rowing and punting, broke down and destroyed the wild rice and grass there growing, and with his gun shot at, wounded, and killed and frightened away the wild ducks and other game there resting and feeding, and other injuries, etc.

The defendant pleaded the general issue, and gave notice that he would show that the premises upon which the injuries were supposed to have been committed were a common highway, and free to defendant, and by virtue thereof, and in use thereof, he did all and singular the acts complained of, as he lawfully might. * * *

There was a large amount of testimony introduced to show that this bay, as well as Sandy creek, was navigable water, and in the disposition made of the case in the court below the fact was conceded that it was navigable, and used as such, and I shall consider that fact as established.

It is also a conceded fact that defendant was in a boat in the navigable waters of the bay, and by the aid of some rushes that grew up through the water, and a structure called "a hide," and several artificial ducks as decoys, was engaged in shooting wild ducks upon the premises covered by plaintiff's patent; that he was requested to desist, and leave the premises, by plaintiff, through his agent, but refused so to do, claiming the right to be where he was, and to shoot ducks and game, because he was in the navigable waters of Lake Erie.

A point is made by counsel for defendant that, at the time the state issued its patent for this land in 1883, the shore had washed away, and the bay existed as a part of the waters of Lake Erie, and the mere grant of the land could convey no greater rights, as to fishing and shooting, to the grantee than the grantor had.

It seems to me that plaintiff is unaffected by the changed condition of the shore. In my opinion, the grant was effective to pass the title to the submerged land. The patent from the state passed such title as it had; and if, prior to its date, a portion of the land had become submerged by the slow and imperceptible encroachments of the waters of the lake, the state, unlike a private person, still would be the owner, and could grant the bed of the lake to

whom it chose, so long as such grant did not interfere with private vested rights. *Smith v. Levinus*, 8 N. Y. 472. * * *

It may be remarked, however, that Congress had not the remotest intention of granting these lands for game preserves, to be bought up and controlled by individuals or clubs. While I have no doubt that plaintiff may, for the purpose of reclaiming this land, construct levees or embankment, and thus shut out the waters of Lake Erie, and the public as well, yet, while he permits it to remain as a part of the navigable water of Lake Erie, there is an implied license to the public, under which the public have the right to navigate the same, and to exercise all such rights as are incident to navigation, and it is also subject to such rights as the public have in the navigable waters of the state.

The plaintiff claims the exclusive right of hunting within the territory covered by his patent from the state. He founds this right upon his proprietary interests in the soil under the water. He does not deny, so long as the premises remain in their present condition, that the public have a right of navigation over his land, but he claims such right is a mere easement, and extends simply to a right of passage over his lands in such vessels as are capable of navigating the water over the same. He insists upon the exclusive right to hunt, and to capture all wild game while on his own premises, and that his right of capture is as much a right of property as the right to make any other use of his own premises. He cites, in support of these propositions, the following authorities: *Moore v. Sanborne*, 2 Mich. 519; *Booming Co. v. Speechly*, 31 Id. 336, 342; *Lorman v. Benson*, 8 Id. 18; *Rice v. Ruddiman*, 10 Id. 125; *Booming Co. v. Jarvis*, 30 Id. 319; *Attorney General v. Booming Co.*, 34 Id. 474; *Ewing v. Colquhoun*, 2 App. Cas. 839; *Walker v. Board, etc.*, 16 Ohio, 544; *Braxton v. Bressler*, 64 Ill. 488; *June v. Purcell*, 36 Ohio St. 396; *Ross v. Faust*, 54 Ind. 471; *Berry v. Snyder*, 3 Bush, 266, 285; *Overman v. May*, 35 Iowa, 89; *Ice Co. v. Shortall*, 101 Ill. 46; *McFarlin v. Essex Co.*, 10 Cush. 309; *Adams v. Pease*, 2 Conn. 484; *Cooley*, Torts, 329; *Waters v. Lilley*, 4 Pick. 145, *Goff v. Kilts*, 15 Wend. 550; *Blades v. Higgs*, 12 C. B. (N. S.) 501, 13 Id. 866; *Ferguson v. Miller*, 1 Cow. 243; *Gillett v. Mason*, 7 Johns. 16; *Gould, Waters*, §§ 93a, 158, 159.

The defendant's counsel contend that, the bay being navigable, and free to the public for passage, the defendant, as one of the public, had a right to go upon the waters, and shoot as he did; that the entry upon the bay in his boat was no trespass; that, having the right, as one of the public, to pass over these waters, and to be where he was, he had the right to fish in them, to shoot from his

boat wild ducks flying over them from the open lake, and to anchor his decoys to attract such ducks; that the ownership of the soil is a qualified ownership, subject to the public and common right of passage, fishing, and shooting wild birds. In support of this, he cites the following authorities: *Pearce v. Scotcher*, 9 Q. B. Div. 162; *Weston v. Sampson*, 8 Cush. 347; *Martin v. Waddell*, 16 Pet. 367; *Smith v. State*, 18 How. 74; *Collins v. Benbury*, 3 Ired. 277; *Browne v. Kennedy*, 5 Har. & J. 195; *State v. Falls Co.*, 49 N. H. 240; *Carson v. Blager*, 2 Bin. 475; *Sloan v. Biemiller*, 34 Ohio St. 492.

We have not been cited to any adjudicated case where this question has arisen. Both parties have presented it on the analogies of the right to fish in public navigable waters; and counsel for both parties insist that, if the case is to be governed by the rights of fishing, it should be decided for their clients. Both appeal to the doctrine of the common law, and find their vindication in its precepts. One asks for the application of the doctrine of the right of fishing in navigable waters where the tide ebbs and flows; and the other is best suited with the common law as applied to non-tidal or fresh water streams.

While the questions of fishing and hunting are in principle somewhat analogous, yet they have always in England been treated as separate subjects of legislation and regulation. The forest and game laws of England have always been treated under a separate code, distinguished for its tyrannical inhibition of the common rights of the subject, and detestable for the cruel punishments inflicted for trivial offenses. 2 Bl. Com. 411 *et seq.*; Com. Dig., tit. "Justices of the Peace," B. 43, 45-49. The common law, which recognized the right of hunting and of property in wild animals to be a royal prerogative, and to vest in the king, has no existence in this country, where no king and no royal prerogative exist. Here the sovereign power is in the people, and the principle, founded upon reason and justice, obtains, that by the law of nature every man, of whatever rank or station, has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's rights. Laws have been passed to protect game during certain seasons, with a view to their preservation, but none denying the right of any person to capture or kill game in the allotted season. This right is restricted only as to place.

Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land but by consent of the owner. It will be conceded that the owner of lands in this state has the exclusive right of hunting and sporting upon his own soil; whatever may be the view enter-

tained when the land belongs to the United States or to the state, there can be no question when the land passes to the hands of private owners.

The defendant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position, which, considered in the abstract, is quite forcible, and, if applied to waters where there is no private ownership of the soil thereunder, would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as the license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a "hide," nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license. * * *

[Several cases are here reviewed and are then summed up as follows:]

In each of these cases the defendant "was where he had a right to be" at the time he committed the grievance complained of, nevertheless this fact did not justify him in doing an act, the direct consequence of which was to injure the owner of the land for his own benefit. It does not follow that, because a person is where he has a right to be he cannot be held liable in trespass. A person has the right to drive his cattle along the public highway, but he has no right to depasture the grass with his cattle in the highway adjoining the land of another person. Also, a person has the right to travel along a public highway, but this gives him no right to dig a pit, or remove the soil, or incumber it in front of lands belonging to others.

In the case under consideration, the defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it; but he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as the owner of the soil. The public had a right to use it as a public highway, but every other beneficial use and enjoyment belonged to the owners of the soil.

Had this action been in case, with proper averments setting forth plaintiff's ownership and use for sporting, and defendant's interfer-

ence and disturbance of plaintiff's enjoyment, the authorities last above cited would have supported the action. I am not prepared to say, after verdict, that trespass will not lie under the circumstances of this case; more especially as no question is raised by defendant's counsel that it is not the proper form of action, and as it appears to have been planted to test the plaintiff's right to the private and exclusive use of the land covered by his patent for sporting purposes. As owner of the fee of the soil under the water, I think he is entitled to such exclusive right, and that the judgment should be affirmed.

I may add, in conclusion, that, aside from the ownership of the plaintiff of the *locus in quo*, the only important question in this case is whether a man has the exclusive right of fowling upon his own land. If he has, it can make no difference with that right whether it be upland or covered with water. As the question of the right to fish in the navigable waters of the great lakes at places not affected by private ownership does not arise in this case, I forbear to discuss it. My views upon that subject were expressed in *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. Rep. 103.

REXROTH v. COON.

15 RHODE ISLAND, 35. — 1885.

TILLINGHAST, J. — This is an action on the case in trover for the recovery of damages for the wrongful conversion of a hive of bees, together with the honey and honey-comb belonging, as is alleged, to the plaintiff. The case was originally brought and tried in the Justice Court of the town of Westerly, from whence it was carried by appeal to the Court of Common Pleas. In the Court of Common Pleas jury trial was waived, and it was tried to the court upon the law and the facts. It comes here by bill of exceptions, the only exception taken being to the ruling of the court, that, upon the facts which appeared in evidence, the plaintiff was not entitled to recover. Said facts are incorporated in the bill of exceptions, and are a part of the record of the proceedings. They are substantially as follows, namely: In May, 1881, the plaintiff placed a small pine box called a bee-hive, in the crotch of a tree in the woods on land of Samuel Green, in the town of Hopkinton. It remained in this position until about the first of September, 1883, when the defendant went upon the premises and took and carried away the hive, together with a swarm of bees that was then in it, also the honey

and honey-comb, and appropriated the same to his own use. The plaintiff had visited the hive about twice a year while it remained in its position, for the purpose of ascertaining whether any bees were in it or had been. He had found none. The plaintiff never had any express permission or license from the owner of the land to place or keep his hive in said tree.

The defendant never had any express permission or license from the owner of the land to come upon it, and take and carry away said property. Said hive was at some distance from any house, and no person knew where said bees came from into said hive, although a number of people kept bees in said town. There was evidence that for several years signs had been posted up by said Green on his premises forbidding all persons from trespassing thereon, and that one of said signs was within about twenty rods of said hive, but the plaintiff testified that he never saw any of them, and that he never had any notice to keep off said premises. The defendant split open said hive took out its contents, and then nailed it together again and replaced it in said tree in as good condition as it was before he took it away. The defendant testified that he knew the owner of said land had forbidden all persons from trespassing thereon, but that said owner had told him that he did not put up said notice to keep off his neighbors, and had given him permission to go upon said land. Demand was made upon defendant in due form before the commencement of suit. After the suit was commenced the defendant turned over to said Green what then remained in his hands of said bees and honey-comb. The value of the property taken was variously estimated at from \$2.50 to \$10. Upon said facts the court ruled that the plaintiff was not entitled to recover, and rendered judgment for the defendant for his costs, to which ruling the plaintiff duly excepted.

The only question, therefore, is whether said ruling was correct.

The plaintiff claims that he hived the bees, and that he thereby acquired at least a qualified property in them, notwithstanding they were upon the land of another, which was sufficient to enable him to maintain this action. We do not think the claim can be substantiated. The action is trover, and, in order to recover, the plaintiff must prove title, some title, in himself, coupled with possession or the right of immediate possession. We do not think he has proved either.

Bees are *feræ naturæ* and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious and of uncertain tenure, cannot be changed or terminated by the act of a mere trespasser.

That is to say, the act of reducing a thing *feræ naturæ* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created. *Blades v. Higgs*, 11 H. L. 621.

"Property *ratione soli*," said the Lord Chancellor, in said case, "is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil." It is further held in the same case that such animals, when found, killed, and taken by a mere trespasser, became also the property of the owner of the land, the same as if taken by him or his servants. See *Sutton v. Moody*, Ld. Raym. 250; *Earl of Lonsdale v. Rigg*, 11 Exch. Rep. 654; *Rigg v. Earl of Lonsdale*, 1 H. & N. 923.

We understand that the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England, excepting, of course, all game laws and statutory regulations, which are now very numerous upon this subject. See *Idol v. Jones*, 2 Dev. 162.

In support of the plaintiff's position in the case at bar, he cites the following authorities, namely: 1 Swift's Digest, 169; 2 Blackstone Comment. *393; 2 Kent Comment. *350; 2 Inst. 1, 14, 15; *Merrills v. Goodwin*, 1 Root, 209; *Gillett v. Mason*, 7 Johns. Rep. 16; and *Goff v. Kilts*, 15 Wend. 550. All of these authorities, in so far as they are pertinent, omitting, of course, the citations from the civil law, which is not in force here, tend in our judgment to support the defendant's position rather than that of the plaintiff.

The case of *Merrills v. Goodwin*, cited by the plaintiff, decides that a man's finding bees in a tree standing upon another man's land, gives him no right either to the tree or the bees; and that a swarm of bees going from a hive, if they can be followed and identified, are not lost to the owner, but may be reclaimed. That is to say, a man may pursue his property of this sort even upon the land of another, and retake it, and this, although the owner might be liable for a trespass in so doing.

Gillett v. Mason, 7 Johns. Rep. 16, cited by the plaintiff, also recognizes the doctrine of a qualified ownership in bees, *ratione soli*; and while it decides that hiving or inclosing them gives property therein, and that he who first incloses them in a hive becomes their proprietor, yet it is clear from the general tenor of the case, as from the note which follows it, that it "must be understood with the restriction that a person could not come upon the land of

another without his consent, for the purpose of taking bees, although unreclaimed."

The case of *Goff v. Kilts*, 15 Wend. 550, is clearly against the position taken by the plaintiff. * * * See, also, *Ferguson v. Miller*, 1 Cow. 243; *Adams v. Burton*, 43 Vt. 36, 38, and Bennett, Farm Law, 64.

In the case at bar the plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant, by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was, does not in any way aid the plaintiff in this suit. The fact that A. commits a trespass upon land of B., and carries away some of his personal property, would hardly be considered a cause of action in favor of C. * * *

Exceptions overruled.

GOFF *v.* KILTS.

15 WENDELL (N. Y.), 550. — 1836.

By the Court, NELSON, J. — Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. Bees are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or enclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant — in other words, to the person who first hives them; but if a swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. 2 Black. Com. 393; 2 Kent's Com. 394.

The question here is not between the owner of the soil upon which the tree stood that included the swarm, and the owner of the bees;

as to him, the owner of the bees would not be able to regain his property, or the fruits of it without being guilty of trespass. But it by no means follows, from this predicament, that the right to the enjoyment of the property is lost; that the bees therefore become again *feræ naturæ*, and belong to the first occupant. If a domestic or tame animal of one person should stray to the enclosure of another, the owner could not follow and retake it, without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves, and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like remedy existed in case of an invasion of it. It cannot, I think, be doubted, that if the property in the swarm continues while within sight of the owner — in other words, while he can distinguish and identify it in the air — that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant.

It is said the owner of the soil is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game, (game laws out of the question), belong to the owner or occupant of the forest, *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says, if a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. 2 Black. Com. 419. But if animals *feræ naturæ* that have been

reclaimed, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded, and reconciled as far as is consistent with a reasonable protection of each. The cases of *Herrmance v. Vernay*, 6 Johns. R. 5, and *Blidke v. Jerome*, 14 Id. 406, are authorities for saying, if any were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another, without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil, therefore, acquiring no right to the property in the bees, the defendant below cannot protect himself by showing it out of the plaintiff in that way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person, who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguished from the cases of *Gillet v. Mason*, 7 Johns. R. 16, and *Ferguson v. Miller*, 1 Cowen, 243. The first presented a question between the finder and a person interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the swarm according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli*. For these reasons I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

M'CONICO v. SINGLETON.

2 MILLS (S. C. CONST. REP.), 244. — 1818.

JOHNSON, J., delivered the opinion of the court.—Until the bringing of this action, the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement of the country up to the present time; and the time has been, when, in all probability, obedient as our ancestors were to the law of the country, a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege. It was the source

from whence a great portion of them derived their food and raiment, and was to the devoted huntsman, (disreputable as the life now is), a source of considerable profit. The forest was regarded as a common, in which they entered at pleasure, and exercised the privilege; and it will not be denied that animals, *feræ naturæ*, are common property, and belong to the first taker. If, therefore, usage can make law, none was ever better established. This usage is also clearly recognized as a right, by the several acts of the legislature on the subject; particularly the act of 1769 (Pub. Laws, 276), which restrains the right to hunt within seven miles of the residence of the hunter. Now if the right to hunt beyond that, did not before exist, this act was nugatory; and it cannot be believed that it was only intended to apply to such as owned a tract of land, the diameter of which would be fourteen miles. It appears to me also, that there is no rule of the English common law, at variance with this principle; but, it is said, that every entry on the lands of another is a trespass, and the least injury, as treading down grass and the like, will support it. (1 Esp. Dig., tit. Trespass, 221.) But there must be some actual injury to support the action. Now it will not be pretended that riding over the soil is an injury; and the forest being the common, in which the cattle of all are used to range at large, the grass, if perchance there be any, may also be regarded as common property; and surely no action will lie against a commoner for barely riding over the common. The right to hunt on unenclosed lands, I think, therefore, clearly established, but if it were doubtful, I should be strongly inclined to support it. Large standing armies are, perhaps, wisely considered as dangerous to our free institutions; the militia, therefore, necessarily constitutes our greatest security against aggression; our forest is the great field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms, the great and decided advantage of which have been seen and felt on too many occasions to be forgotten, or to require a recurrence to.

Having come to the conclusion that it is the right of the inhabitants to hunt on unenclosed lands, I need not attempt to prove that the dissent or disapprobation of the owner cannot deprive them of it; for I am sure it never yet entered the mind of any man, that a right which the law gives, can be defeated at the mere will and caprice of an individual. * * *

Let the motion be dismissed.¹

¹ See also *Broughton v. Singleton*, 2 Nott & McCords (S. C.), 338. — 1820. The game laws of the various States usually have some bearing upon the general question here discussed. — ED.

IX. Minerals.¹

COFFEY, J., IN THE PEOPLE'S GAS CO. v. TYNER.

131 INDIANA, 277. — 1891.

[Appellants contend] that they had the right to use their own property as to them seemed best, and for that reason, they could not be enjoined from exploding nitro-glycerine in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee. * * *

On the other hand, it is contended by the appellee: * * * that natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use. * * *

It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State, ex rel. v. Indiana, etc., Co.*, 120 Ind. 575.

Water, petroleum oil and gas are generally classed by themselves as minerals possessing, in some degree, a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterranean stream of water there is much diversity of opinion and conflict in the adjudicated cases, but the authorities agree that the owner of a particular tract of land may sink a well and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land. Angell, *Watercourses*, § 112; *Hanson v. McCue*, 42 Cal. 303; *Wheatley v. Baugh*, 25 Pa. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; *Acton v. Blundell*, 12 M. & W. 324; *Delhi, Trustees, etc., of v. Youmans*, 50 Barb. 316; *Mosier v. Caldwell*, 7 Nev. 363; *New Albany, etc., R. R. Co. v. Peterson*, 14 Ind. 112; *City of Green-castle v. Hazelitt*, 23 Ind. 186.

It is a familiar maxim that in contemplation of law land always extends downward as well as upwards, so that whatever is in direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr. Angell says that it would seem to follow from this maxim that whether what is subterranean be solid rock, mines or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein and

¹ See also *Huff v. McCauley*, 53 Pa. St. 206, *supra*, p. 76; *Caldwell v. Fulton*, 31 Pa. St. 475, *supra*, p. 102.

apply all that is there found to his own purposes *ad libitum*. Angell, Watercourses, § 109.

Upon this principle it was held by this court in the case of *New Albany, etc., R. R. Co. v. Peterson, supra*, that if an adjoining land-owner, in lawfully digging upon his own land, draws the water from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

In the case of *Haldeman v. Bruckhart*, 45 Pa. St. 514, it was said: "The purchaser of lands on which there are unknown sub-surface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land."

Mr. Gould, in his works on "Waters," 2d ed., section 291, says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word land, and is a part of the soil in which it is found. Like water, it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

In recognition of the principle here announced, in the case of *Brown v. Vandegrift*, 80 Pa. St. 142, it was said by the court that "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment."

What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas.

In the case of *Westmoreland, etc., Gas Co. v. DeWitt*, 130 Pa. St. 235, it was said: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract is uncertain. * * * They belong to the owner of the land and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it

comes into his well and under his control, it is no longer yours, but his."

It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land and draw therefrom all the gas that may naturally flow to it; but he contends that they have no right to explode nitro-glycerine in the well to increase the natural flow.

When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitro-glycerine therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all.

So far as this suit seeks to enjoin the appellants from exploding nitro-glycerine in their gas well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it cannot, in our opinion, be sustained.

MOORE v. SMAW.

17 CALIFORNIA, 199. — 1861.

ACTION by Moore to recover for gold extracted and removed from his premises by defendant. A demurrer was interposed, the substance of which is that the title of the plaintiff, as disclosed by the complaint, was of such a character as to vest in him only the ownership of the soil, without any interest in the minerals of gold and silver which it contained.

In the case of *Fremont v. Flower*, which involves the same questions, and was argued herewith, an answer was interposed, in which it was alleged that Fremont never had any interest in the gold or gold-bearing quartz contained in the soil, and further, in a first count, that they are the absolute and exclusive property of the state of California, and, in a second count, that they are in like manner the absolute and exclusive property of the United States.

Plaintiffs trace back their title in each case to a grant from the Mexican government confirmed by patents from the United States, which patents make no reservations of minerals or mineral lands.

At the time of the original grants by the Mexican government "it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the government of the land in

which they were contained, without express words designating them." There were no such words in these grants.

FIELD, C. J. — * * * We do not understand that this conclusion [that the gold did not pass under the Mexican grant] is controverted by the defendants; but two positions are advanced by them which, though inconsistent with each other, would, if sustained, be equally availing against the claims of the plaintiffs: 1st, that the minerals of gold and silver, which passed by the cession, were held by the United States in trust for the future state, and that upon the admission of California the ownership of them vested in her; and, 2d, that the minerals remain the property of the United States, and did not pass by their patents.

The first position finds support in the decision of *Hicks v. Bell*, 3 Cal. 219, where this court held that the mines of gold and silver found in the public lands are the property of the state by virtue of her sovereignty; and assumed that similar mines in the lands of private citizens also belonged to her by the same right. That decision has not met the approbation of the profession or retained the approbation of the distinguished judge who delivered it. The question as to the ownership of the minerals was not raised by counsel, and its determination was not required for the disposition of the case. But independent of this consideration which only goes to the force of the decision as authority, we are clear that the doctrine there advanced cannot be sustained. It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. * * * To the existence of this political authority of the State — this qualified sovereignty, or to any part of it — the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold

their property, and by the same right; by the right of ownership, and not by any right of sovereignty.

In *Hicks v. Bell*, the court states correctly that, according to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under the general designation of lands or mines, but it assumes that this right of the crown — this regalian right — vested in the State. "It is hardly necessary," in the language of the opinion, "at this period of our history to make an argument to prove that the several States of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the king at common law." It is in this assumption that the error of the decision consists. Under the general designation of *jura regalia* are comprehended not only those rights which pertain to the political character and authority of the king, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects. It is only to certain rights of the first class that the States, by virtue of their respective sovereignties, are entitled. It is to the second class that the right to the mines of gold and silver belongs.

In the great case of *The Queen v. The Earl of Northumberland*, 1 Plowden, 310, which was argued before the Barons of the Exchequer and all the justices of England, it was held by their unanimous judgment, "that by the law all mines of gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof and with other such incidents thereto as are necessary to be used for the getting of the ore;" and also, "that a mine royal, either of base metal containing gold or silver or of pure gold and silver only, may, by the grant of the king, be severed from the crown, and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words." This case was decided in 1568, during the reign of Queen Elizabeth, and continues unto this day an authoritative exposition of the doctrine of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the king, which could be alienated at his pleasure.

No reasons in support of the prerogative are stated in the resolution of the judges, and those advanced in argument by the queen's counsel would be without force at the present time. Onslow, the queen's solicitor, says Plowden, "alleged three reasons why the king shall have mines and ores of gold and silver within the realm.

in whatsoever land they are found. The first was, in respect to the excellency of the thing, for of all things which the soil within this realm produces or yields, gold and silver is the most excellent, and of all persons in the realm, the king is, in the eye of the law, most excellent. And the common law, which is founded upon reason, appropriates everything to the person whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the king. . . . The second reason was, in respect to the necessity of the thing. For the king is the head of the weal-public and the subjects are his members; and the office of the king, to which the law has appointed him, is to preserve his subjects, and their preservation consists in two things, viz.: in an army to defend them against hostilities, and in good laws. And an army cannot be had and maintained without treasure, for which reason some authors, in their books, call treasure the sinews of war; and, therefore, inasmuch as God has created mines within this realm, as a natural provision of treasure for the defense of the realm, it is reasonable that he who has the government and care of the people, whom he cannot defend without treasure, should have the treasure wherewith to defend them. . . . The third reason was, in respect of its convenience to the subjects in the way of mutual commerce and traffic. For the subjects of the realm must, of necessity, have intercourse or dealing with one another, for no individual is furnished with all necessary commodities, but one has need of the things which another has, and they cannot sell or buy together without coin. . . . And if the subject should have it (the ore of gold or silver), the law would not permit him to coin it, nor put a print or value upon it, for it belongs to the king only to fix the value of coin, and to ascertain the price of the quantity, and to put the print upon it, which being done, the coin becomes current for so much as the king has limited. But if the subject should have the ore of gold and silver which is found in his land, he could not convert it into coin, nor put any print or value on it. For if he makes coin, it was high treason by the common law before the statutes of 25th Ed., 3 Cap. 2, as it appears by 23d Ass., where a woman was burnt for forging or counterfeiting money, and it was high treason to the king, because he has the sole power to make money. So that the body of the realm would receive no benefit or advantage if the subject should have the gold and silver found in mines in his lands;

but, on the other hand, by appropriating it to the king, it tends to the universal benefit of all the subjects in making their king able to defend them with an army against all hostilities; and when he has put the print and value upon it, and has dispersed it among his subjects, they are thereby enabled to carry on mutual commerce with one another, and to buy and sell as they have occasion, and to traffic at their pleasure. Therefore, for these reasons, viz., for the excellency of the thing, and for the necessity of it, and the convenience that will accrue to the subjects, the common law, which is no other than pure and tried reason, has appropriated the ore of gold and silver to the king in whatever land it be found."

It would be a waste of time to show that none of the reasons thus advanced in support of the right of the crown to the mines can avail to sustain any claim of the State to them. The State takes no property by reason of "the excellency of the thing," and taxation furnishes all the requisite means for the expense of government. The convenience of citizens in commercial transactions is undoubtedly promoted by a supply of coin, and the right of coinage appertains to sovereignty. But the exercise of this right does not require the ownership of the precious metals by the State, or by the federal government, where this right is lodged under our system, as the experience of every day demonstrates.

The right of the crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the king, which was at the time justified on the ground that the mines were required as a source of revenue. The same regalian right was recognized on the continent, as in England, and of its origin, Gamboa in his commentary on the mining ordinances of Philip II. thus speaks: "Upon the breaking up of the Roman Empire, the princes and States which declared themselves independent, appropriated to themselves those tracts of ground in which nature has dispensed her most valuable products with more than ordinary liberality, which reserved portions or rights were called rights of the crown. Among the chief of the valuable products are the metallic ores of the first class, as those of gold and silver, and other metals proper for forming money, which it is essential for sovereigns to be provided with in order to support their warlike armaments by sea and land, to provide for the public necessities, and to maintain the good government of their dominions."

It follows from the views we have thus expressed, that the first position advanced by the defendants cannot be sustained; that the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future State; that the

ownership of them is not an incident of any right of sovereignty; that the minerals were held by the United States in the same manner as they held any other public property which they acquired from Mexico; and that their ownership over them was not lost, or in any respect impaired by the admission of California as a State.

The second position of the defendants is, that if the minerals did not vest in the State by her admission into the Union, they remained the property of the United States notwithstanding their patents to the Fernandez and to Fremont. This position is not based upon any language of the patents; for it is admitted that their terms of grant would operate in case of a conveyance of an individual, to pass all the interest which the grantor could possess in the land. It is based upon the supposition that as the Act of March 3d, 1851, provides for the recognition and confirmation of the rights acquired by the grants from Mexico, the patents were only intended as evidence on the part of the United States of such recognition and confirmation. By those grants, as we have seen, no interest in the minerals of gold and silver passed to the grantees, and if the patents amount only to an acknowledgment of the rights derived from the former government, that interest still remains in the United States. This view of the patents is not justified by any provisions of the act. The object of the act is to "ascertain and settle" private land claims in California. * * * "For all claims finally confirmed," reads the act, "by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plot or survey of the said land, duly certified and approved by the surveyor-general of California."

There is nothing in the act restricting the operation of the patents thus issued to the interests acquired by claimants from the former government, or distinguishing the patents in any respect from the general class of conveyance made, under that designation, by the United States. To all claimants alike, whose claims have been finally confirmed, patents are to issue without words of reservation or limitation, with the exception that they shall not affect the interests of third persons, an exception which would exist independent of its legislative recognition. Such being the case, the question arises as to what passed by the patents to the Fernandez and to Fremont, and to this question there can be but one answer: all the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land, and that term, says Black-

stone, "includes not only the face of the earth, but everything under it or over it. And, therefore," he continues, "if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows." Book II. 19. Such is the view universally entertained by the legal profession as to the effect of a patent from the general government. The United States occupy, with reference to their real property within the limits of the State, only the position of a private proprietor, with the exception of exemption from State taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. From the operation of conveyances of this nature, that is, of individuals, the minerals of gold and silver are not reserved unless by express terms. They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the patent — the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains in them without a similar reservation. Nor is there anything in the language of the Supreme Court, in the opinion rendered in the *Fremont Case*, which gives countenance to any other view. The attorney-general of the United States objected to the confirmation of the claim of Fremont upon the ground that the grant of Alvarado contained mines of gold and silver. His argument was to this effect: that as the mines did not pass to the grantee by the Mexican law, the claim should not be confirmed, as Fremont would obtain as a consequence of such confirmation a patent which would pass the minerals, to which, by the original grant, he was not entitled. But to this the court replied that, under the mining laws of Spain, the discovery of a mine of gold and silver did not destroy the title of the individual to the land granted, and that the only question before the court was the validity of the title; and whether there were any mines in the land, and if there were any, what were the rights of sovereignty in them were questions which must be decided in another form of proceeding, and were not submitted to the jurisdiction of the commissioners or the court by the act of 1851; in other words, the court said, in substance, that its consideration was confined to the title presented, and the effect of its decree and the patent following it upon the ownership of the minerals was a matter with which it had nothing to do.

The construction given by the United States to their patents ever since the organization of the government, has uniformly been to the same effect. In several of the States, particularly those carved out of the territories ceded by Virginia, North Carolina, and

Georgia, and out of the territory acquired by the treaty with France in 1803, and by the treaty with Spain in 1819, the title to a large portion of the lands is held under patents from the United States. Some of these patents were issued upon a sale of lands; some of them upon a donation of lands; and some of them upon a confirmation by boards of commissioners of previously existing grants of the former governments. They were issued to extensive tracts in the territories of Louisiana, Mississippi, and Florida, and in many cases, they embraced lands in which minerals of gold and silver and other metals existed. Yet in no instance, whether the patents were issued upon a sale or donation of lands, or upon a confirmation of a previously existing grant, have the United States asserted any right to the mines as being reserved from the operation of the patents. They have uniformly regarded the patent as transferring all interests which they could possess in the soil, and everything imbedded in or connected therewith. Whenever they have claimed mines, it has been as part of the lands in which they were contained, and whenever they have reserved the minerals from sale or other disposition, it has only been by reserving the lands themselves. It has never been the policy of the United States to possess interests in land in connection with individuals.

Judgment affirmed.¹

¹ In some of the States the English rule is followed. See *Gold Hill Quartz Mining Co. v. Ish*, 5 Oregon, 104 (1873). In New York the right of the State to precious metals is asserted by the Legislature. N. Y. Public Lands Law, § 11.

PART III.

OF THE USE AND PROFITS OF LAND.

CHAPTER I.

USE BY THE GENERAL OWNER IN POSSESSION.

I. General restrictions on such use.

1. THE MAXIM "*SIC UTERE TUO UT ALIENUM NON LÆDAS.*"

BISHOP *v.* BANKS.

33 CONNECTICUT, 118. — 1865.

PETITION for an injunction against the keeping of a slaughter-house on lands of respondent near the dwelling of the petitioner. The case was reserved for the advice of this court.

PARK, J. — The respondent has successfully answered all the claims of the petitioner for a continuance of the injunction, with but one exception, and that is, in relation to the bleating of calves kept upon the premises for slaughter. We think the facts found by the court below upon this subject are sufficient to require the interposition of the court to prevent its continuance. It is found that the annoyance to the petitioner, proceeding from this cause, was so great at times as to drive him and his family from the occupancy of that part of his house nearest to the premises of the respondent. The court presents an extreme case of the kind — one that will constitute a nuisance, if a nuisance can be produced from such cause. In the cases of *Whitney v. Bartholomew*, 21 Conn. 213, and of *Brown & Brothers v. Illius*, 27 Id. 84, this court distinctly recognize the doctrine that a nuisance may be produced by offensive sounds in the prosecution of business lawful *per se*. The same doctrine is held in the case of *Soltau v. De Held*, 9 Eng. L. & Eq. R. 104, where an injunction was granted to restrain the ringing of church bells by a Roman Catholic community, although they were rung only upon the Sabbath. They were located so near a person's residence that his peace and quiet were greatly disturbed. If sounds of such a character and so made can be sufficient to constitute a nuisance, how can it be questioned in the case under consideration?

It is difficult to conceive of any noise more destructive to the comfort and happiness of a family than the constant wailing of animals in distress in the immediate vicinity of their residence. Enjoyment under such circumstances would require nerves of brass and a heart of steel. But it is unnecessary to pursue this subject, for reason and law harmonize in declaring that the conduct of the respondent in this particular is unlawful and wrong. He should remember the maxim *sic utere tuo ut alienum non lædas*, and conduct accordingly.

The remaining claims urged by the petitioner for a continuance of the injunction are not supported by the allegations of his bill and we do not therefore consider them.

We advise the Superior Court to so modify the injunction that the respondent may be allowed to prosecute his business, but to prevent the bleating of calves and the raising of offensive smells to the annoyance of the petitioner.

II. Special restrictions on such use of land.

1. CONDITIONS AND LIMITATIONS FORBIDDING CERTAIN USES LIMITING TO PARTICULAR USES.

PLUMB *v.* TUBBS.

41 NEW YORK, 442. — 1869.

EJECTMENT to recover the possession of land on account of the breach of a condition subsequent contained in the deed from plaintiff. Judgment for plaintiff. Defendant appeals.

HUNT, Ch. J. — The appellant contends that the condition in the deed from Plumb is invalid, as being repugnant to the nature of the estate granted. He cites authorities to the effect, that a condition annexed to a devise or conveyance in fee, that the devisee or purchaser, shall not alien, is void; that a condition that the feoffee shall not enjoy the land or take the profits, is void; and others of a similar character. The cases cited have been recognized as sound law from a very early period, and may be conceded to be based upon sound principles. Wherever the condition in a deed is unlawful, impossible or repugnant to the nature of the estate granted, it is not to be enforced. 2 Bl. Com. 156-7; Coke Lit. 206a., 206b.; Bac. Abr., tit. "Condition." This condition is evidently neither unlawful nor impossible. Is it repugnant to the estate granted, that its use should be restricted by preventing thereon, the sale of

intoxicating liquors as a beverage? The cases in the books are numerous and uniform in holding that the use of the property in some directions, may be restricted. A condition that a school house should not be erected on the premises, or a distillery, or a blast furnace, or a livery stable, or a machine shop for iron manufacture, or a powder magazine, or a hospital, or a cemetery, have been held to be valid conditions. *Collins v. Marcy*, 25 Conn. 242; *Craig v. Wells*, 1 Kernan, 315; *Gray v. Blanchard*, 8 Pick. 284; *Sperry v. Pound*, 5 Ohio, 189; *Nicoll v. Erie Railway Co.*, 2 Kern. 121.

The case of *Colt v. Towle*, in the English Chancery Appeals, so late as in June, 1859, is like the one before us. The plaintiff sold a piece of land to trustees of a land society, who covenanted that the plaintiff should have the exclusive right of selling beer to any public house erected on the land. The defendant, a member of the society, acquired a portion of the land with notice of the covenant, and erected on it a public house, which he supplied with his own beer. The plaintiff filed his bill to restrain the defendant from supplying beer. It was objected: 1. That the covenant was void for uncertainty. 2. That there was a want of mutuality. 3. That the covenant was void as being in restraint of trade. The court held the objections to be insufficient, and sustained the bill. Law Rep. Eq. Series, part 10, Oct., 1869, Chancery Appeals.

It is said that a condition, which avoids a grant on account of the sale of a single glass of beer, is unreasonable and absurd, and, therefore, void. It is said that a condition forbidding the keeping of a hotel or a saloon, where liquors are regularly sold, might be valid, while one depending upon the sale of a single glass of liquor, would be trifling and ridiculous, and could not be sustained. The grantor in the present case, evidently belonged to that class of men, who consider the habitual use of intoxicating liquors, as a serious evil. He was the owner of a tract of land, which as I infer from the case, he purposed to have formed into a town or village, by the sale of lots to individuals who should build upon them. This would give to his property remaining unsold, the advantage of the enhanced price, resulting from such improvement. The increase of inhabitants would give to himself and family the benefits of refined society. It was his opinion, as we may infer from his restrictive conveyances, that intemperance was a social evil, from which he desired to protect himself and his family. We may infer, in the same manner, that he considered his remaining property, as more valuable if located in a community where no liquor was sold as a beverage, than where its use was permitted. These views and

wishes cannot be pronounced unreasonable and absurd. The grantor had a right to hold them, and he had a right to use his property in a manner that would accomplish them.

Few men would object to the sale of a single glass of liquor as a beverage, if that were the end of it. The argument is made by the grantor, that one sale or one glass leads to another, and that the only way to prevent excess, is entirely to prevent its use. He argues that there is no limit, which can be placed upon its sale or use which will permit its moderate use, and which will insure that such use shall not become immoderate. To accomplish, therefore, his purpose of preventing intemperance, which he fears may reach his own family; which he apprehends may increase taxation; which he thinks will depreciate the value of his remaining property, he determines to adopt a method, which must certainly be effectual. He imposes a condition, that no intoxicating liquor in whatever form, or to whatever extent, shall be sold upon the premises granted. If faithfully observed, this condition would certainly produce the result desired by the grantor. Whether this plan is wise or unwise, is not for us to say. No man is bound by law to be wise. He has a legal right to be wise or otherwise, in his own judgment or as his own caprice may determine. It is enough here to say that neither the purpose of the grantor nor his mode of accomplishing it can be pronounced unreasonable or absurd.

The question has also been recently considered in this court, and we need not go beyond that case to ascertain how the present question should be decided. *Gilbert v. Peteler*, 38 N. Y. R. 165. In that case John C. Green paid the consideration money to one Davis, for the purchase of certain premises, which, at his request, were conveyed to one Bartlett, Green also owning other premises near by. Bartlett and wife afterward conveyed to Samuel M. Fox, the latter covenanting not to erect, or suffer to be erected, any building or structure, whereby the view or prospect of the bay from any part of the dwelling-house of Green, should be obstructed or impaired. In case of breach, the premises were to be forfeited to Green, his heirs or assigns. After several intermediate conveyances, the title passed to the plaintiff, who contracted to sell and convey them to the defendant, the latter being required immediately to expend \$20,000 on improvements. The defendant expended \$23,831 in improvements upon the premises, then refused to complete his purchase, and rescinded and demanded compensation for his improvements, on the ground that the plaintiff could not convey a good title by reason of the covenant or condition aforesaid. This court held: 1st. That upon the facts above stated, the obligation not to

obstruct Green's view, was a condition subsequent. 2d. That it was valid. 3d. That it afforded a sufficient ground for refusing to accept the title. It was accordingly decreed that the contract be rescinded, and that the defendant recover the value of the improvements made by him.

This case is decisive of the principal question before us.

The appellant contends also, that he is relieved from this condition by the conveyance of the other lot from Butterfield to Ferris, on the 13th of October, 1854, without restriction. By the original deed, the grantee was to be relieved from the condition, if the grantor, his heirs or assigns, "should sell other land without a similar restriction, or manufacture or sell such liquor, to be used as a beverage, at the said village, or permit the same to be done on any other land now owned by the said Joseph Plumb, at the said village."

This argument assumes, that by the conveyance from Butterfield to Ferris without restriction, the latter held the land freed from the condition. This is an error, the title passed from Plumb only subject to this condition. His deed was recorded, and the record was notice of its contents (if any was needed), to every subsequent purchaser. Whatever was contained in Ferris' deed or whatever was omitted therefrom, if he violated the condition in the original deed from Plumb, his title was forfeited, and Plumb could re-enter. *Gilbert v. Peteler, supra*. This was exactly what was intended to be secured to the appellant in his deed. He covenanted not to sell intoxicating liquors as a beverage, but he did not intend to be thus restricted if Plumb allowed others to sell. If all were thus restricted, he was bound. The release was to result if lands were sold to a purchaser, who should by such purchase obtain the right to sell liquors on the premises. Whether the restrictions were contained in the last deed, is not so much the point, or whether the last purchaser was restricted. Ferris is thus restricted, and the appellant is not relieved from the condition of the deed. Neither do I think it certain that Butterfield is to be deemed an assignee of Plumb, within the meaning of the terms of this condition. The intention was to give this effect to the acts of Plumb or his heirs. See *Tankerville v. Wingfield*, 6 Eng. Com. Law R. 246.

There is no merit in the last objection, that Ferris sold one glass of ale to a third party in the presence of the plaintiff. If it had been stated that he had sold it with his assent, the case would have been different. In some circumstances the bodily presence of the plaintiff might be evidence of an assent to the sale. In others, it would have no such effect. At the most, it was evidence from which the

jury could have inferred an assent. If the defendant had desired to give it such effect, he should have submitted it to the jury for their decision.

It has been repeatedly held in this court, and in quite recent cases, that no proof of an actual entry or demand of possession, before commencing the action, was necessary. *Cruger v. McLawry*, ante, p. 219; *Hosford v. Ballard*, 39 N. Y. 147.

Judgment should be affirmed, with costs.

FIRST UNIVERSALIST SOCIETY *v.* BOLAND.

155 MASSACHUSETTS, 171. — 1892.

[*Reported herein at p. 525.*]¹

2. RESTRICTIVE COVENANTS.

BLAKEMORE *v.* STANLEY.

159 MASSACHUSETTS, 6. — 1893.

BILL in equity to enforce restrictions contained in a deed of real estate. Case reserved for the determination of this Court.

LATHROP, J. — No question is made as to the validity of the restrictions in the present case, and the only question is as to their interpretation. The language is, "that for ten years from January 1, 1891, no buildings shall be erected other than dwellings, with necessary outbuildings, said dwellings to cost not less than \$2,000 each, and all of said buildings to be not less than twenty feet from the street line."

Although it is not stated in the report what the cost of the tent was, yet, as the bill alleges that its cost was less than \$2,000, and the answer does not deny this, we assume that no question was made on this point. Is, then, a tent such as is described in the report and used in the manner therein set forth a building? The ordinary meaning of this word, it is said by Mr. Justice Morton, in *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209, is "a structure or edifice enclosing a space within its walls and usually covered with a roof." The tent in question was used by the defendants to live in with their families, although they did not sleep in it. It was fitted up with a stove for cooking, and with other furniture. While

¹ See also *Congregational Society v. Stark*, *infra*, p. 509. —ED.

the defendants lived in their own house in another town in the winter, the fair construction of the report is that the tent was used as a dwelling at other times of the year during the daytime. Although the report finds that the tent was placed temporarily on the lots, it is also found that there is no intention of erecting a dwelling-house soon. On these findings, a majority of the court are of opinion that the tent was a violation of the terms of the restriction.

The remaining question is as to the stable. That a stable may be a necessary outbuilding may be assumed. But an outbuilding is something which is to be used in connection with a main building. *Commonwealth v. Intoxicating Liquors*, 140 Mass. 287, 289. And as there was no main building of the kind called for by the terms of the deed, we are of opinion that the stable in this case cannot be deemed to be a necessary outbuilding.

It follows that the plaintiff is entitled to a decree directing the removal of the tent and stable, and restraining the defendants from using the lots in the manner in which they have been using them.

Decree accordingly.

ROWLAND *v.* MILLER.

139 NEW YORK, 93. — 1893.

EARL, J. — The main contention of the parties is over the meaning and force of the restriction agreement. The claim of the appellant that it simply restrains nuisances cannot be sustained, and hence the numerous authorities cited by his counsel on the argument before us, have little or no application. If the agreement was intended simply to restrain any trade or business which was *per se* a nuisance, or which was carried on in such a way as to make it a nuisance, then it was wholly unnecessary. The law will always, upon the application of a party aggrieved, restrain and abate a private nuisance. This case is not governed by the general law as to nuisances, but by the force and effect of the covenants contained in the agreement.¹

When the agreement was made, the parties thereto, desiring to improve, protect and benefit their lots, and consulting their respective interests, absolutely prohibited the carrying on of certain kinds of business specified upon the lots. They determined for themselves that those kinds of business were undesirable in the vicinity of residences, and covenants restraining them can be enforced with-

¹ Plaintiff and defendant acquired title to their respective lots from the same source and under similar restrictive covenants.—ED.

out any proof whatever that they are "injurious or offensive." A person owning a body of land and selling a portion thereof, may, for the benefit of his remaining land, impose any restrictions, not against public policy, upon the land granted he sees fit, and a court of equity will generally enforce them. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Same v. Thacher*, 87 Id. 311; *Hodge v. Sloan*, 107 Id. 244.

The business carried on by the Taylor Company is not among those kinds particularly specified in the agreement.¹ But the claim of the plaintiff is that it is prohibited by the general clause in the agreement as "injurious or offensive to the neighboring inhabitants." This clause enlarges the scope of the agreement. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances *per se*, for reasons already given, and for the further reason that nearly, if not quite, all the trades and business specially named are not such nuisances. Any kind of business may become a nuisance by the manner in which it is carried on, or from its location, and a business may be offensive to neighboring inhabitants and yet fall far short of being a legal nuisance, which a court of equity will abate as such.

This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence.

It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. An ordinary person desiring to rent such a house as plaintiff's would not take her house if he could get one just like it at the same rent at some other suitable and convenient place. Indeed, her house would be shunned by people generally who could afford to live in such an expensive house.

The court can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings and sensibilities of the people

¹The Taylor Company was engaged in the business of embalming and undertaking.—ED.

among whom they live, and hence in this case the learned judge, after the character of the business carried on by the Taylor Company had been proved, could have found, as matter of law, that it was in violation of the restriction agreement, without any further proof. It was, therefore, unnecessary for the plaintiff upon the trial to call witnesses from the neighborhood to give their opinions that this business was injurious and offensive. Even if such opinions were erroneously received, they were unnecessary and harmless, as upon the undisputed evidence as to the character of the business carried on the legal conclusion of the trial judge must have been the same.

But it is contended that the restriction agreement ought not in this case to be enforced, because most of the lots in the block between 42d and 43d streets and Madison avenue and Vanderbilt avenue are no longer occupied for residences, and are devoted to business purposes, and the counsel for the appellant cites as an authority on this point our decision in the case of *The Trustees of Columbia College v. Thacher*. The principles of that case are not applicable to the facts of this. There it appeared that the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to anyone. Here the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to or authorized or encouraged its violation by others. In order to have the benefit of the agreement, she is not obliged to sue all its violators at once. She may proceed against them *seriatim* or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity. This is not a case where the defendants can ask for immunity in an equitable form, because others are in greater or less degree also violators of the agreement. The plaintiff has done nothing and omitted nothing which should authorize the occupant of an adjoining lot, in violation of the agreement, to make her residence uncomfortable and undesirable. Generally, whether an equity court will refuse to restrain the violation of such an agreement, and leave the parties to their legal remedies on account of the changed conditions affecting the premises to which the agreement relates, rests in the discretion of that court, and such discretion will not be reviewed upon appeal here. The question to be determined in the exercise of such discretion depends largely upon the facts, and mainly whether the enforcement of the agreement would greatly

harm the defendant without any substantial benefit to the plaintiff, so as to make the enforcement inequitable. We cannot say, reviewing all the evidence in this case, that it would be inequitable for the plaintiff to enforce the agreement.

The appellant claims that the judgment is too broad in its restraints. But we think all his rights are fully protected by the sixth clause of the judgment, and the subsequent action of the court under that clause upon the application of the Taylor Company.

The matters to which we have thus given attention cover the whole ground of the appeal, and our conclusion is, that the judgment must be affirmed, with costs.

Judgment affirmed.

3. RESTRICTION AS TO EQUITABLE WASTE WHEN THERE IS AN EXECUTORY DEVISE OVER.

TURNER *v.* WRIGHT.

2 DE GEX, FISHER AND JONES (ENG. CH.), 234. — 1860.

THE LORD CHANCELLOR. — In this case the plaintiff by his bill, prayed an injunction “to restrain the cutting of any timber, or at any rate of any ornamental timber,” growing upon the lands devised in fee to the defendant, subject to an executory devise over to the plaintiff.

The decree of the vice-chancellor declared, “that the defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid.”

The result of the decision is, that the defendant is dispunishable of legal, but not of equitable, waste. After great consideration, I agree with the vice-chancellor on both questions.

As to the first, my opinion is clear and decided. The defendant is tenant in fee simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has

been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life and *sans* waste. He could not have intended that the first taker, to whom he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him punishable of waste.

So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The *onus* seems to lie upon the plaintiff to show, by authority, that tenant in fee simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The plaintiff's counsel relied on *dicta* to be found in the reports of three cases, *Robinson v. Litton*, 3 Atk. 209, Cru. Dig., tit. xvi., c. 7, § 26; *Stansfield v. Habergham*, 10 Ves. 273, and *Wright v. Atkyns*, 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143. According to Vesey, Jr., a very careful and accurate reporter, Lord Eldon did say, in *Stansfield v. Habergham*, 10 Ves. 273, "I should by dissolving this injunction contradict what has been understood to be the doctrine of this court; that, where there is an executory devise over, even of a legal estate, this court will not permit the timber to be cut down." But this doctrine is not to be found in any text-writer, and it has never been acted upon. In *Wright v. Atkyns*, 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143, the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In *Robinson v. Litton*, 3 Atk. 209; Cru. Dig., tit. xvi., c. 7, § 26, Lord Hardwicke was influenced by the consideration that the tenant in fee simple with an executory devise over was the infant

heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by Cruise, 6 Cruise, 428, 429, and the infant, though seized of the legal estate in fee, was entitled to the rents and profits only until he attained twenty-one, *i. e.*, for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in Atkyns, the circumstances of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction. 3 Atk. 209.

Therefore, as to legal waste, I think there is no authority to outweigh the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this court ought to interfere by injunction. Tenant in fee simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own; so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous *Raby Castle Case*, *Vane v. Lord Barnard*, 2 Vern. 738, shows that such things may not be done by tenant for life *sans* waste, and tenant in fee with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and what is denominated malicious waste, *viz.*, equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the condition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his own. In the present case, the devise being by the testator of "all his said mansion-house and estate at Brattleby and North Kelsey, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed,

Mr. Daniel contended that, in the absence of malice, this court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to A. in fee, subject, to an executory devise over to B. in fee, and that A. from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that B. and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by B. for an injunction, would this court interfere? Mr. Daniel answered: "A., acting *bona fide*, No." Nevertheless I cannot help thinking that in spite of A.'s *bona fides*, what A. contemplated would be in the nature of a destruction of the subject devised, and would certainly be in contravention of the intention of the devisor, so that B. would be entitled to an injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a court of equity by injunction can well be drawn other than the recognized and well-established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable. I am willing, with Vice-Chancellor Page Wood, to accept the clew by which Lord Justice Turner, in *Micklethwait v. Micklethwait*, 1 De G. & J. 504, 524, proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the vice-chancellor, who is reported to have added: "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, *sans* waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical." *Turner v. Wright*, John. 740-751. Where an estate tail is created with successive estates tail in remainder, the estate

entailed is "limited to go in a course of succession," but a tenant in tail is dispunishable of equitable as well as legal waste, because he may at any time bar the entail, and give himself a pure and absolute fee simple. Again, a tenant for life *sans* waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste), may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainderman or reversioner, if not severed from the soil in his lifetime; whereas, the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenant for life *sans* waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the crown, and tenant in tail under an act of Parliament which precludes the barring of the entail. Such tenants in tail are considered dispunishable of waste; this being an incident of tenancy in tail, probably arising from the power which generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the *Marlborough Case*, 3 Madd. 498, although the court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail; yet, having regard to the enactment "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house. 3 Madd. 549.

There is an analogy which entirely accords with the distinction made by the vice-chancellor in this decree between legal and equitable waste, viz., the case of "tenant in tail after possibility of issue extinct," who is dispunishable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the vice-chancellor, as he pronounced it, should in all respects be affirmed, and that the appeal must be dismissed with costs.¹

¹ In *Matthews v. Hudson*, 81 Ga. 120 (1888) it was held that Hudson took a fee, determinable upon his dying without a child or children, and the other children of the testatrix were intended to take by executory devise in that event. It

4. OTHER CASES IN WHICH GENERAL OWNER MAY BE RESPONSIBLE AS FOR WASTE.

MCKINSTRY, J., IN MCCORD *v.* OAKLAND QUICKSILVER MINING COMPANY.

64 CALIFORNIA, 134. — 1883.

THE material questions presented are:

Does the excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant constitute waste for which his co-tenants may recover treble damages under section 732 of the Code of Civil Procedure?

Does such excavation and cutting and conversion constitute waste which should be enjoined?

Are the plaintiffs entitled to an accounting?

1. Section 732 reads: "If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be a judgment for treble the damages."

In *Elwell v. Burnside*, 44 Barb. 447, it was said: "By the common law one tenant in common could not be guilty of committing waste; that is, the same acts which if committed by a tenant for life or years would constitute waste, would not be waste when committed by a tenant in common. He was not liable to his co-tenant in an action for waste, for the injury done to their common estate. As he is now, however, liable by statute¹ (referring to a statute similar to the section of the code above recited), to respond to his co-tenant in this form of action, for those acts which constituted waste when committed by a tenant for life or years, we must resort to the common law to ascertain whether the acts complained of in this case would be waste, had they been committed by a tenant for life or years."

In the case now before us the quicksilver mine had already been opened when plaintiffs and defendant became tenants in common. If, therefore, it be conceded that under the provision of our code a

appears from the bill that Hudson had sold off large parcels to his co-defendants and that they were committing acts of irreparable waste on the land, stripping off the timber "which was one of the greatest elements of value of the land." The Court say: "It is conceded that if Hudson took a fee of any sort he is exempt from the supervision of chancery in respect to waste, and such undoubtedly is the law. We think he took a qualified fee." — ED.

¹See N. Y. Code Civ. Proc., §§ 1656-1658, for the N. Y. statute.— ED.

tenant in common is subject to the action in like circumstances as is a tenant for life or years, the plaintiffs cannot recover damages as for waste. "As to all tenants for life, the rule has always been that the working of open mines is not waste." And a tenant for life may open new pits or galleries without committing waste. *Neel v. Neel*, 19 Pa. St. 328. A tenant for years is not guilty of waste in taking ore from the mine, the sole subject of the demise, during his term. That is what he pays rent for.

It may be argued that, as between lessor and lessee for years, their contract contemplates the extraction of mineral, and in case of a life estate, the grantor or donor must intend that his grantee or donee shall receive some benefit from his estate. But, is it not also true from the very nature of mining property in this state, valuable only because of the mineral it is supposed to contain, that each of the co-tenants may use it in the only way it can be used? The co-tenants out of possession may at any time enter into an equal enjoyment of their possessions; their neglect to do so may be regarded as an assent to the sole occupation of the other. This is but another application of the principle announced in *Pico v. Columbet*, 12 Cal. 414. True the co-tenant will not be held to assent to the commission of waste by the sole occupant, but the question returns, What acts done by him are waste?

It cannot be doubted that on the part of a mere trespasser it is a wrong in the nature of waste to remove any ore from a mine. The cases cited by appellants fully sustain this proposition. But it is not a just inference that as between tenants in common the rule is the same. Section 732 of the Code of Civil Procedure does not relate to trespasses committed by those who have no interest in the property. Nor does it define "waste" or declare what acts committed by a guardian, tenant for life or years, or joint tenant or tenant in common, as the case may be, shall be waste. For the appropriate meaning of the word, as applicable to acts done by these several classes of persons, we are relegated to the principles of the common law, and to various considerations of policy arising out of different conditions which the common law recognizes and approves.

The word "waste" is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As was said by Roane, J., in *Findlay v. Smith*, 6 Munf. 134, "in considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this as in other cases to the varied

situations and circumstances of the country. . . . The law on this subject must be applied with reasonable regard to circumstances." * * *

In view of the character of the property, and of plaintiff's implied assent to its sole occupation by defendant for mining purposes, we regard the right of the latter to the proceeds of its operations as partaking of the nature of an usufruct; the appropriation of the net returns as a legitimate participation of the profits, and its acts of mining as not impairing or consuming the estate to any greater extent than must be presumed to have been intended to be allowable by each of the parties in interest. * * *

And here it may be added, applying the rule of *Hihn v. Peck*, it would seem each tenant in common of a mine is at least entitled to take out his share of the ore. That neither of the tenants can "look into the ground" may be a reason why a court of equity should order an account to be taken, but ought not to operate a prohibition upon the working of the mine by anybody.

2. Ought the court below to have enjoined defendant from proceeding with its mining?

"In case of joint tenants in common, with respect to whose acts of waste the common law has provided no remedy, courts of equity will interfere when it appears that waste has been committed or threatened by one tenant in common, who has become possessed of the whole premises." Taylor's Landlord and Tenant, 694. This general proposition may be conceded to be correctly stated, but the very question here is — has waste been committed? At the common law the tenant had no redress for acts of admitted waste committed by his co-tenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called "equitable waste," because allowable at law. By our statute, however, a tenant may recover damages of his co-tenant in every case of waste. Holding as we do that the acts of defendant were not, under the circumstances, wanton or destructive, or any waste, it follows plaintiffs were not entitled to an injunction.

O'NEALL, J., IN *JOHNSON v. JOHNSON*.

2 HILL'S EQUITY (S. C.), 277. — 1835.

I THINK there is no doubt that the late Dr. Garden is liable to account for waste, both as tenant for life of the whole, and as tenant in common of the remainder in fee. This is not an application

to stay waste, but for an account of whatever may have been committed. In general, it may be admitted that one tenant in common cannot have an injunction against his co-tenant. But even between them, under special circumstances, the court might grant an injunction. As where the waste was destructive to the estate and not within the usual and legitimate enjoyment. *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Ves. 128. And, as in the case of *Hawley v. Clowes*, 2 J. C. R. 122, where the tenant in common in possession was cutting down the timber and threatening to persevere. This last case carries the proposition further than I should be willing to sanction; it ought, I think, to be shown that the cutting down the timber was not necessary to the enjoyment of the estate, and would greatly prejudice the interest of the co-tenant. But without dwelling further on a view of this part of the case not necessary to the decision of the point now in dispute, I will proceed to state the grounds upon which the defendant is liable to an account for waste.

In several cases in this State it has been held that a tenant in common may use the estate to the extent of his interest in it; and in the case of *Kerr and wife et al. v. Robertson*, it was held (by my brethren), that for woodland cut down and cultivated by one tenant in common, he was not liable to account to his co-tenant for rent, but that the remedy of the latter would be for waste. In *Backler v. Farrow*, ante 111 (at the last term in Columbia), it was held that co-tenants who had cut down and worn out a portion of the land much beyond their shares, were liable in equity to account for the waste, and the commissioner having reported a sum certain as to the value of the waste committed, the defendants were ordered to pay it. These cases sufficiently show the right of the plaintiffs to come here against the representatives of their intestate's co-tenant for an account for the waste by him committed. * * * Where a tenant in common, by cutting down and clearing woodland, beyond his interest, has greatly injured the interest of his co-tenant, he would be liable for waste. And so if the tenant for life cuts down more woodland than is necessary for the enjoyment of his estate, and has injured the remainder, he would be guilty of waste, and liable to the account. It is the ultimate injury done to the rights of the plaintiffs, as co-tenants or in remainder, which gives them the right to complain. For if the clearing of the land had improved its value to the co-tenant or remainderman, it could not be pretended that still the co-tenant, or tenant for life, would be liable for waste.¹

¹ There seems to have been no statutory provision on this subject in South Carolina. — Ed.

VAN PELT *v.* MCGRAW.

4 NEW YORK, 110. — 1850.

PRATT, J. — There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties. 1 Cqw. Treat. 3.

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights and any attempt on his part to impair the mortgage as a security, was a violation of plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joice*, 11 Johns. 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock*, 14 John. 213, and in *Gardner v. Hearst*, 3 Denio, 234. Nor is there anything in the case of *Peterson v. Clark*, 15 John. 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seisin. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence, whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable. * * *

Judgment affirmed.

BRADY *v.* WALDRON.

2 JOHNSON'S CHANCERY (N. Y.), 148. — 1816.

[Reported herein at p. 176.]

WITMER'S APPEAL.

45 PENNSYLVANIA STATE, 455. — 1863.

*[Reported herein at p. 263.]*STATE SAVINGS BANK *v.* KERCHEVAL.

65 MISSOURI, 682. — 1877.

[Reported herein at p. 280.]

CHAPTER II.

USE BY TENANTS FOR LIFE, FOR YEARS OR AT WILL
IN POSSESSION.

I. Ordinary use.

I. THE TEMPORARY USES AND PROFITS — CROPS AND RENTS —
EMBLEMENTS IN GENERAL.BABB *v.* PERLEY

1 MAINE, 6. — 1820.

*(Reported herein at p. 27.)*SARLES *v.* SARLES.

3 SANDFORD'S CHANCERY (N. Y.), 601. — 1846.

[Reported herein at p. 450.]

WHIPPLE *v.* FOOT.

2 JOHNSON (N. Y.), 418. — 1807.

TROVER for a quantity of wheat in the sheaf. Defendant, the sheriff of Chenango county, had levied upon the wheat while growing and removed the same. After it was gathered, notwithstanding a levy thereon made by plaintiff, the sheriff of Madison county, after the wheat was in the sheaf, defendant sold it. Verdict for defendant subject to the opinion of the court.

THOMPSON, J., delivered the opinion of the court. If the execution, under which the defendant justifies the seizure and sale of the wheat growing on the ground be deemed sufficient, it is unnecessary to determine the effect of the bill of sale, which forms a distinct branch of the defense. The defendant, soon after receiving the execution, and between the teste, and return of it, went to the house of Hatch, the debtor, and levied on his personal property, and particularly mentioned the wheat in the ground. This was in December. In the ensuing August, when the wheat was ripe for harvest, the defendant, by virtue of the execution, and with all due diligence, caused the wheat to be cut, carried away and sold. The fee of the land on which the wheat was sowed, belonged to one Smith; and Hatch had the use of it so long only as would be sufficient to pay him for clearing. Under these circumstances, I see no valid objections against considering this property as held by this execution. The wheat growing on the ground, was a chattel, and as such, subject to be taken in execution. 1 Salk. 368; 1 Bos. & Pul. 397; 6 East, 604; note Rob. on Frauds, 126. The defendant, when he levied, took all the possession which the subject-matter would permit, and it was sold as soon as it was fit to be reaped. This, therefore, could not be considered as a dormant execution, and coming within the operation of the rule, that if a creditor seize the goods of his debtor on execution, and suffers them to remain in his hands, the execution is deemed to be fraudulent, and void as against a subsequent execution. Prec. in Cha. 286; 1 Vernon, 245; 7 Mod. 37; 2 Term, 596. The reason of this rule is stated to be, that in such case there is no change of possession, and so no alteration of the property. But in the case before us, the sheriff took all the possession of which the chattel was susceptible. The nature of the property accounts for the delay, and destroys the presumption of fraud, that might otherwise exist. The sheriff might, perhaps, have sold the wheat while growing, and the purchaser would then have been entitled to enter for the purpose of cutting

and carrying it away. But such a sale would probably have been very unfavorable, as the certainty and value of the crop could not be ascertained. (Owen, 70 Vent. 222.) The mere delay, in such a case, to sell until the crops should be fit for harvest, will not, of itself, amount to a fraud in law; and this is the only ground on which the judgment and execution, under which the defendant justifies, has been impeached. The justification having been made out, the defendant would be entitled to judgment, but by the provision in the case, we can only direct a judgment of nonsuit to be entered.

Judgment of nonsuit.

GRAVES *v.* WELD.

5 BARNEWELL & ADOLPHUS (ENG., K. B.), 105. — 1833.

DENMAN, C. J. — In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description. We think it does not.

In the very able argument before us, both sides agree as to the principle upon which the law gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant all the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature; whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question, for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not the crop growing at the end of the term. The last *cestui que vie* died in July; the barley and the clover were

then growing together on the same land, and a crop of both, together, was taken by the plaintiff in the autumn of that year, though the crop of clover of itself was of little value. Thus the plaintiff has had one crop; and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground; but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends are Littleton, section 68, and Coke's Commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him." Lord Coke, Co. Litt. 55, a, says, "the reason of this is, for that the estate of the lessee is uncertain, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots or sow hemp or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee die, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, etc., or sow the ground with acorns, etc., there the lessor may put him out notwithstanding, because they will yield no present annual profit." These authorities are strongly in favor of the rule contended for by the defendant's counsel; they confine the right to things yielding present annual profits, and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*, Cro. Car. 515, they were held to be "like emblements," because they were "such things as grow by the manurance and industry of the owner, by the making of hills, and setting poles;" that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. Mr. Cruise in his Digest, I., 110, Ed. 3, says that this determination was

probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves that the person who planted the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it may be, that in the year when the plant is fit to gather, so much labor and expense is incurred as to put it on the same footing as hops. We do not, therefore, consider this case as an authority upon the point in question.

The note of Sergeant Hill, in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. Gambier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine after harvest, whereas here it determined before.

The weight of authority, therefore, is in favor of the rule insisted upon by the defendant. There are, besides some inconveniences, doubts, and disputes, which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in Autumn, besides the crop in the following year? If so, he gets something more than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are, therefore, of opinion that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment.

Judgment for the defendant.

WHITMARSH *v.* CUTTING.

10 JOHNSON (N. Y.), 360. — 1813.

TRESPASS *quare clausum fregit* for entering plaintiff's close and carrying away a quantity of wheat and rye. One Hilton had a lease of the premises in question and sowed the grain during his term. After the expiration of his term plaintiff leased the premises and gathered the grain. Defendant justifies the trespass under an execution against Hilton. Verdict for defendant. Plaintiff appeals.

PER CURIAM. — The verdict was clearly against law. The crop sown did not belong to Hilton, but to his successor. This lease was for a year certain, and then renewed for the next year; and it was his folly to sow when he knew that his term would expire before he could reap. The doctrine of emblements is founded entirely on the uncertainty of the termination of the tenant's estate; where that is certain there exists no title to emblements. Without touching any other points, we are of opinion that the verdict was against law and evidence, and that the judgment below must be reversed.

Judgment reversed.

CLARK *v.* HARVEY.

54 PENNSYLVANIA STATE, 142. — 1867.

THOMPSON, J. — By the custom, or as it has been called, the common law of Pennsylvania, the tenant of a farm under a lease from year to year for agricultural purposes, is entitled to the way-going crop. This is the law, in view of which, such letting must be presumed to have been made, if nothing to the contrary be said. In the case before us this implication was attempted to be rebutted by proof of bad husbandry, and a manifest trespass justified by an alleged breach of contract. If there were bad husbandry in the case, the redress for that was by suit, and not by confiscation of the tenant's rights. The one thing was no defense to the other, and the learned judge was entirely within the law in charging as he did. The case of *Lewis v. Jones*, 5 Harris, 262, referred to by the counsel for the plaintiffs in error, was upon a different subject from that involved in this case, and is no authority for the ground assumed in the case. The jury have found that the plaintiffs left a fall crop in the ground when they left the premises, and have estimated its value in the damages given. There being a crop in the ground,

therefore, whether good or bad, the plaintiffs had a right to it and to take it away when it ripened, and this being found by the verdict, and that the defendants destroyed it, there was an end of the matter.

Judgment affirmed.

STEWART *v.* DOUGHTY.

9 JOHNSON (N. Y.), 108. — 1812.

KENT, CH. J. — There are several questions raised in this case, which it will be necessary to consider.

1. The first question is, whether the plaintiffs be entitled, in any form of action, to recover.

The lease was determined while the crop was in the ground, and it was determined by the lessor, under the provision contained in the twelfth article of the agreement. The right to the emblements which would otherwise exist in the lessee, as the duration of his estate depended upon the will of the lessor, does not appear to be controlled or affected by the special contract of the parties. In case of the determination of the estate by the lessor, the contract provides for compensation only, “for preparing the ground for the reception of seed, or for any other extra labor.” This preparation of the ground for the reception of seed is not necessarily a substitute for the right to the emblements, for it may apply to clearing and manuring and ploughing the ground, and these acts may have taken place long before seed time. The common law has established a distinction in respect to this very subject of emblements and the cost of ploughing and manuring the ground, so that the determination of an estate at will would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground, and wholly lose the expense of ploughing and manuring the land though if he was ousted afterwards he would be entitled to the emblements. Bro. Abr., tit. Emblements, pl. 7, tit. Tenant, per copie de court roll, pl. 3. We ought to consider the compensation intended by the article for such a case as this, and not as an equivalent for the crop itself. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement. Compensation for preparing the ground for seed is not an indemnity for the loss of the crop, which includes the loss of the seed, the labor of sowing and nursing it, and the hopes, to the laborer and his family, of a fruitful harvest.

While the crop was in the ground, and before notice to quit, it

was sold by the sheriff under an execution against the lessee, and the plaintiff became the purchaser. This was a valid sale, and the purchaser became entitled to the right of ingress, etc., to gather the crop. He succeeded to all the interest of the original lessee in the crop sown and so the law was understood by this court in the case of *Whipple v. Foot*, 2 Johns. Rep. 423. The subsequent act of the lessee in abandoning the premises soon after notice was given, did not impair or affect the purchaser's right which had already vested. Quitting the premises was not injurious to the lessor. He lost no rent by it. It was in furtherance of his wishes, and in obedience to his notice; and if the lessee had continued in possession for the whole six months, he would probably have been an injury to the farm, by preventing its improvement the ensuing season. His prompt abandonment of the premises was no injury, and no reason why he should lose his emblements, even if we were to admit that he had it in his power, by this means, to affect the purchaser's interest. The lessor himself did not intend by the notice to deprive the lessee of the crop already sown; for the six months would not have expired until after harvest. The plaintiff, therefore, appears to have had a clear right and title to the emblements at the time they were gathered by the defendants.

The next question is, whether the plaintiff is entitled to recover the whole or only a moiety of the crop. This will depend upon the question whose property the grain was before a moiety was delivered to the lessor. By the eighth article of the agreement, the lessee was to "render and yield and pay to the lessor one-half of all the wheat, rye, corn, and other grain raised on the farm, in each year, in the bushel, after deducting the seed and also the one-half of the butter and cheese," etc., and by the ninth article he was to deliver such a proportion of hay, etc.. But here was a lease for five years, and the articles of agreement expressly declared that Van Antwerp "rented and hired, and suffered the lessee to possess and enjoy the farm, and gave him the quiet uninterrupted possession," etc. An interest in the soil passed, and the lessee would have been entitled to an action of trespass for any unlawful entry upon it; the proportion of the production of the farm which the tenant was yearly to render, was a payment of rent in kind. They were not tenants in common in the crops and productions raised. The interest and property in the crops was exclusively in the tenant, until he had separated and delivered to the lessor his proportion. It might as well be said that the lessor would have been tenant in common in the crop, though he was to receive only every tenth bushel of grain as a rent. The interest in the whole crop, therefore, passed to the plaintiff.

The only remaining question is whether the plaintiff is entitled to an action of trespass *quare clausum fregit* for the loss of the crop. As he had an exclusive interest, I think the action will lie. The case of *Crosby v. Wadsworth*, 6 East, 602, was an action of trespass *quare clausum fregit*, and the court of K. B. held that the action was proper if the plaintiff had made out his alleged interest, which was to the exclusive enjoyment of a growing crop of grass, and to the right to cut and carry it away. The general language of the authorities is to this effect that the grantee *vestituræ terræ* or *herbagii terræ*, may maintain trespass, though he has not the soil. Co. Litt. 4b; Com. Dig., tit. Trespass, B. 1. There are numerous authorities which support the general position, and which are referred to in *Crosby v. Wadsworth*, and in 1 Chit. on Plead. 176, 177.

The court are, accordingly, of opinion that the plaintiff is entitled to judgment.

BRADLEY v. BAILEY.

56 CONNECTICUT, 374. — 1888.

BEARDSLEY, J. — This is a complaint in trespass, in which the defendants appeal from an adverse judgment in the Court of Common Pleas.

The material allegations of the complaint are that one John R. Bradley was tenant for life of a certain tract of land, of which the defendant George R. Bailey was tenant for life in remainder; that John B. Bailey, in the month of April, 1885, leased the tract to the plaintiff for the term of three years; that the plaintiff sowed a portion of the tract with winter rye on the 18th of September, 1885; and that John B. Bailey died on the 20th of September, 1885, and that George R. Bailey and the other defendant by his direction, in the month of June following plowed in and destroyed the crop of rye then maturing. The truth of these allegations of the complaint was admitted upon the trial except that the defendant claimed that the rye was sown on the 19th instead of the 18th day of September, 1885, which, however, is immaterial.

The only question which we are called upon to consider arose under the issue formed by the plaintiff's traverse of the second answer to the complaint, the material part of which is as follows: The defendants say that if the plaintiff did anything upon said premises on September 18th or 19th, 1885, he did the same with full knowledge that said John B. Bailey was then dying; that if he did any thing it was nothing more than to harrow the soil in a hasty and

superficial manner immediately after he had dug his crop of potatoes from the same, and to scatter a few seeds upon the same, without having first plowed and manured the same, as is customary and proper with the farmers in this state, and at an untimely season of the year, and without laying the same down to grass, as is customary and proper; all of said acts of the plaintiff being for the purpose of defrauding said George R. Bailey in his use of and right to said land after the death of said John B. Bailey.

Upon the trial of this case to the jury the plaintiff, in reply to inquiries made by the defendants upon cross-examination, described the manner in which he prepared the ground for the crop. The defendant afterward asked his own witness this question, "What is the customary way of sowing rye and preparing the ground for it?" The court excluded this question upon the objection of the plaintiff that there was no established custom and that it was immaterial. The defendants claimed the testimony to show that the land was not prepared in the customary way as a part of the alleged defense. This ruling of the court is assigned for error.

In support of the allegation in the answer that the plaintiff knew that Bradley, the tenant for life, was dying when he sowed the crop, the defendants called Dr. Webb, the physician who attended him during the month of September, 1885, and who, after describing his symptoms, testified that for the last week or more of his life he was gradually failing every day, growing weaker and nearer to his end every day, and that this was apparent to every one who had common sense.

It was admitted that at the time of his death, and for several months before, he resided with the plaintiff.

The defendants then offered several witnesses to testify — one, that Bradley appeared to be dying on the 16th and 17th of September, when the plaintiff was present; another, that the plaintiff's attention was called by him to Bradley's condition on the 18th of September, 1885; another, that the plaintiff had said on the 18th and 19th of September that Bradley could not live through the night; and another, that the plaintiff had said a few days before Bradley's death, that he was very low. All of this evidence, except the testimony of Dr. Webb, was objected to by the plaintiff and excluded. The plaintiff, against the objection of the defendants, was permitted to testify in contradiction of Dr. Webb, that the doctor had told him, as late as the last week of Bailey's life, that "he might live for quite a long time; that he might get out of it and live for a year or two, and perhaps longer, and might not live so long as that."

The court charged the jury on this point as follows:

"The question then is, did the plaintiff know for a certainty that his lessor, the tenant for life of the estate, would die before he could mature that crop? If we find that there was any uncertainty in regard to the duration of the life of Mr. Bailey, you must find for the plaintiff. If you find that the time of his death was so certain that he (Bradley) had no doubt in regard to it, then your verdict should be for the defendants."

The several rulings of the court and the charge to the jury referred to, are assigned for error. We do not think that either of them afford the defendants any ground of exception. On the contrary, we think that the charge was too favorable to the claim of the defendants. It was adapted to the issue between the parties, and would, perhaps, have been unobjectionable if that issue had been a material one; but the issue was an immaterial one and the plaintiff would have been entitled to judgment upon the conceded facts if it had been found in favor of the defendants.

If it were possible for the plaintiff to have had absolute knowledge beforehand of the time of Mr. Bailey's death, and he had known that it would occur before the maturity of the crop which he was planting, his right to it would not be thereby defeated.

In Co. Litt., p. 55 b., note 1, the law is thus stated: "So, therefore, if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God; and the same law is of the lessee for years of the tenant for life." Blackstone says, (2 Com. 122): "Therefore, if a tenant for his own life sows the land and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the act of God, and it is a maxim of the law that *actus Dei nemini facit injuriam*." We are referred to no case in which the exception claimed by the defendants has been made to this rule during the centuries of its existence.

To hold that this right may be defeated after the tenant's death, by evidence of his condition of health, or by his declarations or those of his lessee imputing a belief, however well founded, or knowledge, if such knowledge be possible, that his life would not continue until harvest time, would in many cases subvert an important object of the rule, the encouragement of husbandry, and open a fruitful source of unseemly litigation. A tenant in failing health, especially if he had expressed a belief that his end was near, would naturally hesitate to put in crops which might be successfully claimed by his successor in title, or in respect to which his estate might become involved in litigation.

The question asked by the defendants of a witness as to the cus-

tomary mode of sowing rye and preparing the ground for it, was properly excluded. We have shown that the plaintiff had a right to sow the rye for his own use, and it was a matter of no consequence to the remainderman how he did it. Nor did his right to the crop depend upon his cultivating the land according to the rules of good husbandry. If it was done in an unhusbandlike manner and in such a way that the crop would be an inconsiderable one, it would be wholly his own loss. The fact of his hurried and imperfect mode of sowing the land may have been of pertinence to the question whether he was in reality sowing rye or only pretending to do so. But it was not offered for this purpose, but to show that he was acting in the belief that the tenant for life would die in a few days. But as we have already shown, this belief was of no importance. His right did not depend upon the condition of the tenant for life. And he would have no interest in putting any labor on the land as a matter of mere pretense, as he would only lose his labor by so doing.

There is no error in the judgment appealed from.

MARSHALL v. MOSELEY.

21 NEW YORK, 280. — 1860.

ACTION for money had and received by defendant to the use of plaintiffs. Judgment below for plaintiffs. Defendant appeals.

COMSTOCK, Ch. J. — Mrs. Coe, by virtue of her husband's will, had a life estate in the premises, out of which the rents in question accrued, and the plaintiffs owned the remainder in fee. She died April 5, 1855, the leases being then unexpired. On the 1st of May, following, the rents became due for the preceding quarter of a year. The defendant is the executor and residuary legatee of Mrs. Coe, and having collected the rents for the whole quarter, the principal question in the case is, whether he is entitled to apportion them by dividing the quarter into two periods of time, one before and the other after her death, and by retaining in his own hands the portion which accrued before that event.

As rent follows the reversionary estate, the law allows it to be apportioned where that estate becomes divided amongst different owners. This is according to the maxim, "*accessorium sequitur naturam sui principalis*." Thus, if a reversion descend on the death of the ancestor who gave the lease, and the coparceners or heirs make a partition, the rent will be apportioned in favor of each of them. So if the reversion be severed by will or even by conveyance

of the owner, the same result will take place. 2 Platt on Leases, 131, 132, and cases cited. But the same reasons never existed for apportioning rent on the principle of time where the tenant was bound to pay it at stated periods. The sum accruing between each of the times of payment was a single entire debt, and was due only on the condition precedent of the tenant being entitled to enjoy the premises for the time in respect to which it was payable. If, therefore, a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for years, reserving rent half yearly, and should die in the middle of a half year, the rent, according to the principles of the common law, would be lost for the half of a year. The executor or representative of the lessor could not recover it, because by the nature of the contract the lessor was not entitled to it except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, such holding is necessarily under some new contract with the party on whom the estate has devolved. Woodfall's Land. and Ten. 248; 1 Salk., 65; 1 P. Wm. 392; 2 Id., 501, 502; 1 Man. & Gr., 589, 13 N. H., 343; 11 Mass., 493.¹

If, however, the lease continues, although intermediate the days of payment, the reversion passes wholly into new hands; the obligation of the lessee to pay rent continues also. Thus, in the middle of a quarter the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mortgage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is, therefore, payable as though they did not occur; but it is payable only in the sums and at times specified in the demise. The reversion may be transmitted to a new owner during a period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wheresoever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time, and no case can be found where a court of equity has adopted a different rule. Says Mr. Woodfall, Law of Landlord and Tenant, 248, "at common law rent cannot be apportioned, but the reversioner becomes entitled to the accruing rent from the rent day antecedent to the decease of the tenant for

¹ See for present New York rule, § 192 R. P. Law. — ED.

life, whose representative was entitled to the arrearages due at some rent day before the death of the testator, or the intestate; for the law does not apportion rent in point of time nor does equity." See, also, 2 Greenleaf's Cruise, p. 116, §§ 44, 45, 46, *Ex parte Smyth*, 1 Swanst. 337, and note, and other cases cited, *supra*. It is true there are in the English books some cases of a peculiar kind, where on the death of a tenant for life before the day of paying rent for the current quarter or other period, the rent has been divided between his representative and the remainderman; but these are all cases in which the lease terminated on the decease of the life tenant; either because he had no power to lease so as to affect the remainderman, or because if such a power was given to him it had been defectively executed, and the lessee, holding the premises until the rent day voluntarily paid the whole to the person who succeeded to the estate.

In all the cases of this kind the lessee was not at common law bound to pay at all for so much of the time since the last rent day, as had elapsed before the death of the tenant for life, but having conscientiously paid for the whole time, the person who took the estate in remainder was held by the courts of equity to have received for the use of the executor, of his life tenant, so much of the rent as accrued beyond his decease. *Ex parte Smyth*, *supra*; *Paget v. Gee*, 1 Ambler, 199. In these instances the rent actually paid was apportioned or divided on the principle of time; but cases of this kind have no tendency to show that such an apportionment can be made when the lease remains as before, notwithstanding a change of parties entitled to the rents takes place intermediate the rent days. The lessee in that case is bound to pay for the whole time, and the reversioner, or remainderman, takes the rent as an entire sum due to him by the terms of the contract.

The well ascertained rules of the common law are, therefore, opposed to the claim of the defendant to retain any portion of the rents received by him for the quarter during which his testator, the life tenant, died. The leases were not determined by that event, and the plaintiffs, who as remaindermen succeeded to the reversion, were entitled to the whole of those rents. It has also been observed that the courts of equity have never departed from the rule of law on this subject.

It seems hardly necessary to say now that there is no legislation of this State which the defendant can invoke in support of his claim.¹ In England, one of the rules of law in regard to apportionment of rent was abrogated by an act of Parliament, passed in the reign of

¹ But the latest New York statute has adopted the English rule. N. Y. Code Civ. Pro. § 2720. — ED.

George II. That statute, 2 Geo. II., c. 19, after noticing that by the existing rule rents were frequently lost, where a lessor having only a life estate died before or on the day when it would be payable, declared that when any tenant for life should happen so to die, his executor or administrator might recover the whole rent in arrear, in case such death took place on the day fixed for payment, or if it happened before that day then a proportion, according to time, making all just allowances, etc. That legislation, with some change in phraseology, has been followed in this State. Our statute, 1 R. L. 438; 1 R. S. 747, § 22, provides that when a tenant for life, who shall have demised lands, shall die before the day when any rent is to become due, his executors may recover "the proportion of rent which accrued before his death." In the case provided for, therefore, rent can be apportioned in opposition to the rule of the common law, and a recovery had, where, but for the statute, the rent would be lost. But the statute does not include the present case. The leases in question were not given by a tenant for life, but by the owner of the fee, and the disputed rent was not liable to be lost, because the plaintiffs, succeeding to the reversion, could recover the whole of it by action founded on the very leases themselves. The English statute, like ours, was enacted to remedy the apparent injustice of the rule which absolved a lessee from paying any rent, where his interest was determined between the rent days by the expiration of a life estate on which the lease depended. More recent legislation in England has gone still further. The statute of 4 W. IV., c. 22, after reciting that by law rents due at fixed periods were not apportionable, and after reciting the inconvenience of that rule, proceeds to declare that all rents made payable at such periods under any instrument executed after the passing of the act, should be apportioned so that on the termination, by death or any other means, of the estate of the person entitled to the rents, such person, or his representative, should have a portion of such rents, according to the time elapsed since the last period of payment. By a further provision, the entire rent is to be received and recovered from the tenant, by the person who would be entitled to recover it if the act had not been passed, and is to be held by him subject to apportionment, which can be enforced against him by suit at law, or in equity. It will be seen that this statute recognizes the old rule, while it declares a new one for future leases, and that it also carefully protects the tenant against more than one action for the entire rent. We have no such legislation in this State. If we should adopt the principle of that statute, in regard to apportionment, without legislative interference, we should not only change the existing law, but

the change must be made without the protection to tenants which the English statutes secures. If we declare rent to be apportionable in cases like the present, it will follow, according to our rules of pleading and practice, that each party entitled to a share may sue the tenant to recover it. To illustrate, if the defendant has no interest in the rents now in question, then he cannot retain the portion in his hands. If he has an interest, then to that extent he could, under our practice, recover so much as belonged to him, by suit against the tenants if they had not paid these rents. And I think that even a notice to the tenants of his claim to a share, would take away from them their right to pay the entire sum to the persons who, as remaindermen, would be entitled to the other share. To conclude on this point, we find that the rule of law denying apportionment in a case like this, has never been shaken; and whatever may be the arguments founded in justice or expediency, in favor of a different rule, we think those arguments should be addressed to the Legislature, rather than to the courts.

The life estate and the remainder in fee, between which the apportionment is claimed, were created by the will of Mr. Coe, by whom the leases were given, and it has been insisted that we ought to construe the will favorably to his widow, and on that ground allow the apportionment to take place. But we see no room for any construction which will take the case out of the general rule of law. Of course, the life estate given was intended by the testator as a part, and perhaps the principal part, of the provision made for his widow, but it was given simply as a life estate, with remainder over to the plaintiffs; and it does not appear even to have been in lieu of dower in any other real estate which he may have owned. The widow became entitled to the rents as incident to her life estate in the reversion; but as that estate terminated between the periods for payment, the rent accruing, but not yet due, became at once annexed to the estate of those who succeeded her in such reversion. No part of it could be severed at that point of time. To make an exception in such a case, to the general rule, would be virtually to deny the existence of the rule altogether. It may be well to observe that rents are unlike annuities, and unlike the interest of money. They issue out of land, and are a part of the land. They are less capable of division, or apportionment, according to a precise measure of time, because the value of the tenant's enjoyment may be quite different at different periods of the year, and the value, moreover, may very much depend on the enjoyment for the full time specified in the lease. * * *

Judgment affirmed.¹

¹ Three of the eight judges dissented; Clarke, J., wrote the dissenting opinion.

2. ESTOVERS.

SMITH *v.* JEWETT.

40 NEW HAMPSHIRE, 530. — 1860.

BELLOWS, J. — The plaintiffs in this case seek for relief on account of waste already committed; for an injunction to stay waste in the future; for a decree of forfeiture for breach of condition in neglecting to maintain the plaintiff, Sarah F. Jewett; for an account of the personal property received by said Nancy under the will, with the income thereof, and of the real estate, and that proper decrees be made to secure and preserve it for the benefit of the persons interested; and also that the said Nancy, having become incapable of discharging the duties of the trust, be removed, and another trustee be appointed; the bill also prays that the said Nancy be compelled to maintain the said Sarah, and to reimburse the sums of money expended by her, the said Sarah, for her own maintenance, by reason of the neglect of the said Nancy.

The position of Nancy Jewett being that of tenant for life, she is entitled to take from the land a reasonable quantity of wood for fuel, for the supply of herself and family upon the premises, to be cut in a prudent and proper manner. She may also, we think, include a reasonable supply for necessary servants employed to carry on the farm, and living in the same or another house upon the premises, and it can make no difference in this respect whether such servants are paid by fixed wages, or by a share of the crops, as tenants at the halves. To carry on the farm, servants may doubtless be employed and reasonable fuel may be used for their suitable accommodation, and it can in no wise affect the remainderman or reversioner whether the persons so employed are paid by wages in money or a share of the crops, the real question being whether the tenant has used more than a reasonable quantity of wood for such

discussing the origin and history of the rule. After some arguments of a technical character, he concludes: "But I am inclined to decide this case upon broader grounds; the inapplicability of the rule contended for to the condition of society here, the fact that it has never been deliberately and expressly recognized, and its obvious hardships and injustice. There is not a particle of reason, founded upon abstract principles of justice, or arising from considerations of convenience or policy, why rents, in cases of this nature, should not be apportioned; and nothing but the pressure of an indubitable current of authority should constrain us to recognize so anomalous and so technical a rule. When I add these considerations to the manifest intention of the testator, I have no hesitation in saying that the judgment of the Superior Court of Buffalo should be reversed." — ED.

purposes. The tenant for life may lawfully assign his interest to another, who will have the same rights. *Fuller v. Wager*, 7 N. H. 342. There can, therefore, be no objection in this case, that wood was used by a tenant of the said Nancy Jewett. In *Gardner v. Deering*, 1 Paige Ch. 573, it was held that a tenant in dower may take reasonable firewood not only for the house which she herself occupies, but for the house of her servant who cultivates the land, though living upon another tract adjoining. Tayl. Landl. & Ten., sec. 352; *Miles v. Miles*, 32 N. H. 147; *Webster v. Webster*, 33 N. H. 19; 4 Kent Com. 80; 1 Gr. Cru. 104; *Paddleford v. Paddleford*, 7 Pick. 152.

In the case before us the bill charges that the said Nancy had leased the farm and part of the house to one Bean, with a right to cut firewood on the farm, and that he has done so for his use, and that the said Nancy has also supplied her own fire with fuel from the same source at the same time. The answer denies any waste, but admits the lease to Bean, alleging that the expense of hiring hands to cultivate the farm was so great it was thought best so to lease it, and admits also that in cold weather said Bean used wood for a separate fire. But it is not alleged in the bill, nor does it appear in the answer, that an unreasonable quantity was used; therefore the plaintiffs are not entitled to a decree upon that ground, and so also in respect to the charge of bad husbandry, which is denied by the answer.

As to the prayer for a decree of forfeiture for breach of condition, by neglecting to maintain the plaintiff, Sarah F. Jewett, it may be regarded as an established rule that a court of equity will not enforce either a penalty or a forfeiture, and therefore it is contrary to the uniform course of the court to lend its aid to divest an estate for breach of condition subsequent. 2 Story Eq., secs. 1315, 1319, and authorities cited; *Livingston v. Tompkins*, 4 Johns. Ch. 431; 4 Kent Com. (9th ed.), 147; Story, Eq. Pl., sec. 521. * * *

In regard to the application for an account of the property and the income thereof, we see no occasion to decree it. Under some circumstances, where there is cause to fear that the property will be squandered or diverted to other than the legitimate uses, a bill with proper parties and in the nature of a bill *quia timet* may be maintained. But that is not the character of the proceedings here, nor are these parties entitled to an account of the income of the property in the hands of the said Nancy Jewett. By the will the whole property is given to the widow during her life, upon the condition that she maintain the two daughters while unmarried. This gives her an estate for life in the property, both real and personal, as in

Miles v. Miles, and *Webster v. Webster*, before cited. And the estate at once, on the death of the testator, vested in her, the condition annexed to the gift having nothing of the character of a condition precedent. As such tenant for life she was entitled absolutely to the income of the property and reasonable estovers; subject only to the charge of the maintenance of the two daughters. And, on the other hand, whether the income was sufficient or not, she was bound to furnish such maintenance — the property being held by her upon that condition or subject to that charge — and having accepted the gift, she may be compelled to comply with the condition, by a resort to equity or by action at law. *Pickering v. Pickering*, 6 N. H. 120; *Veasey v. Whitehouse*, 10 N. H. 409. Such would have been the law had the property been wholly unproductive. The plaintiffs, therefore, cannot compel the defendant, Nancy Jewett, to come to an account of the rents and profits of the estate upon any grounds disclosed in these proceedings. * * *

The bill must be dismissed.¹

3. FIXTURES AND IMPROVEMENTS.

MERRITT *v.* SCOTT.

81 NORTH CAROLINA, 385. — 1879.

SMITH, C. J. — The tract of land described in the complaint was, in 1842, conveyed by James Merritt, the owner, to his son, John Merritt, in trust for another son, Francis Merritt, for life, remainder to his wife, Deborah, for life or widowhood, and with a further limitation over at her death or marriage, to the children of Francis then living. John Merritt, the trustee, died intestate, leaving children, who with the said Deborah are the plaintiffs in this action. The life tenant, Francis, who is also dead, in his lifetime conveyed his estate to one John Cox, and after his death his administrator, under proceedings in the probate court and with license therefor, sold and conveyed the land to the defendant, Edward Scott. The object of the suit is to recover the land for the use of said Deborah, and damages for its detention since the death of Francis Merritt.

No issue as to title is made and in the inquiry before the jury as to the damages, the defendant offered to show in support of the defense set up in his answer, that valuable improvements had been made on the lands both by himself and the preceding occupant, in

¹ See other cases on this topic under "Waste," *infra*, pp. 422-471. — ED.

² See pp. 310-338, *supra*. For law as to manure, pp. 338-347, *supra*. — ED.

the erection of useful buildings, and by ditching, fencing, and manuring, whereby the value of the land had been greatly enhanced. The evidence on objection from plaintiff was excluded, and the exception to this ruling of the court is the only point presented in the appeal.

Under instructions, the jury assessed the damages from August 18th, 1873, which we suppose to be the date of the determination of the first life estate, at the rate of one hundred dollars per annum. Whether these improvements or any of them were made during the years for which the defendant is charged for rent, does not appear.

We think it clear that improvements of any kind put upon land by a life tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state without deduction for its increased value by reason of good management or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority.

For subsequent rents and uses he is entitled to have the amount reduced by those improvements. Suppose, while holding over, the defendant had by such improvements as in the answer are alleged to have been made, rendered the land more valuable, as it comes to the remainderman, would it not be reasonable he should pay a smaller rent than if nothing of the kind had been done? So if no repairs were made and the buildings had gone to decay, and by mismanagement and bad cultivation, the farm had been abused and its value impaired, a full and larger rent might justly be required of the tenant.

The evidence of such improvements as were made by the defendant, after his estate expired, and he became chargeable with rent, ought to have been admitted and considered by the jury in measuring the value of the rent, and in mitigation of damages. The evidence was competent for this purpose only, and not, in case the improvements were worth more than the rents, to constitute a counterclaim for the excess.

The rule is thus stated by Mr. Tyler: "The defendant should be allowed the value of his improvements made in good faith, to the extent of the rents and profits claimed, and this is the view of the subject which is supported by the authorities." Tyler on Eject. 849.

Referring to the action for mesne profits which might be brought after a recovery in ejectment, Ruffin, C. J., uses this language: "The jury can then make fair allowances out of the rents, and to their extent, for permanent improvements honestly made by the

defendant, and actually enjoyed by the plaintiff, taking into consideration all the circumstances." *Dowd v. Faucett*, 4 Dev. 92.

Thus far the jury should have been allowed to hear and consider the evidence, in assessing the sum which the defendant should pay for the use of the premises, for it is quite apparent the improvements were made in good faith and will inure to the plaintiff's benefit.

As a counterclaim and to charge the land therewith when the estate in remainder is vested in Deborah, the evidence is totally inadmissible under the act of February 8th, 1872. Bat. Rev. ch. 17, § 262a, and the sections following. The act is not applicable to a case like this, but to independent and adversary claims of title, and was intended to introduce a just and reasonable rule in regard to them.

The owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, the increased value he ought not to take without some compensation to the other. This obvious equity is established by the act. But to enjoy its benefits, a party after judgment must file his petition and ask to be allowed for his permanent improvements, "over and above the value of the use and occupation of such land."

If the court is satisfied of the probable truth of the allegation, and the case is one to which the statute applies, and this must be preliminarily determined, it may suspend execution and cause a jury to be impaneled "to assess the damages of the plaintiff and the allowance to the defendant" for his permanent improvements, "over and above the value of the use and occupation of the land."

This course has not been pursued, and the evidence is offered in the trial without any previous application to the judge, or his assent being obtained. But waiving the informality, we are not prepared to say the judge was in error in disallowing the evidence for the purpose of establishing a counterclaim for the excess. The defendant is entitled to have his claim for improvements made since the expiration of his own estate, considered by the jury in estimating the value of the rents, under appropriate instructions from the court in relation thereto. For this error in wholly rejecting the evidence there must be a *venire de novo*, and it is so ordered.

Venire de novo.

II. General restrictions upon tenant's use.

I. THE MAXIM "*SIC UTERE TUO UT ALIENUM NON LÆDAS.*"

BISHOP *v.* BANKS.

33 CONNECTICUT, 118. — 1865.

[*Reported herein at p. 382.*]¹

III. Special restrictions protecting the inheritance for general owner. Waste.

I. NATURE AND KINDS OF WASTE.

a. Voluntary waste.

CANNON *v.* BARRY.

59 MISSISSIPPI, 289. — 1881.

[*Reported herein at p. 433.*]

b. Permissive waste.

HERNE *v.* BEMBOW.

4 TAUNTON (ENG. 'C. P., ETC.), 764. — 1813.

THE plaintiff declared in case in the nature of waste, and alleged certain buildings in the defendant's occupation to be ruinous, prostrate, and in decay for want of needful and necessary reparations. There was also a count for obstructing a way. The defendant suffered judgment by default. The premises were demised by the plaintiff to the defendant by lease, which contained no covenant to repair. Upon the execution of a writ of inquiry, the under-sheriff directed the jury to inquire what sum it would take to put the premises into tenantable repair. The jury, however, rejected that rule, and gave very small damages.

Shepherd, Sergt., now moved to set aside the inquisition, and that the case might be submitted to another jury, contending that the damages ought to have been the sum sufficient to enable the

¹ This case is an illustration of the application of the maxim to an estate in fee, but this maxim and the rules relating to the preservation of public health apply as well to any mode of occupation of land. — ED.

defendant to keep up the premises in as good repair as they were in when the defendant took them.

PER CURIAM. — Whatever duties the law casts on the tenant, the law will raise an assumpsit from him to perform, if there be no covenant in his lease for the performance, but that is a very different case from a declaration framed in tort like this. If this action could be maintained, a lessor might declare in case for not occupying in an husbandlike manner, which cannot be. The facts alleged are permissive waste; an action on the case does not lie against a tenant for permissive waste. *Countess of Shrewsbury's Case*, 5 Co. 13. If, therefore, we were to grant this motion, the defendant would meet the plaintiff in a manner he would not like.

Rule refused.

FERGUSON *v.* —

2 ESPINASSE (ENG. K. B.), 590. — 1797.

ACTION to recover damages for suffering an house of the plaintiff to be out of repair.

The case on the part of the plaintiff was, that the defendant had rented an house of him, as tenant at will, at a rent of £31 per annum, which he had quitted. After the defendant had given up the possession, the house was found to be very much out of repair; and the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair, which sum he sought to recover in the present action.

Lord Kenyon said it was not to be permitted to plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting on a new roof on an old worn-out house; this, I think, the tenant is not bound to do, and that the plaintiff has no title to recover it.

IN RE CARTWRIGHT.

41 CHANCERY DIVISION (ENG.), 532. — 1889.

ADJOURNED SUMMONS. — John Cartwright, who died in 1850, by his will, dated in that year, devised land in the county of Suffolk unto and to the use of his daughter Mary Anne Cartwright and her

assigns for and during the term of her natural life, and from and immediately after her decease to the use of her children, if any, in manner therein mentioned, and if all such children should have departed this life without issue at the time of the decease of his daughter and on failure of her issue, he devised the land to the defendant Newman, his heirs and assigns, forever. The will contained no provisions touching the liability of the testator's daughter for waste.

Mary Anne Cartwright died a spinster on the 15th of December, 1888, and the plaintiff Avis was her executor. At the time of her death the buildings, gates and fences on the devised land were in a dilapidated condition, owing to the necessary repairs not having been done, and the probable cost of the works necessary to place the property in repair was estimated by a surveyor to be £166 12s. 9d. The defendant claimed this sum from the plaintiff, who, on the 28th of March, 1889, took out an originating summons to have it determined whether any and what sum should be allowed and paid to the defendant as compensation in respect of waste suffered by Mary Anne Cartwright during her estate in the premises.

At the hearing, by the direction of the court, the summons was amended by claiming administration of the estate of Mary Anne Cartwright.

Ingpen, for the plaintiff, stated the case.

W. C. Druce, for the defendant.

As legal remainderman in fee the defendant is entitled to compensation by way of damages for permissive waste by the deceased tenant for life. No doubt it is well established that equity will not interfere by injunction in cases of permissive waste by tenants for life, but the question whether or not an action for damages for permissive waste can be maintained against a tenant for life upon whom no express duty to repair is imposed by the instrument which creates the estate, rests upon a different footing, and was treated by Lush, J., in *Woodhouse v. Walker*, 5 Q. B. D. 404, 407, as an open question.

[KAY, J.: Can you show me a case in which a court of common law has given damages in such an action?]

No such case can be shown, but principle and authority are in favor of the existence of such a right of action. Before the statutes of Marlbridge, 52 Hen. 3, and of Gloucester, 6 Edw. 1, c. 8, though an action for waste lay against a tenant in dower or by the curtesy (whose estates are created by the law), it did not lie against a tenant for life or years. Those statutes were passed to remedy the mis-

chief, and Lord Coke, 2 Inst. 145, treats them as extending to permissive waste, saying: "For he that suffereth a house to decay, which he ought to repara, doth the waste;" and there are statements in the notes to *Greene v. Cole*, 2 Wms. Saund. 251, to the same effect.

[KAY, J.: Lord Coke's words only include permissive waste where there is an obligation to repair. He says in effect that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair.]

Lord Coke's meaning is that the obligation is imposed by the statutes. In *Harnett v. Maitland*, 16 M. & W. 257, Parke, B., Ibid. 262, referred to the notes to *Greene v. Cole* as an authority that by the statute of Gloucester the action was given against a lessee for years. It is true that in *Gibson v. Wells*, 1 B. & P. N. R. 290, Sir James Mansfield, C. J., expressed in general language the opinion that at common law an action for permissive waste was not maintainable, but that was a case of tenancy at will, and has no application to tenancy for life or years. *Herne v. Bembow*, 4 Taunt. 764, and *Jones v. Hill*, 7 Ibid. 392, are also usually cited as authorities to the like purport, but those three cases were commented on and explained by Parke, B., in delivering the judgment of the court in *Yellowly v. Gower*, 11 Ex. 274, 294, where he observed that in the first two the court seemed to have contemplated the case only of a tenant at will, and that in the last no such proposition was stated as that a tenant for years was not liable for permissive waste; and he added: "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53, *Harnett v. Maitland*; though the degree of repairs required for a tenant from year to year, by modern decisions, is much limited." *Yellowly v. Gower*, 11 Ex. 274, was decided expressly on the ground that a tenant for life is liable for permissive waste, and that there is no distinction in this respect between tenant for life and tenant for years.

[KAY, J., referred to *Powys v. Blagrove*, 4 D. M. & G. 448, and in particular to the statement of the Lord Chancellor, Ibid. 458, to the effect that in the case of a tenant for life even legal liability for permissive waste was very doubtful.]

That is a mere *dictum*, and his Lordship cites the very cases which are disapproved in *Yellowly v. Gower*. The recent case of *Barnes v. Dowling*, 44 L. T., N. S. 809, was decided on purely equitable grounds, having no reference to the right of a legal remainderman in fee to maintain an action for waste. Still more recently in

Davies v. Davies, 38 Ch. D. 499, Kekewich, J., has followed *Yellowly v. Gower*, and expressly held that a tenant for years is liable for permissive waste.

[He referred also to *Bacon v. Smith*, 1 Q. B. 345, Tudor's Leading Cases (Real Property), 3d ed., pp. 109, 110, and 3 & 4 Will. 4, c. 42, § 2.]

KAY, J. (Without calling upon counsel for the plaintiff): — I am much obliged to you, Mr. Druce, for your argument, to which I have listened with very considerable interest. The result appears to be this: Sir James Mansfield was clearly of opinion that an action for permissive waste would not lie even against a tenant for years. That is clearly shown in the case of *Gibson v. Wells*, 1 B. & P. N. R. 290, which was followed at later dates in *Herne v. Bembow*, 4 Taunt. 764, and *Jones v. Hill*, 7 Ibid. 392, and in the recent case of *Barnes v. Dowling*, in the Law Times reports; and when the point was brought before the Lord Chancellor (Lord Cranworth) in the case of *Powys v. Blagrove*, his Lordship, 4 D. M. & G. 458, said this: "Then it was argued, independently of the trust, that it is the duty of a tenant for life to repair — '*Equitas sequitur legem.*' But even legal liability now is very doubtful." And he referred to *Gibson v. Wells*, 1 B. & P. N. R. 290, and *Herne v. Bembow*, 4 Taunt. 764. His Lordship there decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. Now, in that state of the authorities, this consideration is to be added. Since the statutes of Marlbridge and of Gloucester there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling. I should not think of coming to such a decision without direct authority upon the point. Such authority as there is seems to me to be against the contention, and in opposition to the positive decisions in *Gibson v. Wells*, *Herne v. Bembow*, and *Jones v. Hill*, 7 Taunt. 392, there are only to be found certain *dicta* of Baron Parke and the late Lord Justice Lush which seems to amount to this, that the words of the statutes of Marlbridge and Gloucester are sufficient to include the case of permissive waste, at any rate where there is an obligation on the person who has the particular estate not to permit waste, whether that obligation does or does not exist at the common law in the case of a tenant for life. But at the present day it would

certainly require either an act of Parliament or a very deliberate decision of a court of great authority to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation; I therefore think that this claim must be disallowed.

MOORE *v.* TOWNSHEND.

33 NEW JERSEY LAW, 284. — 1869.

ACTION on the case in the nature of waste to recover damages for permissive waste. Verdict for the plaintiff. A rule to show cause why a new trial should not be granted was allowed. The following reasons were assigned for setting aside the verdict: 1. Because an action on the case will not lie against a tenant for years for permissive waste. 2. Because the law between the parties measures and limits the liability of the tenant in the matter of repairs.

DEPUE, J. — The action on the case, in the nature of waste, has almost entirely superseded the common-law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted.

At common law, waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years. 2 Inst. 299, 305; Co. Litt. 54. The reason of this diversity was, that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and if he did not, it was his negligence and default. 2 Inst. 299; Doct. & Stu., ch. 1, p. 102. This doctrine was found extremely inconvenient as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. To remedy this inconvenience the statute of Marlbridge (52 Hen. 3, ch. 23), was passed. But as the recompense given by this statute was frequently inadequate to the loss sustained the statute of Gloucester (6 Edw. I., ch. 5), increased the punishment by enacting that the place wasted should be recovered, together with treble damages. 1 Cruise Dig. 119, secs. 25, 26; *Sackett v. Sackett*, 8 Pick. 313, per Parker, C. J. The statute of Marlbridge is in the following words:

"Also fermors, during their terms, shall not make, waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously." 2 Inst. 145. The word fermor (*firmarii*) in this statute comprehended all such as held by lease for life or lives, or for years, by deed or without deed. 2 Inst. 145, note 1, and also devisees for life or years. 2 Roll. Abr. 826, L 35. By the statute of Gloucester, "it is provided, also, that a man, from henceforth, shall have a writ of waste, in the Chancery, against him that holdeth by law of England or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall leese the thing that he hath wasted, and moreover, shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of the wardship, it shall be done as is contained in the great charter." 2 Inst. 299. At the common law, a tenant at will was punishable for voluntary waste but not for permissive waste. *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784; *The Countess of Shrewsbury's Case*, 5 Rep. 14; *Hartnett and Wife v. Mailland*, 16 M. & W. 258. Tenants in dower, by the curtesy, for life or lives, and for years, were included in the statute of Gloucester. Tenants at will were always considered as omitted from the statute of Marlbridge as well as from the statute of Gloucester, and, therefore, continued to be dispunishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste, was the uncertain nature of their tenure which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester, is attributable to the fact that the owner of the inheritance might at any time, by entry determine the estate of the tenant, and thus protect the inheritance, from spoil or destruction.

The language of the statute of Marlbridge is, "shall not make (*non facient*) waste," and in the statute of Gloucester, in speaking of guardians, the words used are, "he which did waste" (*que avera fait waste*). The settled construction of these statutes in the English law until a comparatively recent period was, that they included permissive waste as well as voluntary waste. In a note in exposition of the statute of Marlbridge, Lord Coke, in commenting on the words "*non facient*," says: "To do or make waste, in legal under-

standing in this place, includes as well permissive waste, which is waste by reason of omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the statute of Gloucester, ch. 5, *que aver fait waste*, and yet is understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste." 2 Inst. 145; 7 Bac. Abr. 250; 3 Bl. Com. 225; 2 Saund. 252; 4 Kent, 76. So, under the prohibition to do waste, the tenant is held to be bounden for the waste of a stranger, though he assented not to the doing of waste. Doct. & Stu., ch. 4, p. 113; 2 Inst. 303; *Fay v. Brewer*, 3 Pick. 203; 1 Washburn R. Prop. 116. It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease by whomsoever it may be committed, per Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198, with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White v. Wagner*, 4 Harr. & Johns. 373; 4 Kent, 77; *Heydon and Smith's Case*, 13 Coke, 69. The instances in the earlier reports in which lessees for life or years, were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the statute, which subjected them to the action of waste. *Griffith's Case*, Moore, 69, No. 187; *Ib.* 62, No. 173; *Ib.* 73, No. 200; *Keilway*, 206; *Darcy v. Askwith*, Hobart, 234; *Glover v. Pipe*, Owen, 92; 3 Dyer, 281; 2 Roil. Abr. 816 l, 40; 22 Win. Abr. Waste, "c" and "d," pp. 436-440, 443; Co. Litt. 52a, 53b; 5 Com. Dig. Waste, d 2, d 4; *Bissett on Estates*, 299, 300. So uniformly had the courts determined that lessees for life or years had committed waste, by the application of the common-law rules, with respect to waste, whether of omission or commission, that the learned commentator on English law says, "that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable, or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste." 2 Bl. Com. 283.

This construction of the statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of *Gibson v. Wells*, 4 B. & P. 290, in the year 1805, which was followed by the case of *Herne v. Bembow*, 4 Taunt. 764 (1813). These cases it is insisted have settled the construction against the liability of a tenant for years for permissive waste. *Gibson v. Wells*,

is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In *Herne v. Bembow*, it does not clearly appear that the lease was for a term. It is certain that the opinion of the court, proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton, it appears to have been decided, without argument or consideration. The opinion is a *per curiam* opinion, and the only case cited is the *Countess of Shrewsbury's Case*, 5 Co. 14, which was a case of a tenancy at will.

The only subsequent case which sustains these cases is *Torriano v. Young*, 6 C. & P. 8, a case at *nisi prius*. In other cases where *Herne v. Bembow* was cited, the English courts show no disposition to follow it. In *Jones v. Hill*, 7 Taunt. 392, Gibbs, C. J. expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 A. & E. 540, and in *Beale v. Sanders*, 3 Bing. N. C. 850, a decision of that question is avoided; and in *Harnett v. Maitland*, 16 M. & W. 256, 261, Parke, B., on *Gibson v. Wells*, *Herne v. Bembow*, and *Torriano v. Young* being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also dispensable for permissive waste. Text writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt upon a principle that had previously been set at rest. 2 Saund. 252 b, note *i*; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495, and note *e*; 2 Bouvier's Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124, and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions, 385; Ferrard on Fixtures, 278, 281, note; 1 Evans' Statutes, 193, note; Brown on Parties, 257; 4 Kent, 76, 79; Elmes on Dilapidations, 257.

Independent of authority, the true construction of the statute of Gloucester, leads to the conclusion that tenant for life or years, was made liable for permissive as well as voluntary waste. Before either this act or the statute of Marlbridge was passed, waste was recognized in the law, as an injury to the inheritance, resulting either from acts of commission or of omission. Neither of these statutes created new kinds of waste, but gave a new remedy for old wastes, leaving what was waste, and what not, to be determined by the common law. 2 Inst. 300; and by the statute of Gloucester the writ

of waste was suable out of Chancery as well against lessee for life or years, as against tenant by the curtesy, or in dower, putting the former, as to the newly created remedy, on the same footing as the latter. "It hath been used as an ancient maxim in the law, that tenant by the curtesy, and the tenant in dower, should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done, and when an action of waste was given after, against a tenant for term of life, then he was taken to be in the same case, as to the point of waste, as tenant by the curtesy and tenant in dower was, that is to say, that he should do no waste, nor suffer none to be done." Doct. & Stu., ch. 4, p. 113. No distinction can be made between lessee for life and lessee for years. Both are mentioned in the statute conjointly; and each derives his interest in the premises from the act of the owner of the inheritance.

The second section of the act for the prevention of waste, which is in force in this state (Nix. Dig., 4th ed., 1022), provides that no tenant for life or years, or for any other term, shall during the term make or suffer any waste, sale or destruction of houses, gardens, orchards, lands, or woods, or anything belonging to the tenements demised, without special license in writing, making mention that he may do it. The third section is in substance the same as the statute of Gloucester. The act was passed in 1795. The use of the words "make or suffer," in the second section, which are equivalent to Coke's interpretation of *facient* in the statute of Marlbridge, manifests an intent to adopt as the law of this state, the doctrine of the English courts, as to the liability of tenants for life or years for permissive waste, which was universally received at the time of the passage of the act.

The second reason assigned involves the effect of the lease in this action.

Premising that the act or omission, to constitute waste, must be either an invasion of the lord's property, or at least be some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity; (Burton's Comp. R., Prop. 411; *Doe ex dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 Saund. 259a, note o.; *Pyncheon v. Stearns*, 11 Met. 304; 1 Washburn, R. Prop. 108); and that the action is founded partly upon the common law and partly upon the statute, and does not depend for its support on any covenants of the tenant, 22 Viner Abr. 457, Waste M. 4; 3 Bl. Com. 227; *Kinlyside v. Thornton*, 2 W. Black. 1111; *Market v. Kenrick*, 13 C. B. 188, it is obvious that we must resort to the statute for the conditions on which the tenant is excusable for the waste done.

There is a class of cases in which tenants have been held not to be liable for waste resulting from non-repair where the lessor has entered into a covenant to make the repairs for the want of which the injury has happened. These cases go upon the ground that the injury was caused by the lessor's own default, on which he can base no right to recover. There is no such covenant in the lease now under consideration.

The statute forbids waste by the tenant "without special license, in writing, making mention that he may do it." The consent of the landlord by parol will not be sufficient authority. *McGregor v. Brown*, 6 Seld. 114. The words usually employed for this purpose are "without impeachment of waste," but any words of equivalent import will be sufficient, provided they amount to a license to do the acts. The defendant, to bring himself within the statute, relies on that part of the lease which relates to the re-delivery of the personal property leased, in connection with the stipulation giving the defendant the privilege of expending a portion of the rent in each year for repairs. The covenant as to the personal property is entirely distinct from the obligations of the tenant, with respect to the real estate. The privilege of expending a portion of the rent reserved in repairs is not a license to the tenant to omit a duty put upon him by the statute, growing out of the relations between the parties. To construe a privilege given by the landlord to expend his money in the reparation of the demised premises, as a license to the tenant to omit his duty, to the spoil or destruction of the inheritance, would be an entire subversion of the obvious intent of the landlord. If it falls short of a license for the act complained of, it does qualify or abridge the obligation of the tenant which exists independent of the provisions of the lease.

It was further insisted that if any action lies, it should be an action *ex contractu*, and not in *tort*. As already observed, the gravamen of the action is the breach of a statutory duty. An action on the case founded in tort will lie for the breach of a duty though it be such as that the law will imply a promise on which an action *ex contractu* may be maintained. *Brunell v. Lynch*, 5 B. & C. 589. To the same effect are the cases of *Kinlyside v. Thornton* and *Marker v. Kenrick*, already cited, in which it was held that an action on the case in the nature of waste will lie, although the act complained of might also be the subject of an action for the breach of an express covenant.

Rule discharged.

CANNON v. BARRY.

59 MISSISSIPPI, 289. — 1881.

CHALMERS, C. J., delivered the opinion of the court. — The complainants (appellants) are the children of R. L. Cannon, and claim, under the deed executed by their grandfather, Rusha Cannon, to be the remaindermen of the property therein conveyed for life to their said father. They bring this bill against the defendant, Barry, who has become the purchaser at bankrupt sale of the life estate of the father, alleging that he has committed, and is committing, waste upon the inheritance, for which they seek an account for the past and an injunction for the future. * * *

R. L. Cannon, being still alive, the interest of the complainants remains contingent, dependent upon the double contingency of their surviving him, and of their attaining majority or marrying. Hence, the bill cannot be maintained so far as it seeks an account of past waste, since their interest not being vested, and it being doubtful whether it will ever become so, they would have no right to any recovery that might be obtained. Whether they are entitled to any other relief depends upon the character of the acts done or permitted by the life tenant in possession. The *locus in quo* consists of twelve hundred acres of land, of which about three hundred acres only are arable, the balance being swampy in character and heavily timbered. When the defendant took possession, the arable portion was in such condition that it was wholly unproductive for the first year thereafter. By rebuilding the fences, clearing thirty or forty acres additional, removing some of the tenant's cabins to other locations, and building several new ones, he has brought up the rental value of the place to something less than three hundred dollars per annum, exclusive of the amounts expended each year in making these improvements. In accomplishing these results, he has freely cut and used the growing timber on the place, of which there is a superabundance for this and all other purposes. In so doing, as well as in removing the cabins, and perhaps in other respects, he has unquestionably been guilty of that which would be deemed waste under the English authorities, but which we cannot pronounce to be such under the state of things existing with us, and under the circumstances of this case. The condition of this country and that of England are wholly dissimilar, and that which would be a safe test there is altogether inapplicable here. With us, speaking generally, it may be said that nothing will ordinarily be held to constitute waste which is dictated by good husbandry, and promotes

rather than diminishes the permanent value of the property as an estate of inheritance. That such has been the nature and effect in the main, of the acts of the defendant, is incontestably established by the testimony in the case.

He has been guilty of permissive waste in suffering the mansion to go to decay, and also perhaps with respect to the orchard, but courts of equity take no jurisdiction of permissive waste by a life tenant. Their constant interference in such matters would render the enjoyment of the life estate impossible. But the defendant has also been guilty of three acts of unmistakable voluntary waste. He detached from the gin-house and sold the running gear machinery thereto belonging; nor does it change the character of the act that it was done at the instance of the father of the complainants, who received a portion of the price obtained. The father had no longer any interest in the property, and was not the legal guardian of his children. He has suffered the gin-house to be partially dismantled, and though it was done without his knowledge, he is nevertheless responsible for it.

More serious than these was his act in voluntarily permitting a large body of the woodland to become forfeited to the state for unpaid taxes. That the land forfeited was unproductive, that there remained belonging to the estate sufficient wood to supply its wants indefinitely, that the land had been overvalued by the assessor, and that the defendant had tried in vain to have valuation reduced, and that the board of supervisors in making the levy of county taxes had exceeded the limit of their authority, afford no excuse for his action. He took the estate as a whole, and was bound to so preserve it. He cannot segregate the profitable from the unprofitable, nor the sterile from the fertile, by preserving the one at the sacrifice of the other. The taxes were his individual debt, and the fact that they constituted a lien on both his own interests and that of the remaindermen made it his duty to keep them down. While a sale for taxes levied in excess of authority would by law then in force have conveyed no title to the purchaser, see *Gamble v. Witty*, 55 Miss. 26, it would have cast a cloud upon the title and by enabling the purchaser to add onerous damages to the amount paid, as a lien on the land, see *Cogburn v. Hunt*, 56 Miss. 718; s. c., 57 Miss. 681, it would have added to the burden cast upon the tenants in remainder.

These acts of voluntary waste call for relief. The defendant should be required, within such time as the chancellor may deem reasonable, to redeem or repurchase the forfeited lands, and upon his failure so to do a commissioner should be appointed to sequester

the rents, or so much of them as may be necessary for this purpose. For the purpose of redeeming the lands and of hereafter keeping down the taxes, the defendant will be permitted to fell timber in such quantities and at such places as do not seriously impair the value of the inheritance. As tenant for life he has the right to do this, even for purposes of profit. *Sargeant v. Towne*, 10 Mass. 303; *Conner v. Shepherd*, 15 Mass. 164. If it be true that the State has no title to the forfeited lands, by reason of an invalid sale or levy of taxes, an easy remedy for the defendant is found in § 569 of the Code of 1880, which provides a method of striking from the auditor's books lands improperly claimed by the state. Lastly, the defendant should be enjoined from any further acts of voluntary waste to the detriment of the inheritance. When the case is returned to the lower court, the bill should be amended by making the trustees, or the survivor of them, parties. They are clothed with the legal title to the estate, and while the contingent remaindermen need not wait on them for an assertion of their rights, the holders of the legal title should, where it is possible, be before the court. *Kerr on Injunctions*, 256, 267. So, also, should J. N. Cannon and his children, if he has any, be made parties. They stand in the same attitude as the complainants, and equally with them are contingent remaindermen. It is only where the first tenant in tail *in esse* has a vested estate of inheritance that he is held to so far represent all subsequent tenants in tail as to dispense with the necessity of joining them. The doctrine does not apply to a contingent remainderman with no vested interest. *Story's Eq. Pl.*, §§ 145-147.

• Reversed and remanded.

UNITED STATES *v.* BOSTWICK.

94 UNITED STATES, 53. — 1876.

SUIT by Bostwick, as trustee for Lovett, to recover the rent of, and for damages to, certain real estate in the District of Columbia. The United States appeals from a decision in favor of plaintiff.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court:
 * * * The contract is one by which Mr. Lovett agreed to let and the United States to hire, the premises described for the term of one year, with the privilege of three, at a rent of \$500 a month, and without restriction as to the use to which the property might be put. The United States agree to nothing in express terms except to pay rent and hold for one year.

But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance; but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." Com. Land & Ten. 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford v. Dunnett*, 7 M. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. *Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 Marsh. 569.

There are in this contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to use the property for any and all purposes, but were bound to so conduct themselves in such use as not to cause unnecessary injury. Whatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant, while using the property, will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim *sic utere tuo ut alienum non lēdas*. If he fails in this, he violates his contract, and must respond accordingly.

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon.

Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record. * * *

As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more.

It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account. * * *

It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away, and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action. The amount of this damage has not been found. * * *

Judgment reversed.

LOTHROP v. THAYER.

138 MASSACHUSETTS, 466. — 1885.

CONTRACT, with a count in tort, to recover for the loss by fire of a building and certain personal property therein.

Plaintiff let to defendants the building in question, excepting certain rooms in the second story which plaintiff continued to occupy. During the term the building was destroyed by fire. The jury found that the property of plaintiff was burned by the carelessness and negligence of defendants, but not intentionally. Judgment for plaintiff, defendant appeals.

FIELD, J.: The property destroyed or damaged by fire was, first, the portion of the buildings let by the plaintiff to the defendants, or to one of them; second, the remaining portion of the building belonging to the plaintiff and in his possession; and, third, personal chattels of the plaintiff in part in the portion of the building let, and in part in the remaining portion. * * *

The defendants requested an instruction that they were not liable for mere negligence, which was refused; and the court instructed the jury that, "if the fire was caused by their negligence," they would be liable, which means liable for the whole loss. * * *

[*Here follows a discussion of the law as to the spreading of fires to neighboring property.*]

It must, however, we think, be regarded as too well established

to be overturned by judicial decision that the occupant of a building is responsible to the owners of adjoining property for the want of ordinary care on the part of himself or his servants, acting within the scope of their employment, in kindling or guarding the fires used for heating the building.

The distinction between the liability of a tenant at will to his landlord, and of an occupant to his adjoining proprietors for damage by fire, is sharply drawn in *Panton v. Isham*, 3 Lev. 359. On special verdict, it was found that the plaintiff was seized of six stables, and demised one to the defendant, for a week, for eight shillings, and so from week to week at eight shillings per week, as long as both parties should please, and demised the other five stables to other persons for divers terms yet to come, whereby they were possessed, and the fire by the defendant's negligence six weeks afterwards began in the stable demised to the defendant, and burnt the same and all the other stables; and it was held "that for the stable demised to the defendant himself no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 13, *The Countess of Salop's Case*. But thirdly, as to the stables demised to the others, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and defendant, but as to them they are as nothing."

At common law a tenant for life, or for years, or at will, was not liable for waste, but tenants for life or years were made liable by the statute of Marlebridge, 52 Hen. III., c. 23, and by the statute of Gloucester, 6 Edw. I, c. 5, 2 Inst. 144, 299 Co. Lit. 53a, 53b. *Sackett v. Sackett*, 8 Pick. 309. A tenant at will was not within these statutes, and it was held that, although a tenant at will might be liable to his landlord in an action of trespass for voluntary waste, no action would lie for permissive waste. Co. Lit. 57a, note. *Daniels v. Pond*, 21 Pick. 367. Our statutes give an action of waste, or of tort in the nature of waste, against a tenant in dower, by the curtesy, or for life or years, but not against a tenant at will. Pub. Sts., c. 179, §§ 1, 3.

It was early decided that if a tenant at will negligently kept or guarded his fire, whereby the house was burned, this was permissive waste, for which he was not liable to his landlord. The *Countess of Shrewsbury's Case*, 5 Rep. 13b, was this. The Countess of Shrewsbury brought an action in the case against Richard Crampton, a lawyer of the Temple, and declared that she leased to him a house at will, and "*quod ille tam negligenter et improvide custodivit ignem*

suum, quod domus illa combusta fuit," etc.; "and it was adjudged that for this permissive waste no action lay." *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784, was an action on the case, and the declaration was that the defendant, being in possession of a house, stable, and three barns, as tenant at will, "*tam negligenter et im-provide* kept his fire in the said house; that through default of good keeping thereof the said house, stable, and barns were burnt down," etc.; and it was held "that for the negligent burning, this nor any other action lies." See Y. B. 48 Edw. III. 25, pl. 8.

The reasoning of these old cases is undoubtedly technical, but they were decided with full knowledge that an action lay for an injury to a personal chattel, caused by the negligent keeping of the bailee. *Countess of Shrewsbury's Case*, *ubi supra*. It is admitted to be the law that a tenant at will is not liable for permissive waste. *Hartnett v. Maitland*, 16 M. & W. 257; *Moore v. Townshend*, 4 Vroom, 284; *Coale v. Hannibal & St. Joseph Railroad*, 60 Mo. 227.

But it is suggested that these defendants, under our statutes, were not tenants at will within the meaning of the rule; and it is denied that the careless and negligent acts of the defendants, whereby the building was burnt, constitute permissive waste. The defendant's estate, not being created by an instrument in writing, had, under the Gen. Sts., c. 89, § 2, the force and effect of an estate at will only; and it is therefore unnecessary to determine a question which has been somewhat disputed, whether tenants from year to year are liable for permissive waste. The burning of a building through the negligent keeping of a fire by a tenant is by modern text-writers regarded as permissive waste. 4 Kent. Com. 81, 1 Add. Cont. (8th ed.) 253; Add. Torts, 239; Smith's Ld. & Ten. (3d ed.) 287; Taylor's Ld. & Ten. § 349; Gibbons on Dilapidations (2d ed.) 108, 128; Comyn's Ld. & Ten. 171.

The diligence of the counsel for the plaintiff has not shown us any case in which it has been held that a tenant at will is liable to his landlord for injuries occasioned by his negligence in kindling or keeping fires in stoves, fireplaces, or chimneys intended to be used for heating the premises. Such a case is presented in *Scott v. Hale*, 16 Maine, 326, but the defendant had a verdict. The degree of care which the ruling at *nisi prius* required was that of "a discreet, prudent, and careful man in the possession of his own premises." Of this the court say: "We think this was a most liberal instruction in favor of the plaintiff. But we forbear now to go more minutely into the discussion of questions argued, not because they have not occupied our attention, for they have." The verdict was set aside on other grounds.

In the case cited of *Parrott v. Barney*, Deady, 405, S. C. on appeal, 1 Sawyer, 423; the tenancy was from year to year, and the damage was from explosive substances stored in the building. There is nothing in *United States v. Bostwick*, 94 U. S. 53, or in *Robinson v. Wheeler*, 25 N. Y. 252, that decides that a tenant at will is liable to his landlord for the burning of the building let, or caused by negligence in guarding a fire kindled for the purpose of heating the building.

The law of negligence has been largely developed in recent times, and it is argued that there is no sound reason why it should not be applied in the same manner to real property as to personal, and to tenancies at will as well as to tenancies for a term. It may well be doubted whether the existing condition of the law of negligence is altogether satisfactory, and whether it would be wise to establish an unlimited liability to his landlord, on the part of every tenant at will of real property, for every injury occasioned by any act of negligence of himself or his servants, in the use of the property. However this may be, we do not feel at liberty to overturn long-established rules of law governing real property.

We are not in this case required to consider the consequences of the negligent setting or guarding of fires, set for other purposes than such as are necessary to render the tenement fit for occupation, and in other places than those constructed or intended for the use of fires in heating the premises let. It is competent for landlords and tenants to make in writing any stipulations they see fit. When there is no writing, and the tenant takes the precarious estate of a tenancy at will, we think it has been generally understood that the tenant is not liable for the burning of the tenement let, occasioned by his negligence or that of his servants in the keeping of fires set for the purpose of heating the premises, and in the place designed for that purpose, so that they may be fit for occupation. The fact that no action can be found to have been maintained for this cause is strong evidence of this. The ancient law has been acquiesced in, and, consciously or unconsciously, the cost of insurance to the landlord, or the value of the risk, enters into the amount of the rent. We think on this part of the case the exceptions should be sustained.

If the law were to be established anew, it might, with much force, be contended that the test of the liability of the defendants in this case ought to be the same as to all of the property destroyed; but it would deserve consideration whether, in such a case as this, it would not be more reasonable to hold the defendants liable only for gross negligence amounting to reckless conduct.

The existing law has, however, introduced many distinctions. A bailee of chattels for hire is liable only for the want of ordinary care; but if the bailee promises to return the chattel absolutely, then he is liable, although the chattel is destroyed by inevitable accident. *Harvey v. Murray*, 136 Mass. 377.

The obligation of tenants under a written lease to their landlords, except so far as statutes have imposed arbitrary liabilities, are determined by the construction of the lease. But landlords are at common law exempt from many liabilities towards their tenants for the condition of the premises, which they are under towards strangers who are lawfully upon the premises while in their possession. *Bowe v. Hunking*, 135 Mass. 380; *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357.

Disregarding the use of fire in clearing land and for other agricultural purposes, and confining ourselves to the case at bar, which is the use of fire in stoves for the purpose of heating the building, it is manifest that, in many cases, prudence might require a reconstruction of the chimneys and the purchase of new stoves. In many cases it would be difficult to determine how far the bad condition of the premises contributed to the injury occasioned by the fire. We think the reasonable rule is that if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease, with proper covenants; and that a tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; but that he is liable for wilful burning, and also for such gross negligence as amounts to reckless conduct. By the terms of the report the verdict is to be set aside and a

New trial granted.¹

¹ But see *Robinson v. Wheeler*, 25 N. Y. 252 (1862), p. 259, where Wright, J., says: "The judge charged the jury that the plaintiff could recover for the wood-shed without showing that the defendant set fire to it on purpose, if it was burned through his negligence. The tenant was answerable for waste of the premises through his negligence; and although it was argued in the complaint that the defendant wrongfully set fire to and destroyed the wood-shed, and it turned out from the proof that he had negligently set fire to it, and it was burned up, the plaintiff could recover. That was this case. It was the same kind of waste, the complaint arguing that it was committed wrongfully, and the proof showing that it was done negligently." — Ed.

*c. Equitable waste.*VANE *v.* LORD BARNARD.

2 VERNON CHANCERY (ENG.), 738. — 1716.

THE defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and £10,000 portion, settled *inter alia* Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

The defendant, Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, etc., to the value of £3,000.

The court upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant, the Lord Barnard; and decreed the plaintiff his costs.

 STEVENS *v.* ROSE.

69 MICHIGAN, 259. — 1888.

LONG, J. — * * * It is claimed by the defendant that whether the defendant had a right or not to remove the building, as an ordinary tenant, during his tenancy, he had such right under his life lease; that the clause, "to have and to hold, to use and control as he thinks proper, during his natural life," removes all restrictions, so far as any of the acts indicated by the record are concerned; that the words, "to have and to hold," gave him certain legal rights in the land that were well known and well guarded, and by which he had his fire-wood, necessary timber for repairs, the full use of all the arable and pasture land, and his administrator was entitled to the usual growing crops if the tenant should die leaving any unharvested crops growing upon the place; that the mere tenant for life, under the words, "to have and to hold," having all these privileges, the addition of the words, "to use and control as he thinks proper," imply the widest authority, removing all limitations to the defendant's use of the leased premises, and have them, and everything

upon them, so far as the lease governing the case, in his possession, with all the rights and authority of the owner of the land; and if there be any limitation or restriction that even a court of equity would control, in a lease without impeachment for waste, such restrictions are removed by the language employed here, and that such language is at least of equal force and significance as the words, "without impeachment of waste."

On the other hand, it is contended by counsel for plaintiff that the practice of leasing without impeachment of waste has not obtained in the United States, and, that being the case, the words used must very clearly import that the tenancy is to be without impeachment of waste, before a court will so construe them.

The action of waste under the old English practice was a remedy given for injury to lands, houses, woods, etc., by a tenant thereof for life or years, to the injury or prejudice of the heir, or of him in the reversion or remainder. It was either voluntary or permissive — the one by actual design; the other arising from mere negligence and want of sufficient care. The action was partly founded upon the common law, and partly founded upon the statute of Gloucester, and was a mixed action; real so far as it recovered the realty injured; and personal so far as it covered the damages for the injury. Originally, and under the old practice, the action was brought for both of these specific purposes, and, if waste was proved on the trial, the plaintiff recovered, not only the premises injured but also the damages he had sustained by reason of the injury.

The action for this double purpose, having fallen into disuse, was finally abolished in England by the statute of 3 and 4 William IV., c. 27. In this country, although adopted in some of the States, it has been but little used; having been, in practice, virtually superseded by the action on the case in the nature of waste for the recovery of damages merely, or by bill in equity. In our own State this action on the case is authorized by chapter 271, How. Stat., above cited. These provisions of our statute on this subject are in accordance with the legal practice which has been adopted, and long since fully established, in England and in this country.

Tenants for life, not made unimpeachable for waste by the person granting the estate, are liable for both commissive and permissive waste. The real intention, however, of the clause, "without impeachment for waste," is to enable the tenant to do many things, such as cutting wood, opening new mines, etc., which would otherwise at the common law amount to waste; but these words do not operate as a license to the tenant to destroy the estate, or to commit malicious waste, such as cutting down fruit-bearing trees, or trees

which serve for shade or ornament. If he is tenant "without impeachment for waste," he has the same right to cut timber, work mines, etc., for his own use, as the owner of the inheritance; but those words do not justify him in demolishing the buildings, or doing that which operates as destructive or malicious waste. *Wood, Landl. and Ten.* p. 711, § 426; *Leeds v. Anherst*, 14 Sim. 357; *Aston v. Aston*, 1 Ves. Sr. 265; *Vane v. Lord Barnard*, 2 Vern. 738. The words are not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts, consistent with the preservation of the estate, which otherwise might in law be waste.

If, then, these words in the lease, "to have and to hold, to use and control as he thinks proper, for his benefit during his natural life," be construed as leasing without impeachment of waste, as defendant's counsel claim they must be, the defendant would have no right to tear down and carry away the buildings erected on the premises, under the circumstances of this case. [The life tenant, even under a lease without impeachment for waste, owes a duty to the reversioner or remainderman to preserve in a reasonable manner the buildings, and all fruit and ornamental trees, on the estate; and he has no right to commit any malicious waste, or to destroy such buildings or trees.] While there is no doubt he has a right to cut and take timber for his own use, the same as the owner of the inheritance, yet in this case it was contended by plaintiff, and evidence was offered tending to prove the fact, that these fourteen oak trees were left for ornament and shade; and the jury found, under questions put by defendant's counsel, that they were fit for other purposes than fire wood, and were not necessary to the defendant for such purpose, and thus, in effect, found that they were saved and kept for the purposes of ornament and shade. There was an abundance of timber only two miles distant from the dwelling of defendant, which was conveyed to him under the same lease, and from this he had a right to cut his fire-wood, and he had a right, also, to cut such other timber as he pleased, if the lease is one without impeachment of waste. These words were inserted in the lease for the purpose, clearly, of giving the tenant some greater rights than an ordinary life tenant. They are words seldom employed in leases, and they must be construed most strongly against the grantor.

In *Goodright v. Barron*, 11 East, 220, a will was executed with this clause:

"Also, I give and bequeath to my wife, Elizabeth, whom I likewise make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed."

In an action of ejectment, Lord Ellenborough, giving the opinion of the court, and speaking of this clause in the will, says:

"But these words may have been meant to make her dispunishable of waste, for which, as tenant for life only, she would have been liable. . . . If the words 'during her life' had been added, that would have made the intent clear in one way."

In *Webster v. Webster*, 33 N. H. 21, the court say:

"It would seem that no particular form of words is necessary to make an estate for life without impeachment for waste."

We think the words employed in this lease clearly import a leasing without impeachment for waste, and that the defendant has a right to do all those acts which such a tenant may exercise. We, however, find no error in the record, under the circumstances of this case, in view of the character of the building removed, and the trees cut and carried away.

The judgment must be affirmed with costs.¹

2. IN WHAT WASTE CONSISTS.

a. In respect of houses and other structures.

CANNON *v.* BARRY.

59 MISSISSIPPI, 289. — 1881

[*Reported herein at p. 433.*]²

b. As to wood-lands.

JOHNSON *v.* JOHNSON.

18 NEW HAMPSHIRE, 594. — 1847.

CASE in the nature of an action of waste. Verdict for plaintiff, subject to opinion of this court.

GILCHRIST, J. — The words of the devise are: "I give and devise to my wife, during her natural life, the use and income of all my real

¹ This was an action on the case for waste brought under chap. 271 How, Stat., but as will be seen equitable principles are discussed and enforced. For "equitable waste" against owner in fee, see *Turner v. Wright*, *supra*, p. 391. — Ed.

² See also the other cases under permissive waste. — Ed.

estate," and "I give and devise to my brother, Moses Johnson, one-eighth part of all my estate not herein disposed of, which may be left after the decease of my wife," etc.

The defendant is, therefore, tenant for life, and the plaintiff has the remainder, and is entitled to sue for waste committed upon the estate.

The tenant for life, committing waste, is liable in this form of action to the remainderman, unless she is, by the terms by which her estate has been created, exempted from those restraints which, since very early times, have qualified that interest. In other words, unless she has an estate for life, without impeachment of waste, she is liable. 2 Blackst. Com. 283; *Sackett v. Sackett*, 8 Pick. 314; *Chase v. Haselton*, 7 N. H. Rep. 171.

It is impossible to perceive, in the words by which this life estate has been created, any evidence of the testator's intention to dispense with the ordinary restraints and qualifications which attend estates for life in general. Nor do the circumstances and the relation between the parties, adverted to in the argument, or the terms in which the remainder over is limited, raise the presumption that such an intention was in the mind of the testator, much less do they amount to an expression of such a purpose. The case is certainly not stronger than that of *Chase v. Haselton*, 7 N. H. Rep. 171, in which the grant was by way of a quit claim of all the grantor's right and interest in the land for the life of the grantee, which was held not to authorize waste, or to deprive the grantor of his right to recover for waste committed.

What amounts to waste is a question not always free from doubt and difficulty. The tenant for life may have reasonable estovers for house-bote, and may, from trees commonly used for fuel, take sufficient to supply the house upon the estate. Blackst. Com. *ubi supra*. But this right has not been construed to be a right to sell wood from the estate.

In *Paddleford v. Paddleford*, 7 Pick. 152, it was held that trees, which were of a quality that would have justified their use by the tenant for fuel, could not lawfully be sold or exchanged for fuel to be consumed upon the estate. And in this State in the case of *Fuller v. Wason*, 7 N. H. Rep. 341, it was decided that wood could not be sold by the tenant for life, although having the right to consume it even in a larger quantity than that which was sold. The act of selling was, in both the cases cited, distinguished from the exercise of the personal right of consuming, in a particular manner, that which belonged to the remainderman, and was attached to the estate, and was held to be waste.

The tenant, in the present case, sold a portion of the trees, to pay the expense of cutting and conveying to her door those which she had a right to take for fuel. This act plainly transcends the limit of her rights, as fixed by cases cited; for if she can sell for one purpose, she may do so for another.

The trees are parcel of the realty, and belong to the remainderman, subject only to the right of the tenant to use a portion of them for special purposes. The growth and the decay of the forest are of no concern to him. If a tempest uproots the trees, the remainderman is held to be entitled to carry them away, and in certain cases the court of chancery has directed decaying timber to be cut and sold for the benefit of the same party, saving always the rights of the life tenant, who is to be indemnified for the loss of his usufructuary interest in them. *Bewick v. Whitfield*, 3 P. W. 267; s. c., 2 do. 240.

There is no principle which would have justified the admission of evidence of what the testator said, to vary the meaning of the words of the will which he executed.

Judgment on the verdict.

WHITE v. CUTLER.

17 PICKERING (MASS.), 248. — 1835.

TRESPASS *quare clausum fregit* and for taking away a quantity of wood alleged to be the property of plaintiff.

SHAW, C. J., delivered the opinion of the Court. — The question in the present case, is whether a tenant in dower or her lessee has a right to cut wood upon the dower estate, for sale, to be removed and not used or consumed upon or in connection with the estate.

We think that a reference to a few principles, which have been adopted and acted upon in decided cases, in our own State, will lead to a satisfactory decision of this question.

It was in effect decided in *Sargeant v. Towne*, 10 Mass. R. 307, that a tenant for life has no right to cut growing trees, that such cutting would be waste, and that wild and uncultivated land cannot be deemed estate yielding annual rents or profits.

In the case of *Conner v. Shepherd*, 15 Mass. R. 164, it was decided, that in this commonwealth a widow is not entitled to dower in wild and uncultivated lands, held separately and distinct from houses, cultivated lands and other improved estate, first, because they yield no annual profit, and secondly, because the widow could not make

the only beneficial use of them, of which they are capable, without committing waste and forfeiting the estate. These reasons apply as well to the case of a wood-lot situated in the midst of a cultivated country, as to the forest lands in their original state. But the Chief Justice, in delivering the opinion of the Court in this case, takes care in terms to limit its operation to the case of woodlands not used or connected with a cultivated farm, or other improved estate.

In the case of *Webb v. Townsend*, 1 Pick. 21, the general rule, that a widow is not dowerable of wild lands, is confirmed, and it was placed more distinctly upon the ground, that as a widow is to be endowed, not according to the value of the land, but according to the value of the annual rents and profits, and as uncultivated lands yield no rents and profits, dower therein would be nugatory and of no value.

But in a subsequent case, *White v. Willis*, 7 Pick. 143, it was held that a lot of wild land, which had been used by the husband in connection with his house and cultivated land, to supply wood for buildings, fences and fuel, might be properly assigned to a widow as part of her dower, to enable her to take fuel and timber for repairs. It was also suggested, that a widow would have no right to take firebote, etc., from lands of her deceased husband, unless the lands from which it is taken, were included in those assigned as her dower.

A distinction was urged in the argument, between woodlands, kept by the owners to raise wood for sale, for purposes of profit, and wild lands, and that it would be hard to deprive a widow of her dower in such lands, of which the raising of wood for sale may be considered as the most profitable use. But we think the answer results from the legal principles on which the foregoing cases are settled. Such estate yields no annual profit. The owner may make a profit of the land, but it is the exercise of the rights of a tenant in fee, which a tenant for life by law does not enjoy, that of felling growing trees. The result, we think, is, that a widow is not to be endowed of a lot of growing wood and timber, although kept purposely to raise wood and timber as objects of profit, provided that it is not assigned to her as part of her dower, in connection with buildings or cultivated lands. But when woodland is so connected and used, it may be included in the assignment of dower, to be used and enjoyed by the widow, or those holding under her.

But the right of the widow thus acquired is that of reasonable estovers, under which may be included firebote or the necessary fuel for the supply of the dower estate. But this right of reasonable estovers is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used and con-

sumed upon the estate, or for purposes connected with its proper use, occupation and enjoyment. It has been recently decided, that cutting growing trees, to be exchanged for other wood to be used as fuel or timber on the estate, was not within the right of a tenant in dower, but in law was deemed waste. *Paddelford v. Paddelford*, 7 Pick. 152.

A fortiori, the cutting of wood for sale, the proceeds of which are not to be used or appropriated upon the estate or in connection with it, is not admissible under the limited right of taking reasonable estovers.

If the plaintiff, as lessee of the tenant in dower, had no right to cut the growing wood, the defendant, as having the next estate of inheritance, had a right to take the wood when severed. *Blakes v. Anscombe*, 4 Bos. and Pul. 25.

Plaintiff nonsuit.¹

McGREGOR v. BROWN.

10 NEW YORK, 114. — 1854.

DENIO, J. — I am of opinion that two errors were committed on the trial of this cause. First. The farm which the defendant held under a lease from the plaintiff contained about two hundred and thirty or two hundred and forty acres, seventy or eighty acres of which remained in forest and the remainder was cleared. The defendant was proved to have cut down about an acre of the timbered land; and he sold a part of the wood in market. He was permitted to prove, against an objection by the plaintiff, that he applied to the plaintiff for two or three acres of wood, saying that he had more hay to winter cattle than he had pasture to pasture them, and that he would seed down the land that he cleared; that the plaintiff said that the defendant was welcome to the wood if he would clear up and seed down the land on which it stood; and the jury were charged that if this was an agreement for the mutual benefit of the parties, and the wood was cut in pursuance of it, it was a defence to the action. The action was for waste, and the following statutory provision applies to the case: "If . . . any tenant . . . for term of life or years, . . . shall commit waste . . . of the houses, . . . lands or woods, . . . without a special and lawful license in writing so to do, they shall respectively be subject to an action of waste." 2 R. S. 334, § 1.² The object of

¹ Tenant by curtesy may take reasonable estovers only. Going beyond that is waste. *Armstrong v. Wilson*, 60 Ill., 226. — ED.

² See Code Civ. Proc. § 1657. — ED.

the qualification respecting the evidence of a license is the same with those provisions of the statute of frauds requiring certain transactions to be put in writing, namely, to prevent agreements from being set up by false or mistaken oral testimony. I do not think the annexing a condition to the license (for this is what the evidence at most amounted to) renders the parol proof of it any more competent than it would otherwise have been. Nothing like an agreement was shown. The defendant did not agree to clear or seed down any of the woodland, but only that he would seed down what he should clear. It was a clear case of a license proved by parol against the express provision of the statute. * * *

The judgment of the court below should be reversed and a new trial granted.

Ordered accordingly.

c. Changes in manner of using land. Good husbandry.

THE ASSISTANT VICE-CHANCELLOR IN SARLES *v.* SARLES.

3 SANDFORD'S CHANCERY (N. Y.), 601. — 1846.

MY conclusion is that there is not enough proved against Samuel Sarles, to authorize a decree against him in respect of the hay and meadow grass. His most unjustifiable act, in my view, was the annual removal of the bog grass. For this, so far as it was an injury to the freehold, he is liable to account.

So in respect of the overtillage and bad management of the land. With the exception of the field back of the barn * * * I do not think the testimony clear to establish the alleged bad husbandry. * * * The injury to the fee growing out of that field, is waste, which will properly be included in the account to be taken.

GREEN, C. J., IN CLEMENCE *v.* STEERE.

1 RHODE ISLAND, 272. — 1850.

THE defendant is charged with having converted meadow land into pasture land. In England this would be waste. But we are not to apply the English law too strictly. Our lands are in many respects cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry. If in this case the change

injured the farm, or was such a change as no good farmer would make, it is waste. * * *

It is said that the pastures have been permitted to become overgrown with brush. In England that would be waste, but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it is waste.

PYNCHON *v.* STEARNS.

II METCALF (MASS.), 304. — 1846.

WILDE, J. — This is an action of waste, and the case comes before us on exceptions to the instruction to the jury at the trial. The premises described in the writ were formerly the property of Edward Pynchon, and were devised by him to Susan Pynchon, his wife, so long as she should remain his widow, remainder to the plaintiff. The defendant holds under an assignment from the said Susan.

It was proved at the trial, that the plaintiff had taken of the defendant a lease of part of the premises during the life of the said Susan; and it was ruled by the court that, as to that part of the premises, the action could not be maintained. That this ruling was correct, cannot, we think, admit of a doubt. By this lease to the plaintiff, he became the owner of the whole estate. The estate for years immediately merged in the remainder in fee; and the plaintiff entered, as it is understood, before the alleged waste. If, however, the lease had been given after the waste, no action of waste could be maintained after the merger of the estate, and after the entry of the plaintiff under the lease from the defendant.

If it be said that the reservation in the lease to the plaintiff prevented the merger, the answer is, that the reservation did not, and could not, by the well established rules of construction, limit or divest the estate expressly demised to the plaintiff. The defendant only reserved the right to erect buildings on the premises; but no estate for life or for a term of years is reserved; and if it had been reserved, it would have been repugnant to the terms of the lease limiting and demising the estate for life to the plaintiff.

As to the stipulation for the payment of rent, we consider that as a personal covenant of the plaintiff. No right of entry is reserved for the nonpayment of rent; and that covenant can no more prevent a merger than it can prevent the vesting of the estate demised.

As to the alleged acts of waste on the other part of the premises, the plaintiff relied upon sundry facts which are not disputed; namely, that the defendant had opened a way through the premises from one public highway to another; and that the defendant had subverted the soil, by digging out part of the soil for cellars of houses by him erected; and that he had ploughed the lands, dug drains, and had drawn in large quantities of earth, thereby raising the land and changing the surface thereof. The defendant introduced evidence to show that these acts of the defendant were beneficial and not prejudicial to the plaintiff, and did not constitute waste. On this evidence the jury were instructed that the opening of the way was not waste; and that if breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing the surface by breaking up and cultivating it, was not waste; and that the removing the soil for the building of houses, and the erecting them, and digging drains, if the estate on the whole would be equally or more valuable to the owner of the inheritance, would not be waste.

The general rule of law in respect to waste is, that the act must be prejudicial to the inheritance. It is defined by Blackstone, 3 Bl. Com. 223, to be "a spoil and destruction of the estate, either in houses, woods, or lands." It is true, however, that it has been held in England, that to change the nature of the property by the tenant, although the alteration may be for the greater profit of the lessor, was waste. So in England, if the tenant converts arable land into wood, or *e converso*, or meadow into plough or pasture land, it is waste. Bac. Ab. Waste, c. 1. The reasons given are, that it changes the course of husbandry, and the evidence of the estate. But these reasons are not applicable in this commonwealth, and consequently such changes here do not constitute waste, unless such changes are prejudicial to the inheritance. So the doctrine is laid down by Mr. Dane, and it is, we think, supported on satisfactory reasons. 3 Dane Ab. 219. When our ancestors emigrated to this country, they brought with them, and were afterwards governed by, the common law of England; excepting, however, such parts as were inapplicable to their new condition. 2 Mass. 534; 8 Pick. 316. That the principle of the common law under consideration was then inapplicable to the condition of the country is obvious; nor has it been applicable at any time since; for it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required. A conformity, therefore, to this usage, cannot be deemed

waste. Even in England, "if a meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the ploughing of it is not waste." Bac. Ab. Waste, C. 1; Com. Dig. Waste, D. 4. As to the effect of such changes upon the evidence of title to lands, it is evident that it can have none in this State. Our conveyances are very simple. The land conveyed is described by metes and bounds, or by some general and certain description of its limits, without any designation of the kind of land conveyed, whether it be arable land or grass land, wood land or cleared land, pasture or meadow.

As to the other acts complained of, we think they cannot be deemed waste, unless they may be prejudicial to the plaintiff; and that the instructions to the jury, in this respect, were, therefore, correct. To erect a new house on the land where there was not any before, is not waste. Bac. Ab. Waste, C. 5. So there seems no authority for holding that the opening of a way by the defendant, for his convenience, and draining the land are acts of waste. And as to raising the land, by carrying thereon quantities of earth, whatever may be law of England, it is not in this commonwealth waste, unless it may be prejudicial to the plaintiff.

The ancient doctrine of waste, if universally adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided. *Winship v. Pitts*, 3 Paige, 259, and other cases cited by the defendant's counsel.

In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.

For these reasons, we are of opinion that the instructions to the jury were correct.

Judgment on the verdict.

d. Opening and working mines.

WOODWORTH, J., IN *COATES v. CHEEVER*.

1 COWEN (N. Y.), 460.—1823.

THE premises in question contain a valuable ore bed, which was partially opened by the husband of the appellant, during his lifetime. Since his death, the owner has extended this opening at great

expense and with very great success. In setting off dower, the admeasurers disregarded the increased value of the land arising from the circumstance of its containing this ore bed. They estimated the value, considered merely with a view to its agricultural improvement, and assigned by metes and bounds sufficient to cover one-sixth of that estimate, carefully avoiding any interference with the ore. { There is no doubt that as to mines in general, including beds of iron ore, if they are unopened at the time of the owner's death, his widow must take her dower in other land merely. The newly opening a mine is waste, and the widow, having only an estate for life, can legally do no act which injures the inheritance. } All the cases agree in this. But { it is equally clear, that if, during the husband's lifetime, mines are opened, dower in them is properly assignable. } In this case, the admeasurement must accordingly be set aside. The admeasurers must assign to the appellant her dower in all mines which were opened during her husband's life; but she cannot profit by any extension of that opening. { The admeasurers should take into consideration the value of the mine as far as it was opened during the husband's life, and then assign the dower, either by measuring off one-third in value or specifically assigning a reasonable share of the profits at short periods. } The case of *Stoughton v. Leigh*, 1 Taunt. 402, contains the rules by which, I think, the admeasurers ought to be guided.

IN RE SEAGER ESTATE.

92 MICHIGAN, 186. — 1892.

PETITION to determine right of Gertrude McCabe in certain royalties.

MCGRATH, J. — * * * Our statute, How. Stat., § 5733, gives to the widow of every deceased person the use during her natural life of one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. Other sections of the statute provide that, in case of mortgaged lands, the widow shall be entitled to the interest or income of one-third of the surplus; that the widow shall be entitled to dower in aliened lands; that when the estate consists of a mill or other tenement which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided by metes and bounds, dower may be assigned of the rents, issues, and profits thereof to be had and received by the widow as a tenant in

common with the other owners of the estate. These are the only prominent provisions made by the statute for the widow in case decedent shall leave issue.

The naked question raised is whether, under these statutory provisions, a widow is excluded from all interest in the minerals in lands which, at the time of the death of her husband, were unimproved and unproductive, although such lands may be rich in minerals, and were owned, held, and known as mining lands, and were chiefly and solely valuable for the minerals contained in them.]

From my examination I have been unable to discover that this precise question has ever been passed upon by any court in this country. Text-writers generally, and, in some of the following cases none of which involve the question of an unopened deposit, the courts lay down the rule that a widow is dowable of mines which had been opened at the death of the husband, but that she may not open new mines, even upon the land set apart to her as dower; in other words, that a widow is not dowable of mineral deposits where there is no opened mine. Washb. Real Prop. 166; 4 Kent, Com. 41; 1 Bish. Mar. Wom. § 264; 1 Scrib. Dower (2d ed.) 200-206; *Freer v. Stotenbur*, 36 Barb. 641; *Hendrix v. McBeth*, 61 Ind. 473; *Lenfers v. Henke*, 73 Ill. 405; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Coates v. Cheever*, 1 Cow. 460; *Reed v. Reed*, 16 N. J. Eq. 248; *Moore v. Rollins*, 45 Me. 493; *Billings v. Taylor*, 10 Pick. 460; *Neel v. Neel*, 19 Penn. St. 323; *Irwin v. Covode*, 24 Id. 162; *Sayers v. Hoskinson*, 110 Id. 473 (1 Atl. Rep. 308); *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. (Va.) 258; *Clift v. Clift*, 87 Tenn. 17 (9 S. W. Rep. 198).

Sayers v. Hoskinson holds that it is the right of a life tenant to work an opened mine to exhaustion. *Moore v. Rollins* is to the same effect. * * *

In *Irwin v. Covode*, it was held that a court might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, but not such mining as is subject to no other objection than its liability to exhaust the mine. The court say :

"It is said that on the western slope of the Alleghanies the seams of bituminous coal are so few and thin that tenants for life, if permitted to introduce modern facilities for mining, would exhaust lands so held, and leave them ruined on the hands of those in succession. Should this happen, it would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature, it is no valid objection that the use is consumption." * * *

In *Neel v. Neel* the wife had a life estate under a will, and the only

question was whether a tenant for life of land having coal mines opened upon it may mine the coal, not only for his own use, but for sale. The court say:

"It seems in this case that the author of the gift had sometimes sold coal out of these pits, but I do not conceive this to be material. It is sufficient that he opened them; and derived any profit from them, even if it were only *firebote*. The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such by a devise of a life estate. If he meant otherwise, he should have said so; not having said so, this is the legal inference of his intention. . . . The most obvious inference would seem to be that, when a man devises land with an open mine upon it to a person for life, he intended the devisee to derive profit from the mine as well as from the surface of the land. He may not have supposed that the devisee would exhaust the mine, and this might seem unreasonable; but, when the donor did not see proper to restrain the gift, how shall it be done? Surely courts have no such control over the arrangements which people choose to make of their affairs. Usually an enterprising tenant for life may be of advantage to the remainderman, but, in the case of mines, it may be the reverse. And I cannot see how the enterprise of the citizen is to be restrained by judicial process. If we could get ourselves freer from the notions derived from feudal subordination, we would perhaps think that the privileges of tenants for life should be enlarged, rather than restrained, and that the cultivation of the country would be thereby improved."

In *Billings v. Taylor* the husband died seized of a tract of land of four acres in extent, consisting of a slate quarry mostly below the surface of the ground. One-quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the surface, and go down to a certain depth, and then begin on the surface again. The court say:

"It would be too narrow a construction to say that no part of this quarry was opened except that portion which had actually been dug, but it must be considered that the whole, lying together as one tract, belonging to one estate, and wrought in the manner described, was opened, and that the widow was entitled to dower in that as well as the other estate of her husband."

In *Crouch v. Puryear* it was held that it was not waste in a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal.

In *Gaines v. Mining Co.*, held, that a life tenant has a right to use a mine for his own profit, when the owner of the fee in his lifetime

had opened it, even though he may have discontinued work upon it for a long period of years.

In *Reed v. Reed*, held, that the operating of an opened mine was a mode of enjoyment of the land to which a tenant for life was entitled.

In *Findlay v. Smith*, held, that a devisee for life was entitled to the unlimited use of the salt mineral, and of the wood upon the premises for fuel, used in the production of salt from the brine.

It has been held that, if the mode of using the land consisted in cutting the growth upon it as the customary source of profit, the widow may continue to do so. Thus, to cut and sell staves and shingles or hoop-poles under the circumstances supposed would not be waste. *Ballentine v. Poyner*, 2 Hayw. (N. C.) 110; *Clemence v. Steere*, 1 R. I. 272.

The doctrine that a widow is not dowable of mining lands, unless at the time of the death of her husband mines had been opened, is traceable to *Stoughton v. Leigh*, 1 Taunt. 402. There decedent left a large estate, upon which there was a lead and a coal mine, neither of which had been opened; two other lead and two coal mines, which he had leased to tenants, reserving certain rents, which were to be paid whether the tenants did or did not open the mines, one of each class of which mines had been opened at the time of his death; a lead and a coal mine, which he had leased, reserving royalties payable in ore and coal, and which coal mine had been opened at the time of his death, but the lead mine had not. Two other lead mines and two other coal mines had been opened. Deceased was also entitled to minerals lying under lands not his own, and had operated certain mines thereon, and others were unopened. The court held that the wife was dowable of all the opened mines, but was not dowable of the mines or strata which had not been opened, whether owned by lease or not. The decision may not be without reason, but certainly no reasons are given in the opinion. Clearly, as to those lands which had been leased, they had been by the decedent devoted to mining purposes, and the mode of enjoyment and source of profit, under all the authorities, had been fixed and determined by the decedent; and, as to the rents which were to be paid, whether the mines were opened or not, under all the authorities on the subject of dower, the widow was entitled to participate in them.

The rule laid down in that case undoubtedly had its origin in cases where the relation of landlord and tenant existed. A tenant who rents a farm cannot cut and sell the timber therefrom, convert the farm into a brick-yard, open a stone quarry or sand-pit, bore for oil,

or mine for ore thereon, unless authority so to do is expressly given or arises by implication from the situation; but one who rents a piece of ground upon which there is an open quarry or sand-pit or brick-yard, or open mine, may quarry, take out sand, make brick, or operate the mine, unless there is either an express reservation, or some condition or circumstances which would operate as an implied restriction. One who leases a copper mine may mine for copper, but, if he should strike a pocket of silver, the same rule would prohibit him from appropriating the silver. The *Salt-well Case*, where the vein of petroleum was tapped, is an illustration of the principle underlying this class of cases. *Kier v. Peterson*, 41 Penn. St. 361. The question in that class of cases is one of interpretation of the contract, — of what was the use granted, — and, as bearing upon that question, the condition of the premises, the use to which the premises had been devoted, and the source of profit are important considerations; but there is room for but one construction where there is but one mode of enjoyment, one source of revenue or profit, one use. Suppose that a lease were given by A of all his mining lands, or a devise were made for life of a gravel bank, although no mine or pit had been opened, and the lands were available for no other purpose, or were adapted to no other use, from which any considerable revenue could be derived, and suppose such grant were made to a wife or child, could it be contended for a moment that the ordinary methods of use or enjoyment of such lands were not to be adopted; that the usual mode of deriving revenue from such lands was not to be resorted to; that such land was not to be used according to its nature?" * * *

In *Gaines v. Mining Co.*, *supra*, the court say:

"In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction. The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored. When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose has some support in the adjudications in this country, and is certainly not without reason to uphold it."

In *Hickman v. Irvine*, 3 Dana, 121, the court say:

"We cannot concede that a widow is entitled to dower in the improved land only of her deceased husband. She is, by the general provision of the common and statute law, to be endowed of one equal third part of all the lands of which he was seized during the coverture; and, to whatever extent the doctrine of forfeiture for waste may apply to the case of a doweress who reduces forest lands to a state of cultivation, we cannot view this doctrine, and the possibility that its application may render a portion of the dower lands useless to the widow, as a limitation either upon the quantity or quality of the land to be assigned as a dower. When a case shall occur in which the lands assigned for dower cannot be made available for the reasonable support of the widow without converting a portion of the woodland to the purposes of cultivation, and in which, upon an attempt being made thus to render it available, the reversioner shall insist upon a forfeiture, it must be decided upon consideration of the object of the law in establishing the right of dower, upon a comparison of its regard for the present comfortable sustenance of the widow with its care for the preservation of the inheritance, and upon a view of the actual condition of the estate and of the surrounding country with regard to improvement and population, whether the change of timbered into arable land is in the particular case such an act of waste as would be just cause of forfeiture."

The strict rules of the common law of England respecting waste and the rights of tenants for life do not obtain here. With us the change in the mode of use is not waste. It is not use, but abuse, that is waste. Waste must be consumption, nor is consumption always waste. The owner of a life-estate has some rights in common with the owner of the fee. There is no substantial reason why, so far as the use of premises is concerned, there should not be a community of right between the owner of the life estate and the owner of the reversion.

Our statute respecting "dower" defines it as the use for life of one-third of all the lands of which the husband was seized during the marriage relation. "Dower" is defined by the English authorities as the provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children. Co. Litt. 30b; 2 Bl. Comm. 130. The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws

is to distribute them with each generation, where dower is one of the positive institutions of the State, founded in policy, and the provision for the widow is a part of the law of distribution, and the aim of the statute is not subsistence alone, but provision commensurate with the estate.

In the present case the grant is by operation of the statute giving the use of all the lands of which the husband was seized. The grant must be held to include the use of these lands, irrespective of whether mines were opened upon them before or after the husband's death. The question here is not the impairment of one mode of enjoyment or source of profit to reach another. There is but one mode of enjoyment of the land in question; but one source of revenue or profit. The land is susceptible of but one use.

The widow is therefore entitled to one-third of the amount in the hands of the petitioner, and the decree of the court below is affirmed.

3. AGAINST WHOM WASTE LIES AND IN WHOSE FAVOR.¹

BATES *v.* SHRAEDER.

13 JOHNSON (N. Y.), 260. — 1816.

ACTION of waste. The declaration stated, that Elizabeth Graham was seized in her demesne, as of fee, in certain premises, in the town of Fishkill, which are described by metes and bounds, and contained twenty-five acres; and being so seized, she married Duncan Graham, and, during the coverture, they had a son born, John Graham, by which marriage, and birth of son, Duncan Graham became entitled to the premises as tenant by the curtesy, the reversion being in the said Elizabeth and her heirs; that Elizabeth Graham died, whereby her son, John Graham, became entitled to the reversion of the premises, as heir to his mother; that John Graham died without issue, and without leaving any brother or sister, or any legal representative of such brother or sister, and that the plaintiff became entitled to the reversion as heir-at-law of John Graham, he, the plaintiff, being the oldest son of John Bates, deceased, who was the oldest brother of Elizabeth Graham, and the oldest uncle of John Graham; that Duncan Graham, during the continuance of his estate as tenant by the curtesy, in the year 1809, assigned his estate in the premises to the defendant, who, being in the possession thereof, did wrongfully and unjustly make waste, sale, and destruction, in the whole of said premises, by destroying and changing the nature of

¹ See also cases on pp. 391-400, *supra*.—ED.

the land, etc., by felling timber, etc., and felling divers trees, etc., to the disinherision of the plaintiff, and against the form of the statute in such case provided.

To this declaration there was a general demurrer, and joinder in demurrer.

YATES, J., delivered the opinion of the Court. — This is an action of waste, brought by the plaintiff against the assignee of the tenant by the curtesy. The declaration states that the plaintiff's right of inheritance to the *locus in quo* is derived from John Graham, as the person last seized. It also states the previous seisin of Elizabeth Graham, his mother, who died, leaving her husband tenant by the curtesy, from whom the defendant holds the premises by assignment; that John Graham derived his inheritance from the mother; and that both died without lawful issue. The waste is specially stated, and it then concludes that the plaintiff is injured, and has sustained damages to the value of two thousand dollars, and, therefore, he brings suit, etc.

To this declaration there is a general demurrer and joinder; and in support of the demurrer it is insisted that John Graham was not so seized as to form a new stock of descent, and that the plaintiff is not heir-at-law; and if he be such heir, that waste does not lie by him against the assignee of the tenant by the curtesy.

From the facts set forth in the declaration, it does not appear that this is a case not provided for in our statute to regulate descents; and the common law governs only in cases not provided for by that act. It is stated that the inheritance is claimed through John Graham, the son, who died in the lifetime of his father, the tenant by the curtesy. There can be no doubt that this tenancy suspended the descent, so that the inheritance could not be transmitted during the continuance of that estate, as no stock of descent, during its existence, could be formed by John Graham. And as it does not appear, by the declaration, when the mother died, nor whether she left any other brother or sister besides the plaintiff in this cause, a sufficient title to the inheritance is not shown to sustain the action.

But admitting that the plaintiff is entitled to the inheritance, it is clear that he cannot seek redress from the present defendant. 1 Inst. 54; 2 Inst. 301a.¹ At common law, the assignee of the tenant by the curtesy cannot be sued in waste. The action ought to have been brought against the tenant himself by the heir; and the books state that thereby he shall recover the lands against the assignee, for the privy which is between the heir and tenant by the curtesy. *Walker's*

¹But see Code Civ. Proc. § 1651 for present New York rule. — ED.

Case, 3 Co. 23. So, if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed, and the grantee cannot have any action of waste but only against the assignee; for between them is privity in estate; and between them and the tenant in dower, or the tenant by the curtesy, is no privity at all; so that, at law, if the assignee is suable in waste, there must be a privity of estate; unless, then, the action against the assignee is warranted by the statute, it is improperly brought in this instance.

The section in the act § 36, ch. 56, 1 R. S. 750, does not authorize this action, for, according to the decision in *Livingston v. Haywood*, it gives the reversioner or remainderman an action of waste or trespass for any injury done to the inheritance, notwithstanding an intervening estate for life or for years; it gives the action of waste where waste is the appropriate remedy, and trespass where trespass in the appropriate remedy, but does not alter the law as to the requisite privity of estate between the heir and the tenant by the curtesy, so that the principle continues the same as to the assignee, who, without such privity, is not liable in waste.

The sixth and seventh sections of the act for preventing waste, contain no authority for this action; the sixth gives the right of action to the heir at any time during or after his minority, and the seventh section declares tenants for life, or for another's life, or for term of years, or any other term, liable to waste after granting their estates, if they take the profits. Neither of those sections can be so construed as to alter the law on the subject, so as to give the heir an action of waste against the assignee of the tenant by the curtesy. It would seem that such an action can be brought in no case, except where the heir has granted over the reversion, because, as before stated, by the grant the privity of the action is destroyed, and the grantee cannot have any action of waste but only against the assignee, for as between them there is privity in estate, but no such privity, after the grant, exists between the assignee and the tenant by the curtesy. It is, therefore, evident, that the action of waste in this instance cannot be maintained by the heir against the assignee. The law is decidedly against it, and the principles in relation to tenants by the curtesy ought to be strictly applied, in an action like the present, because the judgment operates as a penalty, the recovery being not only for the place wasted, but treble damages. The defendant is, consequently, entitled to judgment.

Judgment for the defendant.

PHILLIPS *v.* COVERT.

7 JOHNSON (N. Y.), 1. — 1810.

PER CURIAM. — There is no doubt but that an action of trespass will lie against a tenant at will for voluntary waste, as in the cutting of timber; for the injury amounts to a determination of the will and of his possession. Co. Litt. 57a; 5 Co. 13a.; Cro. Eliz. 777, 784. The defendants in this case were nothing more than tenants at will, for the purpose of this action, even if they were entitled to be considered as holding from year to year, for the purpose of a notice to quit; and they would have no right to such notice, after they had determined the will. The nonsuit must be set aside, and a new trial awarded, with costs to abide the event of the suit.

Rule granted.

LEIGHTON *v.* LEIGHTON.

32 MAINE, 399. — 1851.

WELLS, J. — The plaintiff in his bill alleges, that the defendant, Leighton, has committed strip and waste upon his land, described in the bill, by cutting and hauling away the wood and timber growing on it; that he has commenced an action of trespass against the defendant, which is now pending, and that both of the defendants have expressed their determination and intention, and have made preparations to commit further strip and waste by putting on teams and taking off the wood and timber.

The defendants have demurred to the bill, and the question arises whether it can be maintained. The act done was a trespass, and those threatened to be done were of the same character.

{ This court has equity jurisdiction in those cases only in which it is conferred by statute, and it is expressly given in the case of waste, when there is not a plain and adequate remedy at law. Ch. 96, § 10. But the remedy given by an action of waste at the common law was confined to cases where there was a privity of estate. 2 Black. Com. 281. Our statute, chap. 129, § 1, gives the same action, to the person having the next immediate estate of inheritance, against tenants in dower, by the curtesy, tenant for life or years, in which he shall recover the place wasted, and the amount of damages done to the premises. The statute thus recognizes the privity of estate as the foundation of the action, and defines with accuracy its limits. The Legislature then gives the party injured a further remedy in equity.

Formerly, courts having general equity jurisdiction, confined the exercise of it in relation to waste, to such as was technically so called, but it was afterwards extended to trespasses where the mischief was irreparable, and operated as a permanent injury to the estate. } Story's Eq. Jur., § 928; *Thomas v. Oakley*, 18 Vesey, 184. In *Stevens v. Beekman*, 1 Johns. Ch. 317, it was doubted whether this extension of the ordinary jurisdiction of the court would be productive of public convenience, and in *Jerome v. Ross*, 7 Johns. Ch. 345, while the jurisdiction was admitted to exist in that court, exercising full chancery powers, it was stated that it ought to be restrained to those cases where the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. It is thus apparent, that courts of general chancery jurisdiction exercise it in relation to a certain class of trespasses, and the question arises whether it has been given to this court. The same question has arisen upon a similar statute in Massachusetts, *Attaquin v. Fish*, 5 Metc. 140, and the rule laid down there as having been acted upon, in the construction of statutes conferring chancery jurisdiction upon the court, is, never to take cognizance of any subjects which are not expressly brought within it by statute, and not to extend jurisdiction to such subjects by implication, and certainly not when the implication is doubtful. And it was decided that the equitable powers given concerning waste extended to cases of technical waste only, and not to those trespasses which courts that have full chancery powers restrain by injunction.

Acting upon this rule, to which no objection is apparent, we must confine the jurisdiction to cases of technical waste. We cannot find in the statute any clear and satisfactory intention to confer a more enlarged power. Because courts of equity in the plenitude of their power have gone beyond legal waste, a term well defined and understood in the law, and have granted relief and injunctions in cases of trespasses committed and threatened to be committed, this court having but a limited jurisdiction, cannot feel justified in pursuing the same course.

Nor does there appear to be any pressing necessity for such action. A party in possession of his property has the legal right to protect and defend it. If his timber is cut down, he may take or replevy it, or recover damages in an action of trespass. And by statute, chap. 169, he may have a criminal process against any one who has threatened to commit an offense against his person or property, and if there is just cause to apprehend and fear the commission of such offense, the person against whom the complaint is made may be put

under bonds, with sufficient sureties to keep the peace. And when a party is out of possession of real estate, and has commenced an action to recover it, and the person against whom the action is brought shall commit any act of waste, or shall threaten to do so, by the Act of July 10, 1846, chap. 188, the court in which such action is pending may issue an injunction to stay such waste.

The remedies afforded by the law to the plaintiff are so ample, that there is less regret of a want of jurisdiction by which his bill could be sustained. This cannot be viewed as a bill for discovery, for it is not averred that the facts rest within the knowledge of the defendant alone, and are incapable of other proof. *Woodman v. Freeman*, 25 Maine, 546.

Bill dismissed with costs.¹

SAWYER, J., IN PARROTT v. BARNEY.

2 ABBOTT (U. S.), 197. — 1870.

As to the waste upon the premises demised to the defendants, I think that, upon the facts found, the defendants are liable; although, as will hereafter appear, there was, in my judgment, no negligence on their part. There was, doubtless, fault on the part of those who delivered the explosive substance to defendants for carriage over their express route, without informing them of the dangerous character of the article, for which they may be liable to defendant. The rule seems to be established, that with respect to liability for waste, the tenant is in a position analogous to that of a common carrier, and without some special agreement to the contrary, responsible for all waste, however or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. 4 Kent, Com. 77; *Attersol v. Stevens*, 1 Taunt. 182; *Cook v. Champlain Transportation Co.*, 1 Denio, 91; 2 Eden, Inj., 198, and notes. In *White v. Wagner*, 4 Harr. & J., this doctrine was carried out in an extreme case. The tenant is held responsible to the landlord, and left to his remedy over against the delinquent party. The liability does not depend on mere negligence, but it is imposed on the same grounds of public policy as those upon which the strict liabilities of common carriers are made to rest.²

¹ See *Livingston v. Livingston*, 6 Johns. Ch., 497. — Ed.

² Defendants composed the firm of Wells, Fargo & Co. They received upon the premises leased by them of plaintiff a case of nitro-glycerine which exploded and caused the injury in question. Defendants did not know the contents of the package. — Ed.

4. THE VARIOUS REMEDIES FOR WASTE.

a. At common-law.

(1). WRIT OF PROHIBITION AND ATTACHMENT.

(2). WRIT OF WASTE.¹(3). TRESPASS ON THE CASE IN THE NATURE OF WASTE.²*b. Under modern statutes.³**c. In equity—injunction.⁴*

5. OWNERSHIP OF TIMBER, MINERALS, ETC., REMOVED BY TENANT.

MOOERS *v.* WAIT.

3 WENDELL (N. Y.), 104. — 1829.

TROVER for timber. Plaintiff demised certain premises to one J. S. Frazer, for four years, under an agreement for an ultimate sale to Frazer. During the term, J. S. Frazer sold a number of pine trees to J. F. Frazer, who paid for them, removed them and sold them to Griffin, one of the defendants herein. This action is brought to recover their value. The case comes up on a motion to set aside a nonsuit.

By the Court, SAVAGE, Ch. J. — It has been decided by this court, in the case of *Suffern v. Townsend*, 9 Johns. R. 35, that an agreement to sell land does not imply a license to enter and cut trees; and also that a license to enter, would not authorize the cutting timber; for that one license does not imply the other. In that case there was a parol contract of sale and purchase, under which the defendant entered and cut timber; but the contract was not consummated, and the plaintiff recovered in trespass for the timber cut

¹ These writs, (1) and (2), were granted originally against tenants in dower and by the curtesy and guardians in chancery only. Defendant could be made to pay the actual damage only. The statutes of Marlbridge and Gloucester extended these remedies to all tenants for life or for years. The statute of Gloucester made the penalty for waste treble damages and forfeiture. These penalties have been retained with certain modifications in New York. See Code Civ. Pro. § 1655. The writ of prohibition and attachment has now been superseded by the equitable remedy—injunction.—ED.

² See cases, *supra*. — ED.

³ These follow as to the penalties with more or less modification the statutes of Marlbridge and Gloucester, but are usually in form actions on the case in the nature of waste. See the New York statute, Code Civ. Pro. §§ 1651-1659, and see cases, *supra*. — ED.

⁴ See cases, *supra*. — ED.

while the defendant was in possession. The same point was again decided in *Cooper v. Stower*, same vol. 331. In that case there was a written contract, much like the contract in this case, except that there was no lease of the lot; but the defendant produced a contract, signed by Stower, by which he acknowledged he had received a contract and bond for the consideration money, which were to be executed and returned to the plaintiff; and agreed that until the papers were executed, no timber should be cut on the lot; and it was shown that they were executed and returned by the next mail. The defendant contended that a license to enter was implied. The court considered the acceptance of the contract of Stower a license to enter and occupy as tenants at will, but not to commit waste; and that cutting the timber beyond what was necessary for the use and improvement of the farm, terminated the tenancy at will; and of course the defendants were trespassers. It was there considered that the withholding the deed was the plaintiff's security upon the land; but it would cease to be a security, if the defendants might lawfully strip the land of its timber, and render it of no value.

The contract in this case goes farther, and gives the right of occupancy for a term of years, on performing certain conditions. It is undoubtedly true that Frazer had a right to enter and enjoy the lot which he had contracted to purchase; but, as was said in *Cooper v. Stower*, "the contracts in the case must be construed reasonably and consistently with the rights of both parties;" and as cutting of the pine timber where the land was not suitable for cultivation, was not the proper and reasonable mode of enjoying the lot for agricultural purposes, Frazer had no right to cut the timber. The timber constituted the principal value of the land. The land thus valuable was the plaintiff's security for the purchase money; and the destruction of the timber was, therefore, totally unauthorized by the contract. Had it appeared that the lessee could not enjoy the lot to the best advantage for the purposes of cultivation and improvement as a farm without cutting the timber in question, a different case would have been presented; and I should think the rights of the parties would be very different; then the cutting, and perhaps the selling would have been justifiable. But when trees, or anything else attached to the freehold, are unlawfully detached therefrom, the property thus wrongfully separated from the freehold, becomes the personal property of the owner of the inheritance. "Waste is a tort," says Lord Hardwicke, 3 Atk. 262, "and punishable as such; and the party has also a remedy for the trees cut down, by an action of trover." 2 Cruise, 268. The case of *Fanant v. Thompson*, 5 Barn. & Ald. 826, is full

to the same point. Certain machinery attached to a mill was leased for a number of years. The tenant, without permission of his landlord, severed the machinery from the mill, and in that situation it was sold on an execution against the tenant. It was held that no title passed to the purchaser, and that trover lay for the machinery. The judges, in giving their opinions, compare the machinery, when attached to the freehold, to the case of trees standing which are parcel of the inheritance, to the use of which the tenant has a qualified right during his term, to wit, for shade and fruit. If, however, they are separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance; they become his goods and chattels.

These cases abundantly show what is consonant to good sense and sound policy, as well as justice; that a tenant who commits waste by cutting timber, acquires no title to the timber which he thus unlawfully cuts, and, of course, can convey none; and further, that a *bona fide* purchaser from the tenant acquires no title, but is liable in trover to the true owner.

The facts of the case clearly show that the timber was unnecessarily, and, therefore, unlawfully cut by Frazer. The logs in question were therefore the property of the plaintiff. The nonsuit must be set aside, and a new trial granted; costs to abide the event.

LUSHINGTON *v.* BOLDERO.

15 BEAVAN (ENG. ROLLS COURT), I. — 1851.

PETITION for the payment of money out of court. Charles Boldero and Henry Lushington had successive estates for life in certain premises, without impeachment for waste. They became bankrupts and their assignees committed equitable waste by felling ornamental timber. They were compelled to pay into court the proceeds of said sales. This is the fund now in controversy.

THE MASTER OF THE ROLLS. — I shall first consider what would have been the effect if Charles Boldero had himself done this act. He was tenant for life without impeachment of waste, and having cut ornamental timber, the court compelled him to pay into court the amount for which the timber was sold; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine applicable to this and other similar cases is this,

that no person shall obtain any advantage by his own wrong. But it is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund; his income for life would be thereby increased beyond what it would have been if the timber had not been cut.

It has been observed, that in all the reported cases the rule has been applied to the *corpus* of the fund; but that, I think, ought not to vary my judgment, because it depends upon this equitable and just principle that no man shall obtain a benefit by his own wrongful act; the authorities, therefore, which lay down the principle in cases of *corpus* only, are equally applicable to any species of interest to be derived by a wrongful act.

It is then said that this is a case in which the court does not impose a forfeiture, but only requires restitution; and that to deprive the tenant for life of the income, it would be to inflict a penalty upon him, inasmuch as he would have had the enjoyment and advantage of the shade and most of the timber if it had not been cut. But this he deprives himself of by his own wrongful act, and for this reason the court refuses to give him any substitution or remuneration. It is also material to bear in mind, that if the timber had not been cut, it would have increased in value for the benefit of the reversioner, but that has been rendered impossible by the tenant for life having improperly cut it. If, therefore, it is impossible for the court to ascertain what portion of the interest ought to be attributed to the estate of the reversioner, and what portion to the enjoyment of the tenant for life, it is the tenant for life who has himself put the court into that situation, and made it incapable of arriving at a just conclusion. It is not a case in which the court can act on the principle of restitution. The case put, by way of analogy, of a tenant for life selling out the fund and being compelled to restore it, is inapplicable, because the tenant for life cannot in this case restore the subject-matter.

There may be a great number of cases in which the timber would become of great value when the reversion fell in; and it is impossible for the court to ascertain what portion of it would have been enjoyed by the reversioner if the wrongful act had not been committed. Undoubtedly the tenant for life does in some cases directly gain an advantage, but it is not by reason of his own act. Thus, where by the act of God a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying, and it cannot

benefit the reversioner to allow it to remain standing, the court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the court will not allow him to gain any benefit from it; but the reversioner takes the benefit arising from an accretion of the fund, in lieu of the accretion of the timber.

Can I look at this case in any different point of view, because the assignees, and not the tenant for life, have done the wrongful act? The assignees stand for these purposes exactly in the same situation as the tenants for life; they are bound by the same equities, and are exactly in the same position, and the same observations apply to both. Nor am I able to separate, or to distinguish the case of Sir Henry Lushington from that of Charles Boldero; because, if the two tenants for life had concurred together, and had agreed between themselves that the one in possession should cut the timber, and that they should divide the produce in certain proportions, the court would have prevented either of them from gaining any benefit from the wrongful act which they concurred in performing. Here, they are the assignees of both; and I am unable to find any principle which says that the assignees must not stand exactly in the same situation as the tenant for life would stand, and be bound by exactly the same equities. If Charles Boldero had died immediately afterwards, and Sir Henry Lushington had survived for a very long period, and the income of the proceeds of the timber had been applied during that period in payment of the joint creditors, they would have obtained a great benefit from the wrongful act of the assignees. I must hold them in exactly the same position as if the wrongful act had been committed by Sir Henry Lushington alone. I cannot separate the character of the assignees; they are assignees for the joint creditors and of the joint estate; and I consider that I must treat the case exactly in the same way as if the two tenants for life, one only being in possession, had concurred in the wrongful act of cutting the timber.

It was suggested that I should suppose the possible case of the commission having been superseded; and I was asked, whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, ought to be prejudiced by the wrongful act committed by his assignees. It would be hard if it were to be so; but I do not consider that question at present, because it does not arise before me. But, if the question did arise, it is manifest that the remark would apply just as much to the case of Mr. Charles Boldero's estate

as to that of Sir Henry Lushington; nor can I find anything whatever in the fiduciary character of the assignees, who, in matters of this description, stand in exactly the same position as the tenants for life, to prevent their being held liable precisely in the same manner as the tenants for life themselves. They have themselves done this wrongful act and neither they nor the persons for whom they are trustees can gain any advantage by reason of it.

I am of the opinion, therefore, that upon the petition, I must make an order according to the prayer.¹

¹ See *Gent v. Harrison*, Johnson (Eng. Ch.), 517—ED.

CHAPTER III.

USE OF ANOTHER'S LAND.

I. Under easements.

THE GREENWOOD LAKE AND PORT JERVIS RAILROAD COMPANY *v.* THE NEW YORK AND GREENWOOD LAKE RAILROAD COMPANY.

134 NEW YORK, 435. — 1892.

VANN, J. — The only evidence tending to show that either Myers or Thorp was a "trustee" was the addition of that word to their names, respectively, in designating them as the respective grantees in the conveyances of March 17 and December 22, 1877. As there was no declaration of trust and no deed to either, "as trustees," the addition to the name of the party of the second part, in the absence of other evidence, might be regarded as merely *descriptio personæ*. *Towar v. Hale*, 46 Barb. 34; *People v. Board of Stock Brokers*, 49 Hun, 349; affirmed 112 N. Y. 670. But if either was a trustee, the conveyance to him "and to his successors and assigns forever," was absolute, with no limitation upon his power to convey and no disclosure of the nature or object of the trust. While he might be required to account for the proceeds in a proper proceeding and upon adequate proof, his grantees took a good title, which neither party to this action can question, as both claim under it. Mr. Traphagan, therefore, took the entire estate and during his ownership he granted a certain right in the land under consideration to the Greenwood Lake Ice Company. The nature of that right is the main question to be determined upon this appeal. The instrument by which the right was created was under the hand and seal of Mr. Traphagen and, after reciting his ownership of the strip of land in question, it proceeded as follows: "And whereas the Greenwood Lake Ice Company desire to use said property as a way of ingress, egress and regress for themselves, their agents, servants and laborers over and upon which they may pass and repass railroad cars containing ice and materials for use in said ice business; now, therefore, in consideration of one dollar to me in hand paid, I do hereby grant to the said ice company and to their assigns and successors in said ice

business, the right to use said property for the purpose of a way of ingress, egress and regress over and upon which they may pass and repass railroad cars containing ice and materials, said supplies for use in said ice business, together with themselves, their employes and servants, but it is expressly understood that this license to use said railroad is not an exclusive right to the said company. And it is further agreed that the right hereby conveyed is not to be assigned by the said company except to the successors in and assigns of said ice business and only for the purpose of said business."

It is contended by the plaintiff¹ that this was a license, revocable at the will of the grantor, or his assigns, and by the defendant, that it was an easement, irrevocable without the consent of both parties or their successors and that it ran with the adjoining land of the grantee, upon which its ice business was conducted, and for the benefit of which the grant was made. While the instrument creating the right is termed in the body thereof, a "license to use said railroad," this is not conclusive, for the court must look at the nature of the right, rather than to the name that the parties gave it, in order to learn its true character.

An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. Washburn, Ease. 2; Goddard, Ease. 2; 3 Kent's Com. 452; *Nellis v. Munson*, 108 N. Y. 453; *Pierce v. Keator*, 70 Id. 419, 421; *Hills v. Miller*, 3 Paige, 254, 257; *Ritger v. Parker*, 8 Cush. 147; *Morrison v. Marquardt*, 24 Iowa, 35; *Big Mountain Imp. Co.'s Appeal*, 54 Penn. St. 361; *Hewlins v. Shippam*, 5 Barn. & C. 221; *Rowbotham v. Wilson*, 8 Ellis & B. 123.

A license is a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein. *Wiseman v. Luck-singer*, 84 N. Y. 31; *Mendenhall v. Klinck*, 51 Id. 246; *Pierrepont v. Barnard*, 6 Id. 279, 286; *Jackson v. Babcock*, 4 Johns. 418; *Mumford v. Whitney*, 15 Wend. 380; *Cook v. Stearns*, 11 Mass. 533; *Prince v. Case*, 10 Conn. 375; Washburn, Ease. 6, 7; Goddard, Ease. 3; 13 Am. & Eng. Encyc. 539.

Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee.² *Wiseman v. Luck-singer*, 84 N. Y. 31, 41; *Dempsey v. Kipp*, 61 Id. 462; *Pierrepont v. Barnard*, 6 Id. 279; *Risien v. Brown*, 10

¹ Plaintiff owns the land in question, subject to such rights as the Ice Co. had. Defendant is practically an employee of the successor of the Ice Company — Ed.

² But see cases under "Licenses" Part IV. — Ed.

S. W. Rep. 661; *Rogers v. Cox*, 96 Ind. 157; *Russell v. Hubbard*, 59 Ill. 335; *Morse v. Copeland*, 2 Gray, 302; *Drake v. Wells*, 11 Allen, 141.

The right in question was created by deed, and is made assignable, because it runs to the "Ice Company and to their assigns and successors," with a limitation upon the power of assignment, restricting it "to the successors in and assigns of said ice business." It was without profit, as nothing was to be taken from the land of the grantor. It was not personal, because succession in title was provided for. Its nature indicates that the parties intended it to be a permanent interest in the land of the grantor, for it was a right of way over a railroad for the purpose of enabling a corporation to carry on a business requiring transportation upon an extensive scale. The business was of such a character that a revocable right might result in irreparable injury to the grantee. The express mention of successors and assigns of the business shows that the parties had in contemplation something more than a temporary expedient, or a merely revocable user. Moreover, the right of way was the only means of communication by land with the railroad upon which the ice company depended for the transportation of its ice to market, and of supplies to its ice house. The track was laid upon the strip of land leading to the railroad, the right to use it granted and the ice house built, all at about the same time, and apparently for the same purpose, as there was no other use for the track. While it is true that no dominant estate is expressly named in the grant, yet one in fact existed and was named by implication. The grant was to an ice company, for use in its ice business, of the right to use a railroad track for the purpose of ingress and egress. Ingress to what and egress from what? Obviously, the adjoining land on which the ice company had constructed an ice house, and was conducting its ice business at the date of the grant, and to which it acquired title only three days after the original conveyance of the strip of land in question. All of the deeds were on record, and the creator of the right under consideration expressly mentions the ice business five times in the instrument creating it, thus showing that he knew of its existence, and contracted with reference to it as it was then conducted. The sole object of the grant was to benefit the ice business by giving it a right of way from its ice house to the railroad, and by necessary implication from the language used, under the circumstances surrounding the grantor when he used it, the term "ice business" was intended to designate the land where that business was carried on, as the land to be benefited by the grant. That land, therefore, was designed to be, and is indirectly referred to as, the dominant estate,

or that to which the right belongs, while the *servient* estate, or that upon which the burden rests, is directly mentioned.

We think that the grant from Mr. Traphagen to the ice company, when construed with reference to what the parties had in contemplation, satisfies every element in the definition of an easement, and conflicts with nearly every element in the definition of a license.

After examining all of the exceptions to which our attention has been called, we find nothing that should reverse the judgment, which should, therefore, be affirmed, with costs.

Judgment affirmed.

II. Profits à prendre.

VAN RENSSELAER *v.* RADCLIFF.

10 WENDELL (N. Y.), 639. — 1833.

TRESPASS for entering upon certain land and carrying away timber.

By the Court, SAVAGE, Ch. J. — Common or a right of common, is a right or privilege which several persons have to produce of the lands or waters of another. Thus, common of pasture is a right of feeding the beasts of one person on the lands of another; common of estovers is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, etc.; common of turbary and piscary are in like manner rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are in general either appendant or appurtenant to houses and lands. There is much learning in the books relative to the creation, apportionment, suspension, and extinguishment of these rights, which fortunately in this country we have but little occasion to explain; but few manors exist among us as remnants of aristocracy not yet entirely eradicated. These common rights which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country such rights are uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil. In our State, however, we have the manors of Livingston and of Rensselaerwyck, in which these rights have existed, and to some extent do still exist, and we are obliged, therefore, to look into the doctrine of commons to ascertain the rights of parties and do justice between them.

Common of pasture is the principal of these rights, and, therefore, most of the cases found in the books relate to that species of common. This was appendant, appurtenant, in gross, or because of vicinage; of the last I shall take no notice, because it is not applicable to estovers. Common appendant is a right annexed to the possession of arable land, by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to common are a part. This kind of common must have existed from time immemorial, and can be claimed by prescription only, and is confined to such, and so many cattle as are necessary to plough and manure the land which is entitled to common, and which are levant and couchant, that is, so many as the land will sustain during the winter. Common appurtenant does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription. It may be created by grant and may be annexed to any kind of land, whether arable or not. Common in gross has no relation to the tenure of land, but is annexed by deed or prescription to a man's person.

Common of estovers must, I apprehend, be either appendant or appurtenant; they are necessarily incident either to houses or lands. This right of common may exist by prescription and is then appendant, or be especially granted, and then it becomes appurtenant. 3 Cruise Dig. 83 to 90; 3 Black. Com. 33, 34. Whether this kind of common is apportionable is the principal question in this case. It seems to have been doubted heretofore whether common of pasture was apportionable, and we find the subject elucidated by Chief Justice Willes in *Bennet v. Reave*, Willes 227, as late as the year 1740. He says common of pasture appendant may be apportioned; for as the land is entitled to common only for such cattle as are necessary to plough or manure the land, the common cannot be surcharged by any number of divisions or subdivisions in consequence of alienation. It had been contended in that case, that the owner of every parcel, even a yard, was entitled to common for beasts of the plough as well as other cattle, on the assumed ground that the tenant was bound to plough the lord's land, and, therefore, must have a team, and, of course, must have them pastured; but it was clearly shown that the team entitled to pasture was such as was necessary for ploughing the land entitled to common, and it made no difference into how many hands it went; no more team was necessary for ploughing, and no more cattle necessary for manuring. Such common is apportionable, and the common being incident to the land, passed with it in such proportions as the land should be divided into; the assignee of half, for instance, of the land, was entitled to half the

right of common. This case was of common appendant, and of this kind of common, of pasture, it is said, it is apportionable either when part is purchased by the lord or any other person. Common appurtenant of pasture is also apportionable by alienation of part of the land, but not if the person entitled to it purchases part of the land out of which the common is to be had, 3 Cruise, 92, 3; Co. Litt. 122a.; and the reason assigned is because common appurtenant is against common right, whereas common appendant is of common right. 4 Co. 36; 8 Co. 78.

The authorities also inform us that *common of estovers* cannot be apportioned. Lord Coke says, "If a man have reasonable estovers, as housebote, etc., appendant to his freehold, they are so entire that they shall not be divided between coparceners." Co. Litt. 164b; 3 Cruise, 93. Lord Mountjoy's case is there stated, which was that of common turbary; and it was resolved that he could not assign his interest to one or more, for that might work a prejudice and surcharge to the tenant of the land, and, therefore, if such an inheritance descended to parceners, it cannot be divided. In *Luttrell's case*, 4 Co. 87, Lord Coke says, "So if a man has estovers by grant or prescription to his house, although he alters the rooms and chambers of this house, as to make a parlor where it was the hall, or the hall where the parlor was, and the like alterations of the qualities and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney or makes a new addition to his old house, by that he shall not lose his prescriptions, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added." 3 Cruise, 89. Estovers appurtenant to an house cannot be separated from the house, but must be spent on the house. 3 Cruise, 89; Plowd. 382. These authorities seem to be express that common of estovers cannot be apportioned, and for the reason that thereby the land out of which the estovers are to be taken would be surcharged. If, for instance, estovers are granted as belonging to a farm of 200 acres; so long as this is one farm, there is but one house and probably not more than two chimneys; but if this farm is divided into two, another house becomes necessary and double the number of chimneys must be supplied. This would be an injury to the lord. So also of fences and buildings; by dividing the farm into two, more fences and buildings become necessary, and if both are to be supplied from the woods of the lord, an increased quantity would be taken, where, by the grant itself, only estovers for one farm were allowed. As these

estovers cannot be apportioned, neither of the tenants among whom the farm is divided can have them, and, therefore, they become extinguished. Common of estovers must be considered as an entire thing, not to be divided; and in case of a common person, if an entire thing be divided or extinguished in part by the act of the party, it is an extinguishment of the whole; but otherwise where it is by the act of God or the law. 11 Vin. 567, pl. 4, tit. Extinguishment, P. 6 Co. 1; Bruerton's Case, 4 Co. 37; Turringham's Case.

Lord Coke also says, "If a man have reasonable estovers, as housebote, heybote, etc., appendant to his freehold, they are so entire as they shall not be divided between coparceners." Co. Litt. 164b. In answer to the question, what shall become of such inheritances? he says it appears by the books that the eldest shall have them, and the others a contribution; but if no other property descended from which contribution could be had, then the parceners should have alternate enjoyment, or, in case of piscary, one shall have the first fish and another the second; and so of a toll-dish, where the hereditament was the toll of a mill. If, however, that doctrine were applicable here, it would only relate to descents, not alienation by deed; and even as to descents, it has been held that one of several heirs to whom a right of estovers descended, could not alien his share so as to authorize the assignee to enter and cut wood. *Leyman v. Abeel*, 16 Johns. R. 30. This case of *Leyman v. Abeel* recognizes the doctrine which I have advanced, that estovers are not apportionable. There one of the proprietors of the Catskill patent devised certain lands to his two sons, and gave each an undivided moiety of his right in the undivided lands; he also devised portions of lands to each of his three daughters and to a granddaughter. He then gave to each of his children liberty of cutting wood and taking stone from any of his undivided lands in common forever. The land subject to common became the property of the plaintiff. One of the five children of the proprietor, Nelly Abeel, died in 1809, leaving four children, one of whom conveyed his right to cut wood and carry away stone to the defendant, who did cut and carry away five loads of wood, for which the suit was brought. It was held that the right of Nelly Abeel descended to all her children, but that the right to cut wood, although descendible and alienable, could not be enlarged so as to defeat the intention of the devisor, by imparting the entire right to be enjoyed by each; that one could not alone convey any right — of course one alone had no right to cut wood; but from this case it would follow, that as the right was an entirety and had devolved by operation of law upon four, although they could not enjoy it severally, they might jointly convey it to one who might

enjoy it in severalty as an entirety. It follows also from the doctrine of this case that the owner of such a right cannot divide it, *i. e.*, by the act of the party; if he conveys part of the lands entitled to common, granting the right, it cannot be enjoyed. The common belongs to the whole farm as an entirety, not to parts of it. This would enlarge the right to the prejudice of the land out of which the common was to be taken. As no one portion of the land entitled to the common could enjoy it, it is necessarily extinguished; and being extinguished, it can be revived only by a new grant. It is contended by the counsel for the defendant in error, that the case of *Livingston v. Ten Broeck*, 16 Johns. R. 14, contains a contrary doctrine. It was conceded that the question of extinguishment did not arise in that case, but the learned judge who gave the opinion of the court does say that common appurtenant can be apportioned, and he refers to several cases as sustaining the position, all of which cases are cases of common pasture.

It will be seen, by applying these principles to this case, that Jacob Truax was entitled to common; but when he conveyed his farm, on the 15th December, 1769, part to one son and part to another, thereby creating two farms out of the one entitled to common, such right being an entirety, not being apportionable, could not be enjoyed by either, and, of course, was extinguished. This is the main point in the case, and is decisive of it.

Several other questions were raised and discussed; such as whether the lord had a right to enclose any part of the common; and if so, whether the lease in the present case was such an improvement as would exempt the *locus in quo* from being subject to the right of common; and whether the plaintiff had such a possession as would entitle him to maintain trespass, which questions I will notice, but not discuss at large. 1. The possession of the plaintiff was sufficient against a stranger; he showed title to lands which were not in the actual possession of any other; he was therefore in possession, as in such cases the possession follows the title. 2. There is no doubt that the lord has a right to improve his waste lands, provided he leaves enough for those who are entitled to common. There can be as little doubt, I think, that the improvement, to bar a common, must be an actual *bona fide* improvement; not a mere possession fence, run around a piece of woods. But as I hold the right of estovers in this case was gone, the defendant and those whose estate he represents have no right to raise that question; they are mere strangers, and as against such the plaintiff's title and possession were sufficient.

The law is established in England and recognized in the case of *Livingston v. Ten Broeck*, that if the commoner purchases part of

the land subject to common, if the right of common be apportionable, it shall be apportioned, otherwise the whole is extinguished; but that principle seems to be not applicable here. The John Truax farm was purchased by John Tayler in 1791, long before he had any interest in the Jacob Truax farm, which was entitled to common. The ground of that extinguishment is this: that the commoner has voluntarily consented to the diminution of the common out of which his pasture or estovers were to be enjoyed; and where there can be no apportionment, there must be an extinguishment.

Upon the whole case, therefore, I am of opinion: 1. That the plaintiff, as against the defendant, has shown a sufficient possession of the *locus in quo*; 2. That common of estovers is not apportionable, and, of course, that though Jacob Truax was entitled to estovers, yet his sons, to whom his farm was conveyed in parcels, and their assigns, never had any such right; and 3. That consequently the defendant was a trespasser in cutting the rails in question, and the plaintiff should have recovered in the court below.

Judgment of the common pleas reversed, with single costs, and a *venire de novo* to issue.

III. Under licenses.

COOK v. STEARNS.

II MASSACHUSETTS, 533. — 1814.

PARKER, C. J. — The question presented by the demurrer and joinder in this case is, whether the facts set forth in the plea in bar amount to a justification of the trespass complained of in the declaration.

The possession of the *locus in quo* is admitted to be in the plaintiff; and no title to it is claimed by the defendant in his plea. But he claims a right to enter upon it, for the purpose of repairing the dam and bank, and clearing the canal from obstruction; because those, whose estates the plaintiff now holds, permitted him to enter and make the bank, and dig the canal; from which permission he would infer a right to enter and use the soil as often as the state of the mill owned by him should require it. He has not described the mill as ancient, nor set up any prescriptive right to an easement in the close of the plaintiff; but alleges that he had the consent legally obtained to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs.

It is evident, therefore, that the defendants' claim a permanent

interest in the plaintiff's close, a right to maintain the bank, dam and canal, which he formerly placed there by consent, and to enter upon the plaintiff's close at any time to make necessary repairs. Now, this is an interest in land, which cannot by our statutes of 1783, c. 37, pass without deed or writing; for all interests in lands, according to that statute, whether certain or uncertain, are declared to be estates at will, unless the evidence of them exists in deed or writing; and if a continuation of the interest is intended for seven years, it must not only be passed by deed, but the deed must be acknowledged and registered in the same manner as is required in the transfer of a fee.

The defendant not having alleged that he acquired the right, which he claims, by deed or writing, his plea is for that cause bad. After a verdict perhaps this defect would be cured; because it would be presumed that the evidence, which the law requires to establish such an interest as is claimed, had been exhibited; but on demurrer, where a right in land is set up as a satisfaction for a trespass, the manner in which that right was acquired should be averred, that the court may immediately determine whether it was a lawful conveyance of the right or not.

But the counsel for the defendant, aware that they could not set up any estate of a permanent nature in the plaintiff's close, without averring and proving a deed or some other lawful conveyance, have considered the facts alleged in his plea as amounting to a license, given him by the former owner of the land, to make the dam, bank and canal; and they have contended, first, that such license may be by parol; and, secondly, that it is not in its nature countermandable, from which they would infer that a right continues in him to maintain the dam, etc., and to enter upon the plaintiff's close to repair them *toties quoties*, etc.

This argument had some plausibility in it, when it was first stated. But upon more mature consideration it seems to have no foundation in principles of law.

A license is technically an authority given to do some one act, or a series of acts on the land of another, without passing any estate in the land, such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. See Viner's Abridgment, title License, A, E, D, G, and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses, which in their

nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such.

The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our *statuté*. If the defendant had a license from the former owners of the plaintiff's close, to make the bank, dam and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it an authority, at any future time, to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it without any reservation, would of itself, be a countermand of the license. For although, when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing, and to repair it, if it is of a permanent nature; yet the first permission or license must be by grant, in order to draw after it this consequence.

We are also all satisfied, that the plea is in this respect bad; it not showing such a license as may be pleaded, and, indeed, the interest claimed being not in the nature of a license but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant; neither of which is averred in this plea.

If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties, which the legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase.

It has been argued that by the act providing for the support and regulation of mills, a right to acquire property in the land of another, for the purpose of erecting or carrying on a mill, is contemplated to exist by *parol*. But that statute did not provide a mode of acquiring title to the mill or the land; but merely superadded the right of flowing land, upon compensation, according to the statute, by those who had legally obtained the right to build a mill.

The defendant's plea is adjudged bad.

PART IV.
OF ESTATES AND OTHER INTERESTS IN LAND.

CHAPTER I.

ESTATES AS TO QUANTITY AND QUALITY: FREEHOLDS.

I. Freeholds of inheritance or fees.

I. LIMITATION OF A FEE IN ITS CREATION OR TRANSFER.
WORDS OF LIMITATION.

a. By deed inter vivos — at common law.

(1.) THE GENERAL RULE AS TO NECESSITY FOR TECHNICAL WORDS OF LIMITATION
IN A TRANSFER OR RESERVATION.

ADAMS *v.* ROSS.

30 NEW JERSEY LAW, 505. — 1860.

APPLICATION by Ross, mortgagee, for moneys paid into court as the value of a portion of the mortgaged premises taken in fee by the Erie Railroad Co., by exercise of the right of eminent domain under its charter. Ross claimed the whole of the money; other parties claim to be interested. The court below allowed Ross but a part of his claim and from that decision he brings error to this court. The facts appear at large in the opinion.

WHELPLEY, J. — This writ of error brings up for review the judgment of the Supreme Court, giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural

life, and at her death to her children which may be gotten of her present husband: to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be gotten of her present husband, Alonzo W. Adams.

The deed contains covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty. These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of the conveyance to her, was a minor. On the 12th October, 1855, she, with her husband, executed a mortgage to secure the payment of \$6,000 in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the Supreme Court.

The Erie Railway Company, under the provision of an act of the legislature took a part of the land in question, and hold it in fee simple. The value of the land taken has been ascertained at \$3,061; that is now in the Supreme Court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband and children, one having been born of the marriage since the conveyance; and what, if any, are the rights of Ross, the mortgagee to the money in court.

The Supreme Court held, that the estate granted by the deed was an estate in fee tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to curtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, in case he survived her.

This decision was reached by interpreting the word "children," in the deed, as equivalent "to heirs, calling in the covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The Supreme Court was right in holding the first estate conveyed to Mrs. Adams, not a fee simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee simple did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee.

Rawle on Cov. for Title, 420; *Blanchard v. Brook*, 12 Pick. 67; 2 Co. Litt. 385*b*.

Lord Coke expressly says: But a warranty of itself cannot enlarge an estate as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate.

Justice Vredenburg, in his opinion, admits this to be law. He says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: From these covenants, it is demonstrated that, by the terms children by her present husband, the grantor intended the heirs of her body by her present husband. It follows from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee simple, for example, yet that if the covenants show an intent to pass a fee simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she warranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the Supreme Court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defining the quantity of estate conveyed.

Starting with that premise, it seems difficult, nay impossible, to reach the conclusion, that the covenants are to be looked to in the interpretation of the conveyance, as such.

The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is, not what

estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door, for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty in getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule, that the grantor of a deed must express his intent by the use of the necessary words of conveyance, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point, it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase: "To have and hold to him and his heirs." For these words, "his heirs," make the estate of inheritance. For if a man purchase lands by these words, "to have and to hold to him forever," or by these words, "to have and to hold to him and his assigns forever," in these two cases he hath but an estate for life, for that there lack these words, "his heirs," which words only make an estate of inheritance, in all feoffments and grants.

These words, 'his heires,' doe not only extend to his immediate heires, but to his heires remote and most remote, born and to be born, *sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri and hæredum appellatione veniunt, hæredes hæredum in infinitum.* And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention

and confusion." Co. Lit., vol. 1, 1 a, 8 b; 1 Shep. Touch. 101; Com. Dig., tit. Estate, A, 2; Preston on Est., 1, 2, 3, 4, 5; 4 Cruise's Dig., tit. 32c, 21c, 1.

There are but two or three exceptions to this rule. The cases of sole and aggregate corporations, and where words of reference are used "as fully as he enfeoffed me." A gift in frank marriage, etc., which are to be found stated in the authorities already cited.

These exceptions create no confusion; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate tail as a fee simple. 1 Co. Lit. 20, a; 4 Cruise's Dig., tit. 32 c, 22, § 11; 4 Kent's Com. 6; Bl. Com. 114.

This author sets this doctrine in clear light. He says: As the word heirs is necessary to create a fee, so, in further limitation of the strictness of feodal donation, the word body, or some other word of procreation, is necessary to make it a fee tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail, as if the grant be to a man, and his issue of her body, to a man and his seed, to a man and his children or offspring, all these are only estates for life, there wanting the words of inheritance.

The rule in Shelley's Case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word heirs are words of limitation, and not of purchase, 1 Rep. 93; 4 Cruise's Dig., c. 23, § 3, tit. 32, require the use of the word heirs to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply unless the word heirs has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the Supreme Court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England or in any state of this Union abiding by the common law, where, in a conveyance by deed, the word children has been held to be equivalent to heirs. That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the Supreme Court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis*; to maintain the great rules of property, to adopt no new dogma, however convenient it

may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been, than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed, Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in after-born children to the same estate.

The deed operated as a covenant to stand seized. The proper and technical words of such a conveyance are, stand seized to the use of, etc.; but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words bargain and sell, give, grant, and confirm, have been allowed so to operate. 4 Cruise, tit. 32, c. 10, §§ 1, 2.

By such a covenant, an estate may be limited to a person not *in esse*, if within the considerations of blood or marriage. Fearne on Rem. 288; 1 Rep. 154, *a*; 1 Preston on Est. 172, 176; 4 T. Rep. 39; *Doe v. Martin*.

This deed, on the face of it, expresses the considerations of natural love and affection, as well as the money consideration of one dollar.

It follows, from these considerations, that Adams is not entitled to curtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Mrs. Adams, interest in the land was subject to the provisions of the act for the better securing the property of married woman, passed March 25th, 1852; the deed to her was after this act passed.

This was clearly a gift or grant, within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms gift, grant. The reasoning of Justice Vredenburg upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the Supreme Court must be reversed. The

money in court must be invested for the benefit of Mrs. Adams for life, and after her death for the benefit of the surviving children of the marriage, in equal shares, during their respective lives, and at their deaths respectively; their several shares must be paid to Miss. Traphagen, or if she be then dead, to her heirs or devisees.¹

COLE v. THE LAKE COMPANY.

54 NEW HAMPSHIRE, 242. — 1874.

BILL in equity by Cole to procure the reformation of a certain lease and to enjoin the defendants from interfering with certain structures erected by plaintiff, which (as he claims), he would have had a right to erect had the written lease conformed to the intention of the parties. The court below decreed that the lease be reformed and granted the injunction. A further question arises in this court as to whether the instrument as reformed is a lease "at will" or "for life," or whether it is to be taken as a lease in fee, reserving a fee-farm rent. This court holds that it is not at will. The discussion as to whether it is for life or in fee will be found in that part of the opinion which is reported below, together with the essential facts.²

LADD, J. — * * * The word "heirs" does not appear in the lease. The defendants thereupon contend that, at most, it conveys only a life estate to the lessees. The plaintiff claims that the whole instrument read together is sufficient to give a perpetual right to take and use the water upon the terms and conditions therein specified, — that is, a fee, — but at the same time moves that in case the court should be of a different opinion, the lease may be reformed by inserting the proper words of inheritance, so as to express in legal language the actual contract of the parties according to their intention when it was made.

Before proceeding to consider the question thus raised, we may as well say, that, from an examination of the lease alone, without resorting to extrinsic evidence at all, we entertain no doubt that

¹ It would seem that technical words of limitation are still required to pass a fee in Maine, Vermont, Massachusetts (see below, p. 496, and *Sedgwick v. Laftin*, 10 Allen 430). Rhode Island, Connecticut, Pennsylvania, Delaware, South Carolina, Florida, Ohio. For the New Hampshire common-law rule, see below, *Cole v. The Lake Co.*, p. 489. — ED.

² A large part of the opinion is omitted. The part printed is useful here mainly as explaining and illustrating feudal doctrine. — ED.

the understanding and contract of the parties were as claimed by the plaintiff. The defendants demised and leased to the plaintiff and others the right to draw a certain quantity of water from their canal through a flume to the plaintiff's mills and buildings on certain land, for the use and operation of the plaintiff's mills and machinery; gave the plaintiff the right to maintain the flume and keep it in repair, and for that purpose to enter upon the defendants' land, "to have and to hold said demised premises to the said lessees, paying a certain yearly rent." Everything included in those stipulations "shall extend to and bind their legal representatives;" the fair meaning of which is that every right of the parties under the instrument shall extend to their legal representatives. This is all expressed in the common language of the country. No technical words, presumed to be used in a settled, technical, legal sense, are employed. The intention of the parties is therefore to be found in the ordinary, natural, and popular signification of the written language in which they choose to express themselves. In point of fact, there is nothing for construction here at all, for it is a primary maxim that it is not permitted to interpret what has no need of interpretation. It is not permitted to the court to defeat the plainly expressed intention of the parties, by distorting, explaining away, or wresting from its commonly received import the language they have used, under the name and guise of construction.

[The language of this lease, in its ordinary, natural, and popular sense, makes the intention of the parties to pass a perpetual right obvious and unmistakable.] Such being, in fact, the manifest meaning of the instrument, and the indubitable intention of the parties as therein expressed, it might not be difficult to find authority on which to hold that the deed should be treated as reformed in conformity with that intention under the prayer for general relief in the bill. *Busby v. Littlefield*, 31 N. H. 200, and authorities cited.

There may also be room for doubt whether the defendants, having entered into a covenant in terms undeniably sufficient to bind a corporation of this sort forever, could be permitted to repudiate it on the ground that the estate is limited to the legal representatives rather than the heirs of the lessees, so long as the conditions upon which the estate was granted continue to be performed by any one who comes within the class designated by the term legal representatives. Coke Litt. 9 *b.* 94 *d.*; 2 Bl. Com. 108, notes; 4 Kent Com. 7; 1 Washb. R. P. 58. We have not chosen, however, to examine either of these propositions, but prefer, rather, to inquire whether there exists in this state any law whereby a legal contract, fairly and openly concluded between the parties, and by them put in writing

in terms so plain as to leave no room for doubt as to the obligations they have thereby mutually assumed, is set aside and nullified for want of a single word, purely technical in its legal effect, which adds nothing to the sense of the instrument, and can only be made consistent with the intention it is held to express by an interpretation which withdraws it entirely from all the ordinary uses of the language in which it is found. There being no doubt as to what the contract between these parties was, no doubt as to the meaning of the lease, the question we propose to consider is, whether that contract is to be destroyed by an application of the proposition that to create a fee the word "heirs" must be employed.

Suppose A., being the owner in fee of a piece of land, by a deed duly executed, conveys to B. all "his estate and interest therein," and expressly declares in the same deed that B., having paid him the full value of the land, it is his intention, and the effect of the deed shall be, to pass an absolute title in fee simple to B. A rule of law defeating that intention and preventing the deed from having the effect intended to be given by its express terms — construing the language, "This deed shall pass, and shall be construed to pass, a fee," to mean "This shall not pass, and shall be construed not to pass a fee" because the superfluous word "heirs" was not used — would undoubtedly strike the unlearned with a degree of astonishment. Such a rule must appear to an intelligent layman, unfamiliar with the mysteries of the fossil remains of feudal institutions, as arbitrary, destructive, tyrannical, and in most violent conflict with all ideas of legal reason which such a person can comprehend.

The question whether that rule is part of the law of this State is presented for our consideration in the present case, in a form which differs in no material respect from the case supposed for illustration.

It is said to be a rule of the common law that without the word "heirs" a fee-simple in land cannot pass by deed; and that this rule is so absolute and unyielding, that, no matter how clearly the intention of the grantor to convey a fee may be stated in the deed, such intention can be of no avail without that word. Washb. R. P. Bk. I., ch. III, sec. 53, and authorities in notes. *A priori* we should expect to find a rule which in its practical application brings about results so anomalous and absurd, but which is, nevertheless, enforced with such remorseless rigor by the courts, upheld by reasons very plain and very imperative. Naturally we should also expect that the books, which are full of cases where its application has produced palpable injustice, more or less aggravated according to circumstances, would also be filled with strong and conclusive

reasons in its support. On the contrary, what does appear? I venture to affirm that since the revolution by which the house of Stuart was finally excluded from the British throne, when most of the shackles which feudalism had riveted upon the tenure of lands throughout the kingdom were removed, not a reason, nor the semblance of a reason, growing out of the condition and wants of society, the progress of civilization, the exigencies of trade, or the analogies of the law can be found in its support in any country or state where the common law has been used.

The rule is a feudal one; that it had no place in the laws of the Saxons is shown by Reeves. Speaking of the form of charters at about the time of the Norman Conquest, he says: "The words of limitation to convey a fee, whether absolute or conditional, were divers;" and after giving a number of Latin forms which were used, some of them containing the word "*hæredibus*," and some not, he continues, "from which divers ways of limiting estates (and numberless other ways might be produced), it must be concluded that no specific form had been agreed on as necessarily requisite to express a specific estate; but the intention of the grantor was collected, as well as could be, from the terms in which he had chosen to convey his meaning." 1 Reeves's Hist. Law (Finlason), 42.

Blackstone says: "This very great nicety about the insertion of the word 'heirs' in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which we may remember it was required that the form of the donation should be punctually pursued; or that, as Cragg expresses it in words of Baldus, *donationes sint stricti juris ne quis plus donasse præsumatur quam in donatione expresserit*. And, therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs." 2 Bl. Com. 107. Chancellor Kent says: "The rule was founded originally on principles of feudal policy which no longer exist, and it has now become entirely technical," and he gives the same reason for it as Blackstone. 4 Kent Com. 6.

To comprehend fully the reasons which gave birth to this rule, we ought to recall not only the nature of the feudal tenures of land in England, but the history of the origin and development of the system itself, which before the close of the eleventh century had succeeded, mainly by conquest and force, in vesting the ultimate ownership of nearly all the lands in England, as well as on the con-

continent of Europe, in the feudal lords, and parcelling them out among a few military chieftains or leaders of bands of predatory barbarians. * * *

Blackstone says: "At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the will of the lord, who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more years. Among the ancient Germans they continued only from year to year. . . . But, when the general migration was pretty well over and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers, — a more permanent degree of property was introduced, and feuds began now to be granted for the life of the feudatory. But still feuds were not yet hereditary, though frequently granted by the favor of the lord to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services. . . . In process of time feuds came by degrees to be universally extended, beyond the life of the first vassal, to his sons, or perhaps to such one of them as the lord should name, and in this case the form of the donation was strictly observed; for, if a feud was given to a man and his sons, all his sons succeeded him in equal portions, and as they died off, their shares reverted to their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his heirs, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. . . . Other qualities of feuds were, that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity, who were presumed to inherit his valor, to others who might prove less able." 2 Bl. Com. 55. * * *

These extracts are enough to show that the word "heirs," when first introduced into charters and feoffments, was a word of very great importance. It enlarged the right of the vassal from one held either at the will of the lord, or for his own life, to a permanent and hereditary interest. It signified an undertaking by the lord that he

would accept the heir as his vassal, and that all the rights and obligations growing out of that relation should be extended to him. It was, in effect, simply a stipulation for a renewal of the lease upon the same terms with the heir of the first lessee. They also show to some extent the nature of the institutions and condition of society in which the rule we are speaking of originated and to which it was applicable, and strongly present the contrast between those institutions and our own.

It is important to our inquiry that the utter repugnancy and hostility of feudal institutions to ours should be fully borne in mind. * * *

It was to answer one of the conditions upon which the existence of such a system depended that the rule in question was introduced. Unless the lord bound himself that the fief should go to the heir of his vassal, the heir had no rights in it on the death of his ancestor, but the lord, being the absolute owner of the soil, might bestow the fief upon any stranger who would enter into homage and do fealty to him for the land, upon such new services as he might impose.

The rule was nothing more nor less than the practice of the feudal sovereign, securing and perpetuating his grasp upon all the land, and the service of all the landholders in his realm. Its origin, purpose, and history show it to be in no way adapted to our institutions, system of government, or condition of society. As a feudal rule of construction, it was a recognition of the fact that the vassal held his lord's land upon the condition of rendering in his own person certain services to his lord. The vassal, thus holding the land by reason of the personal trust and confidence reposed in him by his lord, could not assign, nor could his heirs inherit, his obligation of personal service on the land held on such a condition. *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141; *Bethlehem v. Anns*, 40 N. H. 34, 41, 42. The feudal rule is inapplicable to a conveyance of New Hampshire land not held by any such tenure.

When the fetters which feudalism had fastened upon the tenure of lands in England fell off, every reason on which this rule had rested fell with them. Why should the rule itself be retained? Lord Coke says: "*Cessante ratione legis, cessat ipsa lex.*" Coke, Litt. 70 b. And that has come to be — indeed, it was then — one of the most familiar maxims of the law. The fourth maxim of construction of statutes laid down by Dwarria is, An act of parliament cannot alter by reason of time; but the common law may, since *cessante ratione cessat lex*. Potter's Dwar. 122.

But suppose the rule was retained in England after the reason of

it ceased and that it was engrafted upon the common law at the time of the settlement of this State and the adoption of the constitution, the question is, Has it been adopted here? The framers of the constitution, in providing for the continuance of such laws as had theretofore been adopted and approved, etc., wisely excepted such parts thereof as should be found repugnant to the rights and liberties contained in that instrument. Const. N. H., art. 90. This implies that there might be some parts of the common law to which the exception should be applied. With all the devotion to the general principles of the common law which eminently distinguished that generation of men, they could not fail to see that as a body of municipal law it was not wholly free from defects. They must have known, as Judge Cooley says, that many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism; that the feudal system, which was essentially a system of violence, disorder, and rapine, gave birth to many of its maxims; and that some of these, long after that system had passed away, might still be traced in the law, especially in the rules which govern the acquisition, control, and enjoyment of real estate. Cooley's Const. Lim. 22. Hence the exception. Accordingly it has many times been held, under our constitution, that if there is any part of the common law incompatible with our institutions or not adapted to our circumstances, it does not prevail here. *Lisbon v. Lyman*, 49 N. H. 582, and cases cited.

They who brought the general body of the common law with them to this region might well have omitted to bring the feudal rule, not because it was fabricated in a barbaric age, but because it was designed and fitted to perpetuate a barbaric condition; not because it originated in a foreign land, but because it was not suited to the commonwealth which our foreign ancestors came to this country to organize; not because, as a part of the military system of Europe, it was less necessary in feudal times than other compulsory methods of filling armies and navies in other times, but because the general feudal relation of lord and vassal not being an incident of New Hampshire civilization, and the particular debt of personal service due from the vassal to the lord (which the heirs of the vassal might be incompetent to perform) not being a universal consideration of the conveyance of New Hampshire real estate, the feudal rule (requiring the word "heirs" as evidence of the lord's intention to assume the risk of his vassal's heirs being incapable of the stipulated service), was inapplicable to the situation and circumstances of the emigrants, and implied a servitude inconsistent with the prin-

ciples of personal freedom and equality which pervaded their social and political plan, hostile to the general object of their emigration, and particularly subversive of that absolute ownership of the soil which they specially sought in the new world.

It appears that in Massachusetts, prior to 1651, the word "heir" was "oftentimes omitted when an estate of inheritance is intended to be passed by the parties;" and in that year a statute was passed by the general court introducing the feudal rule, which has been maintained in that state by statute ever since. Sedgwick v. Laflin, 10 Allen, 430. When the union which at the time existed between Massachusetts and New Hampshire was dissolved, the people of the latter province, 1660, adopted a code made up mainly by copying such of the Massachusetts statutes as they thought adapted to their wants. In that code this act was omitted, and no statute on the subject has ever existed here. The word must have been omitted as often proportionally here as in Massachusetts; and when the attention of our people had been directed to the subject by a statute under which they lived for twenty-eight years, the omission could hardly have been accidental. They were for several generations engaged in vigorously resisting Mason's claims to a proprietorship, which if maintained would have given him a substantial baronial dominion over the whole province, with the title of lord-protector, which he assumed. Belk. Hist. N. H. 94 (ed. 1831); and see 1 N. H. Prov. Pap. 433-582. There was nothing in their history in this, any more than in the old country, calculated to impress them with the expediency of introducing the mediæval rule, either by statute, or by consent and general understanding without a statute. We know of no reason why they should have desired or intended to do so.

The effect of the Massachusetts statute in Sedgwick v. Laflin, illustrates the difficulties and injustice occasioned by importing a rule so incompatible with American institutions as to be capable, upon legal principles, of being introduced by nothing short of express legislation. Like many other arbitrary rules that might be made, it would prevent some litigation that would be necessary for ascertaining the intention of the parties upon rules of construction calculated to discover their intention. But the evils of such litigation cannot be compared with the gross injustice that would be perpetrated by such a rule, arbitrarily and summarily defeating the intention of the parties, where the evidence happened not to be sufficient (as it would be likely to be now that the parties can testify) to induce them to resort to litigation to have their deeds reformed and their intentions carried out in suits in chancery. * * *

The rule was not applied at common law in England to the construction of wills — Coke, Litt. 322 b.; Com. Dig., Devise, (N. 4); Chitty's Note 2 Bl. Com. 108 — nor in this state, irrespective of the statute of 1822 — *Fogg v. Clark*, 1 N. H. 163; *M'Afee v. Gilman*, 4 N. H. 391; *Forsaith v. Clark*, 21 N. H. 409 — where, although the decision was after the statute, the will was proved very long before.

In *Loveacres v. Blight*, Cowp. 352, Lord Mansfield said: "I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator; for common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of real estate. But, as they know when they give a man a horse, they give it to him forever; so they think if they give a house or land, it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life; because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law.

"But as this rule of law has the effect I have just mentioned, of defeating the intention of the testator in almost every case that occurs, the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. . . . In general, wherever there are words and expressions, either general or particular, or clauses in a will, which the court can lay hold of to enlarge the estate of a devise, they will do so to effectuate the intention." He did not explain by what authority the court has laid hold of the generality of other expressions in a will to take the devise out of this rule, or how it would be possible in that way to give effect to the intention of the testator without shaking a rule of law by the conjecture of a private imagination, provided it is a rule of law that the word "heirs" is indispensable to the passing of a fee. Nor did he do what would have been more useful still, that is to say, point out the reason for a distinction in this respect between the construction of a will and a deed. The reason for not applying the rule to wills is sensible and easily understood. It is, as Lord Coke expresses it, *quod ultima voluntas testatoris est perimplenda secundum veram intentionem suam*. Coke, Litt., 322 b. But this shows no reason for the distinction. It does not show why the intention of the maker of the instrument is any more sacred in one case than in the other, nor by what right the court can abrogate the rule in favor of one class of

donees, if it must be rigidly enforced against the other. If for any reason, however mysterious, a fee in land could not pass without the use of this potent word, all efforts of the court to bring about such a result where the word was wanting, whether in a will or deed, must have failed. But in the case of wills those efforts did not fail. What, then, became of the feudal rule? It yielded to reason. It was swept away by the monstrous absurdity and injustice which its application must involve. It could not stand, because no enlightened court could uphold it, and in so doing defeat the manifest intention of the donor, without feeling that they were ministers of arbitrary oppression and wrong rather than of law. For obvious reasons the same question as to defeating the intention of the grantor in a deed seldom comes up. But when it does arise, how can that intention be defeated without involving a violation of common right and common sense, equally glaring and flagrant? Where is the reason for upholding the rule as to deeds, and rescinding it as to wills? By what right can the courts say that the intention of a testator plainly written in his will shall govern, but the intention of a grantor as plainly written in a deed of bargain and sale shall be set at naught, the consideration of the sale be disregarded, and the property be thrust back upon the grantor or his heirs, on the death of the grantee, for the want of this feudal word inheritance?

In the nature of things the word is no more necessary to the valid conveyance of land than to the valid conveyance of a horse. Its use was necessary in the scheme of a semi-barbarous institution, a vast engine of slavery and oppression, an instrument of violence and disorder, which had no better security for its continued existence than superiority of brute force, and which was swept away upon the dawn of a better civilization more than five hundred years ago. Why is its use still required in one class of instruments and not in the other, when both have the same object in view, namely, the conveyance of land?

I have not found any answer to this inquiry. The legal signification and effect of the word as used in our deeds of bargain and sale are purely technical. Strictly speaking, there is no one in existence at the time of the grant to answer the description. *Nemo est hæres viventis*. Those who may become the heirs of the grantee take not the slightest present interest by virtue of the word. The conveyance vests the absolute and unlimited ownership in the grantee; the word imposes no restraint on his power of alienation. Nevertheless it has a settled and well understood meaning as thus used, and, as a legal term, is very convenient and useful to show that the estate granted is a fee. It could not now be safely omitted without

using some other form of expression showing with legal accuracy the intention and contract of the parties.

Of course it will not be omitted by any conveyancer or other person who knows the significance it has acquired. But when a case arises where the intention of the grantor to convey a fee simple is clearly shown by other words in the deed, we think the court have no power to say a fee shall not pass because he has not, in addition, inserted this technical word, using it in a sense entirely distinct and different from its usual and common import. Our conclusion is, that the rule, which would defeat the obvious intention and destroy the plainly expressed contract of the parties in the present case, is not adapted to our institutions or the condition of things in this State; that it never became part of the law of the State, and, therefore, that this instrument conveys to the lessees a perpetual right to take and use the water upon the terms and conditions specified, which right may pass to their heirs and assigns as a fee.

A decree is to be entered in accordance with these views.

(2.) INCORPORATION OF WORDS OF LIMITATION BY REFERENCE TO ANOTHER INSTRUMENT.

LEMON *v.* GRAHAM.

131 PENNSYLVANIA STATE, 447. — 1889.

EJECTMENT. Plaintiff was nonsuited below. The facts appear in the opinion.

WILLIAMS, J. — The title to the land in controversy was, in 1866, vested in James Ramsey, under whom both parties claim. In August of that year he made an assignment to his son, Allen Ramsey, which was written on the back of the deed under which he acquired title, and delivered the paper on which the deed and the assignment were written to his son. The assignment was in these words:

“I, James Ramsey, do hereby assign and set over all my right, title, claim, interest, property, and demand whatsoever in and to the within deed unto Allen Ramsey, for value received. Witness my hand and seal this 3d day of August, 1866.

James Ramsey. [Seal.]

“Attest: George Bish.”

Eighteen years later, in 1884, he conveyed the same land by deed to his daughter, Elizabeth Jane Graham. The father was in posses-

sion until his death. Allen Ramsey died before his father. This action was brought by the heirs at law of Allen. The defense alleges that Allen took only a life estate in the land, under the assignment made by his father to him, and that on his death his title was extinguished, the fee having passed to Mrs. Graham under the deed made to her in 1884.

Two questions were raised on the trial, and are now for determination. The first relates to the construction and legal effect of the assignment to Allen Ramsey. The other is over the right of the plaintiffs to show by George Bish, the scrivener by whom the assignment was drawn, and the subscribing witness to its execution, what the parties intended and agreed upon, what they asked him to put in writing, and what he undertook to do for them. The learned judge of the court below held that the assignment conveyed only a life estate, and that evidence offered to show that a fee-simple was intended, and that the failure of the scrivener was by mistake of his own, was incompetent.

We do not doubt the general rule laid down by the learned judge, that the word "heirs," or its equivalent, is necessary in a deed in order to vest a fee-simple in the grantee. The rule is as old as the common law, and, as applicable to a formal deed, is well understood, and constantly applied. It is the invariable practice of professional conveyancers to describe the estate which it is intended to convey, by apt words. If it is a fee, the words of inheritance are introduced. If it is for the life of the grantee or of another, the character and duration of the estate are clearly set forth. Instruments having no apt words of description in them are not often met with, but when encountered are found, like the one before us, to be the work of men who have no professional training, and no knowledge of the principles of conveyancing. They are almost always intended to convey a fee-simple, and fail to do so because of the omission of the necessary technical words, the importance of which was unknown to the scrivener and to the parties. It is for this reason that the courts have relieved against the mistakes so made, when the proofs were sufficient to justify them in so doing, and have applied the general rule only to such cases as came clearly within its operation. Thus, the courts both in England and in this country have held that the word "heirs" was not necessary to pass an absolute estate in fee when there was a gift by will, but that the intent to vest a fee may be gathered from the will as a whole. *Little's App.*, 81 Pa. 190. So it has been held that an executory contract without words of inheritance will pass a fee-simple in equity. *Ogden v. Brown*, 33 Pa. 247. And it was held in the case last cited

that the effect of an informal instrument transferring an interest in real estate depends, not on any particular words or phrases found in it, but on the intention of the parties as collected from the whole instrument. This case was followed in the recent case of *Dreisbach v. Serfass*, 126 Pa. 32.

But the effort to avoid the rigor of the rule where its application is not obligatory began long ago. Where technical words are supplied by reference to another instrument which contains them, the case was recognized as an exception as early as the days of Lord Coke; and this exception was recognized by our own case of *Lytle v. Lytle*, 10 W. 259, and followed. The rule was plainly laid down in the last case cited that a fee simple may be created in Pennsylvania, by deed without words of inheritance, by a reference to another instrument in which such words are found, and it was made clear that such was the rule in England at a very early date. The following examples are from *Shepherd's Touchstone*. A conveyance was made by deed in which the grantor recited that "B. hath enfeoffed him (the grantor), of white acre, to have and to hold to him and his heirs, . . . and that as fully as B. has given white acre to him and his heirs he doth grant the same to C." Here the word "heirs" is supplied in the grant to C. by the reference to the grant from B., and C. takes a fee-simple without the appearance of words of inheritance in the grant to him. Another case is that of a grant of two acres of land "to have and to hold, the one acre to A. and his heirs, and the other acre to B. *in forma predicta*." *Shep. Touch.* 101. Here B. takes a fee-simple by virtue of the reference to the grant to A., in which words of inheritance appear. The reference shows the intent of the grantor, and is held to import the words of inheritance into the grant to B.

In the light of these cases, let us look once more at the assignment before us. We find the assignor held a deed in fee-simple, in the usual form, made in 1862 by another son, John. On the back of this deed the assignment is written. It refers for a description of the estate granted to the terms of the deed upon which it is indorsed, and professes to transfer to the assignee all the right, title, interest, property, claim, and demand of the assignor "in and to the within deed." What was the title of the assignor? That question can only be answered by an examination of the description of it in the body of the deed; but, whatever it was, the assignor undertakes to transfer it to his assignee. Not a part of it; not a life estate carved out of it, but "all the right, title, interest, property, claim, and demand" of the assignor. Nothing was left. He transferred his whole estate, as vested in him by virtue of the deed,

by the reference to its terms in the assignment. He said, in substance and in legal effect, "as fully as the within deed clothes me with the title to the land described in it, so fully and completely do I transfer the same land to my son Allen. He is to take from me the title which I took from my grantor." The technical words that are wanting in the assignment standing by itself, are thus supplied by the reference to "the within deed" for a description of the estate; and the fee-simple which the father took by the deed from John he transfers by his assignment to Allen. This is what was intended; and the scrivener wrought better than he knew in making his reference to "the within deed" for a description of the "right, title, estate, interest, property, claim and demand" of the assignor. If Allen bought a life estate only, it is reasonable to suppose that he would have taken possession; but he left his father in possession, and in the full enjoyment of its proceeds. If the father understood that he parted with a life estate only, and retained the fee, he would naturally keep the deed under which he acquired title; but he indorsed his assignment upon that deed, and delivered it so indorsed, to Allen. We are satisfied, therefore, that the parties intended just what our construction of the assignment shows they did, viz., to convey the fee-simple to Allen. In this view of the case, it becomes unnecessary to consider the other question at any length.

The judgment is reversed, and a *venire facias de novo* awarded.

(3.) IN THE TRANSFER OF A FEE TO A TRUSTEE.

WILCOX *v.* WHEELER.

47 NEW HAMPSHIRE, 488. — 1867.

BILL in equity to restrain defendants from cutting certain water pipes.

BELLOWS, J. — This cause is heard upon bill and answer. The defendants claim under William Simpson, alleging that by his deed to Mr. Britton only an estate for life was granted. The substance of that deed is, that, in consideration of one hundred dollars paid by said Britton, agent for the Proprietors of Orford Bridge, Simpson conveys to him for the use of that corporation, and to his assigns, two parcels of land, one being described as a road four rods wide from the bridge to the main road, and the other apparently for a toll-house; to have and to hold the same to said Britton in trust, as aforesaid, and to his assigns.

By this deed, by force of the statute of uses, the title vested at once in the corporation, as it had full capacity to take; and nothing indicates any purpose that the legal estate should be kept on foot in Mr. Britton. The conveyance was made to him, probably, because conveyances directly to corporations had not then become quite familiar. Had it been conveyed to the corporation directly, then, as a corporation aggregate never dies, it would be a fee-simple without words of succession or inheritance. Had it been a sole corporation, words of succession would have been necessary.

This general doctrine is well settled; 4 Greenl. Crim. Dig. 279; 4 Kent's Com. 7, where it is said that the reason why, in deeds to corporations aggregate, the word heirs or successors is not necessary, is, "because in judgment of law a corporation never dies, and is immortal by perpetual succession." So is Co. Lit. 9, 6.

Such being the law where the grant is directly to a corporation aggregate, it would seem not to be unreasonable to apply the same doctrine to a grant to a trustee for the use of such a corporation, when it is of such a character that the whole title at once vests in the corporation, making it substantially a grant to the corporation.

Upon this point the law is well established, that if there be a conveyance to a trustee, and the nature of the trusts is such as to require a fee, then by necessary implication the trustee will take an estate of inheritance, although there be no words of limitation.

In the case of devises this has long been the law, and even where the purposes of the trust might probably be accomplished without a fee; or, in other words, if by possibility the purposes of the will might not be answered without the trustee had a fee, the will would be so construed. *Shaw v. Weigh*, 2 Str. 798; *Willis v. Lucas*, 1 P. Wms. 472; *Collin's Case*, 6 Co. 16; and *Ackland v. Ackland*, 2 Vern. 687; *Gibson v. Montfort*, 1 Ves. Sen. 485; *Oates v. Cooke*, 3 Burr. 1684. So the intent to give a fee would be inferred from the fact, that, by possibility, a fee might be necessary to effectuate the trusts, and the leaning of the courts was very strong so to construe a devise.

The same rules are applied to grants, and it was so distinctly laid down in *Cleveland v. Hallet*, 6 Cush. 403, by Shaw, C. J., as an exception to the rule requiring the use of the word heirs as well established as the rule itself, viz.: that when a conveyance is in trust, and the trusts are of such nature that they do, or by possibility may, require a legal estate in the trustee beyond that of his own life, then without words of limitation in the conveyance to the trustee, he shall take a fee.

In *Newhall v. Wheeler*, 7 Mass. 189-198, it was held, Parsons,

C. J., that though no words of limitation are used, the estate of the trustee shall be commensurate with that of the *cestui que trust*.

So is *Stearns v. Palmer & al.*, 10 Met. 32, where the grant was in trust for the use of "the inhabitants of the first parish in Springfield, and their heirs, forever, for a burying yard."

So is *Gould & al. v. Lamb & al.*, 11 Met. 84, where the conveyance is to A. B., to have, etc., as he is trustee under an indenture tripartite, which showed the intention to be to give more than a life estate; and so it was held that a fee passed without words of limitation.

So in *Brooks & al. v. Jones*, 11 Met. 191, which was a mortgage to W., treasurer of a corporation, to have and to hold, etc., to him, the said treasurer, and his successors in office, to his and their use and behoof forever, the condition was to pay a sum of money to the treasurer and his successors in office, and it was held that W. took a fee in trust for the corporation, although the word heirs was not used, but the intention was plain, and no stress was put upon the term forever.

The same doctrine is laid down by Chancellor Kent, in *Fisher v. Fields*, 10 Johns. 494, 505. So is *Villiers v. Villiers*, 2 Atk. 72.

In *Welch v. Allen & al.*, 21 Wend. 147, it is held that where lands are granted to a trustee without words of perpetuity, he will, by implication of law, take a fee, if such estate be necessary to fulfil the objects of the trust.

So the doctrine of *Cleveland v. Hallett*, before cited, is confirmed in *Attorney-General v. Prop. Federal St. Meeting House*, 3 Gray, 1.

The conveyance to Glen, Hall, Shaw & al., for themselves, as a committee chosen and appointed by the congregation of the Presbyterian Meeting House in Long Lane, etc., to have and to hold the land in their said capacity, and to their successors forever, but to and for the only proper use, and benefit, and behoof of the said congregation, forever, and for no other use; and it was held that the trustees took a fee upon the principle before mentioned, and no stress is put on the word forever, and the corporation was not incorporated.

So in *King v. Parker & al.*, 9 Cush. 78, where the grant was to B., "in trust to and for the use of the Free Masons' Lodge in Boston, known by the name, etc., to their only proper use, benefit and behoof forever," it was held that this proved the fee.

The question then is, whether this conveyance to Mr. Britton, agent of the bridge corporation, to be held for the corporation, passed the fee without words of limitation; that is, whether the intention to give the corporation the fee can be gathered from the

grant Had it been directly to the corporation, being a corporation aggregate, the fee would have passed; and in all such cases where the conveyance is through a trustee to hold for the use of such corporation, the intention to make it perpetual is to be inferred, and so are the Massachusetts cases already cited, we think.

Here the grant was of two pieces of land, for a road and toll-house, both essential to the use of the bridge, as much so as the land upon which stands the Federal street church; and it is impossible to suppose that it was intended to grant an estate for the life of Mr. Britton only, which might have ended in one year. Such being the case, it must be considered that the fee passed, and at once vested in the corporation.

In respect to some of the Massachusetts authorities, which hold that where the purposes of the trust cannot be answered without a greater estate than for life, then by implication a fee will pass, it is urged by defendant's counsel that the intention to give a greater estate is manifested by the use of the term forever, which in this case is wanting.

It is obvious, however, that this term is not one of limitation and only bears upon the question of intention, and if that is ascertained by the nature of the grant, or the language used, whatever it may be, the law will give effect to that intention, and in this case we think the intention to grant a fee is very clearly to be inferred from the nature of the grant itself. * * *

Perpetual injunction decreed.¹

(4.) IN THE TRANSFER OF AN EQUITABLE INTEREST.

FISHER *v.* FIELDS.

10 JOHNSON (N. Y.), 495. — 1812.

BILL in equity to restrain Fields from prosecuting an action at law in ejectment and to compel him to convey to Fisher the lands in dispute. The bill was dismissed by the court below. Plaintiff appeals. The further facts appear in the opinion.

KENT, Ch. J. — The appellants claim title to lot No. fifty-seven, in Aurelius, under a deed from Benjamin Griffen, the soldier who drew the lot, and in whose name the patent issued. This deed was made on the 27th of March, 1784, and was drawn on the back of the

¹ See *Cole v. Lake Company*, 54 N. H. 242 (1874), reported *supra*, p. 489, which does not cite or discuss this case. — ED.

original discharge, and though no consideration was expressed in the deed, yet the appellants have averred and proved a valuable consideration given. The respondent claims under a subsequent conveyance from the same soldier; and the sole question is whether the appellants are entitled, under the first deed to the relief prayed for by their bill.

It is not pretended that the respondent is a *bona fide* purchaser without notice. It is in proof that he purchased with a knowledge of the assignment to Birch, under whom the appellants claim; but the defense is that the soldier's deed to Birch was not sufficient, in law or equity, to entitle him to the land, or, at least, to any greater interest than a life estate.

{The Onondaga commissioners appear to have thought otherwise; for they awarded that the equitable title was in the appellants, and that the respondent held in trust for them.} After a careful consideration of the case I am of the same opinion.

When the soldier assigned over his right to Birch, in 1784, he had no legal title. He had only an equitable claim upon the State, founded upon the concurrent resolution of the Legislature of March, 1783. It was not requisite, therefore, that he should make use of the same formal and technical conveyance that would have been proper, if he was conveying an estate in fee. It was only an assignment of an equitable interest, and it was sufficient if he used words that denoted clearly and explicitly his intention. The deed here was on the back of his discharge, and it is declared that Birch was entitled to all the lands that he was entitled to, either from the state or continent, for his services as a soldier. This was a full declaration of trust. No person could possibly mistake its meaning; and there is no just pretense that it was not fairly procured, and for a price that was, at that day, deemed an adequate consideration. It is probable that a large portion of the titles to the military lands were originally assigned in the same brief manner. It was an authority to the assignee to receive the patent to his own use; and if the law had not afterwards directed the letters patent to issue, in all cases, in the name of the soldier, this authority would no doubt have been deemed sufficient to have procured the patent in the name of Birch, or his assignee. The issuing of the patent in the name of the soldier did not invalidate the equitable claim of Birch; for the soldier took it as trustee to the party to whom the equitable interest had been transferred.

The act of the 6th of April, 1790, expressly provided that "all grants, bargains, sales, devises and other dispositions" of the land made by the soldier, before the issuing of the patent, should

be deemed valid. It also declared that the patent should have a retrospective effect, and that the land should be deemed to have vested in the patentee and his heirs, from the 27th of March, 1783. The act of the 5th of April, 1803, went still further, and declared that the lands should be deemed to have been vested in the soldier at the time of his death, though he died before the 27th of March, 1783. These statutes were made not to divest, but to confirm and enlarge the interest which the soldier may have passed before the date of the patent. The statutes were made for the benefit of purchasers, and to render their titles valid in a court of law, equally as if the soldier had been seized in fee at the time of the conveyance. And courts of law, when any such conveyances are brought before them, are to give them the same operation as if they had been executed by the party seized; and such has been the decision of the Supreme Court.

But these statutes never meant to weaken or defeat any equitable trust which may have been created by any deed competent to raise such a trust, though incompetent to convey the fee at law. The Court of Chancery has exclusive cognizance of cases of trust, and is charged with the duty of seeing them fulfilled, and in doing so it acts in furtherance of the liberal provisions and intent of the statutes. Suppose that Griffen, instead of the deed in question, had executed a bond to Birch, and bound himself, by the consideration which it is proved he received, to convey that interest to Birch, or such other person as Birch should appoint, would not equity compel him to execute that trust? Most undoubtedly; and so it was decided in a case which I shall presently mention.

There never was a greater mistake, as I apprehend, than the supposition that this transfer of the soldier's right to Birch is to be tested by the strict technical rules of a conveyance of land at common law, and that Birch did not take the whole interest of the soldier, because the word heirs was not inserted in the assignment.

If Griffen, at the time, had been seized in fee of the land, as an estate at law, the argument would have had weight. But surely that formality was not necessary to pass a mere undefined claim upon the government, for Griffen had nothing else to convey but an interest in trust. That would be contrary to all the rules relative to the creation or assignment of a trust. The act of 28th February, 1789, on this very subject, is sufficient to justify a contrary conclusion; for that act directs the commissioners of the land office to require from each soldier entitled to bounty lands, an assignment of his claim to lands under any act of congress, to the surveyor-general, for the use of the people of this State. There is no particular

form of an assignment given, nor anything intimated about a conveyance with the usual and apt words of inheritance. No doubt such an assignment, as the one in this case, would have been deemed sufficient to vest this State with the interest in the soldier's claim upon congress, and I am persuaded, that if the facts were investigated, no more formal assignments were taken.

It is a well-settled principal that no particular form of words is requisite to create a trust. The intent is what the courts look to. 2 Fonb. 36, note; 3 Ves. Jr. 9. A trustee or *cestui que trust* will take a fee without the word heirs, when a less estate will not be sufficient to satisfy the purposes of the trust. This has been frequently ruled in chancery, and the Court of K. B., during the time of Lord Mansfield, made the same decision at law. 2 Atk. 72, 578; 1 Ves. 491; Amb. 93; 3 Burr. 1684. In *Moorecroft v. Dowding*, 2 P. Wms. 314, A. purchased an estate in the name of a third person, who gave a bond to convey it to such person and uses as A. should appoint; and the lord chancellor held that the third person was a trustee to A., who had, in equity, a specific right to the land, and he was decreed to convey. Here, a bond was held sufficient to create a trust in fee. But what puts this point beyond all doubt, is the doctrine of the common law on the subject of uses and trusts. Before the statute of uses, if a man had bargained and sold his land for a valuable consideration without inserting the word heirs, the Court of Chancery would have decreed an execution of the use in fee, because the use was merely in trust and confidence, and because this was according to the conscience and intent of the parties. But, after the statute of 27 Hen. VIII., as the uses were transferred and made a legal estate, a different rule took place. 1 Co. 87 b., 100 b. A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formally applied to uses. And, in exercising its jurisdiction over executory trusts, the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party. This principle seems to be well established, and it has been ably vindicated by Fonblanque. Vol. 1, 396 note, 400 note; vol. 2, 18.

To apply, then, this doctrine to the present case; the soldier, after the assignment of his claim upon the State to Birch, and after the issuing of the patent in his name, became seized in trust for Birch, or those to whom Birch had assigned his interest; and instead of dismissing the appellant's bill, the Court of Chancery ought to have decreed an adequate legal conveyance to be made by the defendant to the appellants. The defendant purchased of

Griffen knowing of the assignment, and, therefore, he was a purchaser chargeable with the trust, and as much bound to execute the trust as the soldier himself. The clearest justice, and clearest principles of a court of equity are in favor of such a decree.

A good deal was said, upon the argument about the statute of frauds, but it appears to me that the objection is wholly inapplicable. This is not a case of an agreement about the sale of lands; it is a complete assignment by deed of an equitable claim; and the 12th section of the act (Sess. 10, c. 44), says, that all declarations or creations of trust, or confidence, of any lands, shall be proved by some writing, signed by the party enabled to declare the trust.

Judgment of reversal.

(5.) IN THE TRANSFER OF A FEE TO A CORPORATION.

ALDIS, J. IN CONGREGATIONAL SOCIETY OF HALIFAX *v.*
STARK.

34 VERMONT, 243, 249. — 1861.

IT IS true as claimed by the counsel for the plaintiffs, that a deed to a corporation aggregate will convey a fee simple though the word "successor" is not used in the deed. As such a corporation never dies, it is immaterial whether such a deed is construed as granting to them an estate for life or a fee, for in their case the one is the same as the other. Hence the deed of McCrillis to the Halifax society vested in them in fee simple the lands conveyed.

It is further claimed as a necessary consequence that the clause in the habendum of the deed is repugnant to the premises, and therefore void. The habendum is in these words: "To have and to hold the premises during the time the said society or their heirs shall meet on said land for public worship, or have a meeting-house standing on said land and appropriate the use of the same to the congregational or Presbyterian public worship."

It is the proper office of the habendum to determine what estate or interest is granted by the deed, and to limit, qualify or explain the words used in the granting part of the deed. Where the estate or interest is set forth in the premises the habendum cannot by the use of words repugnant to such estate defeat it. Where, therefore, the habendum is contradictory to the premises, the habendum is void, and the words in the premises stand. Co. Litt. 21; 4 Cruise's Dig., § 76, p. 273; *Goodtitle v. Gibbs*, 5 B. and C. 709; 2 Bla. Com. 298; *Timmis v. Steele*, 4 Ad. and Ell. 664 (45 E. C. L. 664).

But where the habendum is not so contradictory to the premises, but only limits, explains or qualifies the words there used, it performs its proper office. It may lessen, enlarge, limit and qualify the use of the land conveyed so long as it does not defeat the estate granted.

Here the deed in the premises does not describe the estate or interest conveyed, but only the land by its name and boundaries. A deed to a corporation would describe them in the same way whatever was the estate conveyed, whether in fee or for life. Hence in such a deed the description of the estate or interest conveyed would naturally be, and ought to be, in the habendum. A deed to a natural person and his heirs necessarily causes a fee and not an estate for life — not so with a corporation. Hence this deed to them in the premises describes the land and not the estate or duration of the interest conveyed. The word successors is not used, still without it they may take a fee, and would if there were no limitation or description of a less estate in the following parts of the deed. But in a deed to a natural person the word "heirs" would carry a fee, and its absence would show a less estate for life. The habendum proceeds to explain the use which the grantee is to have of the land, and limit its extent and duration. It may be a fee simple, the use may last forever if the grantees see fit to occupy it for the purpose for which it is conveyed. There is no repugnancy between the premises and the habendum.

We do not deem it very material to decide whether the clause in the habendum shall be held to be a condition or a limitation. The clause in question well illustrates what is said in Sheppard's Touchstone, p. 121, that, "conditions at all times have in their drawing so much affinity with limitations that it is hard to discern and distinguish them." But the legal effect of this language clearly is, that when the grantees cease to meet on said land for public worship, and fail to have a meeting-house on the land and to appropriate its use to Congregational or Presbyterian public worship, then their title ceases, and the grantor or his heirs may re-enter and hold the land.

We think, therefore, that the county court was right in holding that the grantor and his heirs had a reversionary interest in the land, and that when the grantees ceased to comply with the terms and conditions upon which the land was granted to them and to use it as specified in the deed, then their right to the land expired, and the reversionary interest of the grantees came into operation as a present and absolute estate in fee.

WILCOX *v.* WHEELER.

47 NEW HAMPSHIRE, 488. — 1867.

*[Reported herein at p. 502.]*NICOLL *v.* THE NEW YORK AND ERIE RAILROAD CO.

12 NEW YORK, 121. — 1854.

*[Reported herein at p. 527.]*¹

(6.) IN PARTITION DEEDS BETWEEN JOINT TENANTS AND TENANTS IN COMMON.

SCOTT, J., IN RECTOR *v.* WAUGH.

17 MISSOURI, 13. — 1852.

A NUMBER of proprietors of a town, supposing that they have a title to the land on which the town is laid off, make an equal partition of the lots amongst themselves, and mutually convey with warranty. The entire title to the land which is the subject of partition afterwards fails. * * *

After the failure of the first title, one or more of the proprietors acquire a new and distinct title to the land on which the town was laid off, and a former proprietor, who has neither contributed nor offered to contribute anything towards the acquisition of the new title, lays claim to all the lots conveyed to him by the deed of partition. * * *

In the deed on which this action is founded, there are no words of perpetuity used in conveying the estate to Stephen Rector. According to the law in force at that day, the words employed only conveyed a life estate, and the duration of the warranty is only co-extensive with the estate to which it was annexed. The warranty, then, was extinct on the death of Stephen Rector. In 4 Kent, 5, it is said, the word "heirs" is necessary at common law to create, by deed, an estate in fee simple. Further on, he says, that this rule does not apply to a partition between joint tenants, coparceners and tenants in common, nor to releases of right to land, by way of discharging or passing the right, by one joint tenant or coparcener to another. In taking a distinct interest in this separate parcel of the land, the releasee takes the like estate in quantity,

¹ Read in this connection pp. 527-529 only. — Ed.

which he had before in common. This is a question in which the matter of intent has nothing to do. The law has appropriated a certain word, by which an estate in fee simple can only be created by deed. If that word is omitted, however clear and manifest the intent may be, an estate in fee will not pass. It is conceded that, as between joint tenants and coparceners, a fee may pass by a release without the word heirs, but it is apprehended that one tenant in common cannot release to another. A deed intended as a release between tenants in common, although it cannot have that effect, may yet operate as some other kind of conveyance; but to make it effectual as such to pass a fee, proper words of limitations must be employed. Cruise says, one tenant in common cannot release to his companion, because they have distinct freeholds, but they must pass their estates by feoffment. Vol. 4, tit. 32, ch. 6; § 25. So he says, if one coparcener or joint tenant releases all his right to another, it will pass a fee without the word heirs. Ib., ch. 21, § 7. Lomax says that partition between tenants in common who having several and distinct freeholds, might have conveyed to each other by feoffment, might, at common law, have been effected by livery of seisin. The adjustment between them in severalty of the estate, derived to them in common by distinct titles, could only be effectuated by a conveyance, accompanied by that notoriety indispensable to all conveyances at common law. 2 Vol. 96. So, again, one tenant in common cannot release to his companion, because they have distinct freeholds; but they must pass their estates by feoffment. Ib. 98. Preston on Abstracts says, when several persons are tenants in common, the title to each share is to be carried on precisely in the same manner as if the title to that share was a title to a distinct farm. 3 Vol. 58. Hilliard says, joint tenants and coparceners may release to each other. In a release of this kind, a fee will pass without words of limitation. The releasee is deemed in law to hold, not by the release, but by the original limitation to all the parties. The release is not an alienation, but a mere discharge of the claims of one to the other. Hence, a fee arises out of the original conveyance. Tenants in common, having distinct freeholds, cannot release to each other. 2 Vol. 300, 301. Bacon says, if there be two joint tenants, and one release to the other, this passeth a fee without the word "heirs," because it refers to the whole fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common cannot release to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer, otherwise than as persons who are sole

seised. 4 Vol. 455. The books may be traced to the earliest periods, and it will be found, that no author has maintained that one tenant in common can convey to another, in any other way or by a conveyance whose operation is different from those used by feoffers, between whom no such relationship exists. It follows from this that, however conveyances between tenants in common may operate, and they cannot operate by way of release, they must contain words of perpetuity to pass a fee.

(7.) EFFECT IF THE WORDS OF INHERITANCE BE IN THE COVENANTS ONLY.

ADAMS *v.* ROSS.

30 NEW JERSEY LAW, 505. — 1860.

[*Reported herein at p. 483.*]

b. Inter vivos — under modern statutes.

(1) Some of these statutes declare that the word "heirs" shall not be necessary in order to create or to convey a fee, but leave the estate created in the particular case to be determined by construction without any guiding rule of presumption.

(2) Other statutes provide that a grant of real property shall pass all the estate or interest of the grantor unless the intent to pass a less estate or interest shall appear by the express terms of the grant or by necessary implication therefrom.¹

c. By devise under the ancient "statute of wills."

JACKSON *EX DEM.* WELLS *v.* WELLS.

9 JOHNSON (N. Y.), 222. — 1812.

EJECTMENT. A verdict was taken for plaintiff, subject to the opinion of this court.

Per Curiam. — Upon this will it is clear, upon the established principles of construction, that the defendant's father took only an estate for life. The words of the will are, "I give and bequeath unto my eldest son, Daniel Wells, all that part of a lot of land that I now live on [*northward of the north road and also three lots on the broad meadow*]."

¹ N. Y. R. P. L. §§ 205, 210. — ED.

Here are no words of limitation or perpetuity, though it appears, from other parts of the will, that the testator understood their force and effect, and knew how to use them; nor is there a single word or expression, which denotes anything more than a description of the land devised. There is nothing which alludes to the quantity of interest which the testator had in the land. It is a mere designation of its local situation, and to give this devise the effect of a fee would upset a volume of adjudged cases, and throw the law of devises into inextricable confusion and uncertainty. The cases of *Denn v. Gaskin*, Cowp. 657; *Right v. Sidebotham*, Doug. 759; *Doe v. Wright*, 8 Term Rep. 64, and *Doe v. Child and Wife*, 4 Bos. & Pull. 335, may be cited out of an almost endless series of authorities, as very much in point, and perfectly decisive.

The next question is, whether the remainder of the testator's interest in the premises, after the termination of the life estate, was not devised to the lessor of the plaintiff. He gives to the lessor, in fee, "all the rest of his estate, both movable and immovable, of every kind not disposed of," and then charges it with some debts and legacies, and in default of his paying the same, the testator directs that so much of the estate so devised to him, should be sold, as should be requisite to pay the debts and legacies. This point is as clear as the other. All the rest of his estate, not disposed of, is a general, sweeping clause, that must most obviously embrace the interest in question. After this clause, there could be no dying intestate as to any part of the estate. The authority to the executors to sell any part of his estate on nonpayment of the debts and legacies, cannot be considered as a restraint or qualification of the residuary clause, so as to detach the interest in question from it; for an interest in remainder is capable of being sold no less than a vested interest.

Judgment for plaintiff.

MORRISON v. SEMPLE.

6 BINNEY (PA.), 94. — 1813.

EJECTMENT brought by the guardian of Edward and Sarah Semple against Morrison and others.

One Samuel Semple left a last will and testament by which he gave all his "real and personal property" to Steele Semple, under whom defendants below (Morrison and others) claim. Plaintiffs below claim the land in question as heirs of Samuel Semple, asserting that

Steele Semple (who is now dead) took only a life estate therein. The judgment below was for the Semples. Morrison appeals.

TILGHMAN, C. J. — Judgment was entered in this case, in the Court of Common Pleas, without argument and by consent, in order that it might be brought up for the opinion of this court. The question is, whether an estate for life or in fee passed to Steele Semple by the will of Samuel Semple. The will is very short and in the following terms: (Here the Chief Justice read the will.) The counsel for the defendant in error placed this case in as strong a light as it would bear, but I have never entertained a doubt on the subject. In whatever point of view it is considered, I perceive a plain intention with apt words to pass a fee simple. [Here is a testator with an only child (a daughter), who had a husband and two children. He makes no mention either of child or grandchild, but speaking of his son-in-law in the most affectionate manner, he gives him the whole of his real and personal property, and appoints him his sole executor. What can be concluded from this but that the testator placing unbounded confidence in the husband intended to put every thing in his power. It is inconceivable that with any other intent, he should have observed a profound silence with respect to every other human being. It is a singular instance of confidence, but does not prove that the testator had no affection for his daughter or her issue. It proves that he was convinced of the honor and integrity of his son-in-law, and to an honorable and upright mind no obligation could be stronger than that which this will imposed. What is its language? "I place every thing that is dear to me in your hands. The person and the fortune of my child are confided to you. I know that you will prove worthy of the trust." But it is said that intention alone is not sufficient. The heir is not to be disinherited without words sufficient to pass the estate to some other person. It is true that we are not permitted to guess at the intention; it must be ascertained from the words of the will. But if it can be so ascertained it shall be carried into effect. No technical words are necessary to pass a fee simple. Any expressions which show an intent to give an absolute estate are sufficient. A devise of land to one forever, or "to dispose of at his will and pleasure," is a fee; because there is a manifest intent to give a fee. So a devise of one's estate, or of all one's right or interest in land passes a fee for the same reason. The rule is this: Words which only describe the object devised give no more than an estate for life, but words which comprehend the *quantum* of the estate, pass the fee. And this rule is not founded on any artificial principle, but on the plain ground

of common sense and fair construction. When a man gives all his estate, it is as much as to say, all the interest that he has in the subject devised. In the present instance the testator designates no particular object, but gives in general, all his real and personal property. I can conceive no expressions more comprehensive. The giving of the real and personal property by the same words, shows an intent to give the same interest in both, that is to say, an absolute interest, for no man ever doubted that those expressions give an absolute interest in personal property. Property signifies the right or interest which one has in land or chattels. In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in dictionaries, and so understood by the best authors. The possession of land may be in one man, the property in another. There is a right of possession, and a right of property. Every scrivener who draws a conveyance, mentions not only the land itself, but also "the right, title, interest and property of the grantor of, in, and to the same." In common conversation we say that such a house or piece of land is the property of such a person. When, therefore, a man devises all his real property, he devises all the right and interest which he has in any lands or real estate. If he has a right in fee simple a fee passes, otherwise the will is not complied with; for if the devisee takes but an estate for life, he does not take all but only part of the devisor's property. Many cases were cited on the argument. I think it unnecessary to take particular notice of any of them. [It is a principle undeniable, that when the words of a will indicate an intention to pass the whole interest of the devisor, the devisee shall take a fee.] Being clearly of opinion that such an intention is indicated by the expressions of this will, it follows that Steele Semple took an estate in fee in all the real estate of Samuel Semple. The judgment of the Court of Common Pleas must, therefore, be reversed, and judgment entered for the plaintiffs in error.

WHEATON *v.* ANDRESS.

23 WENDELL (N. Y.), 452. — 1840.

EJECTMENT by the heirs-at-law of Prudence Taplin to recover of defendant certain lands devised to her by the will of her husband. Defendants allege that Prudence took only a life estate under said will. Verdict below for plaintiffs, subject to the opinion of this court.

BY THE COURT, COWEN, J. — This ejectment seems to have been brought on the authority of *Loveacres ex dem. Mudge v. Blight*,

Cowp. 352, decided in 1775. The introductory and devising clauses in that case cannot, as the counsel for both parties in the principal case seem to agree, be distinguished in their import from the words used in the will before us; and they were held to carry a fee. But it is very plain, as the counsel for the defendant contends, that this was not in virtue of their own proper force. They were helped by various other parts of the will; among others, there was a charge on the land incompatible with the idea of a mere estate for life. That is mentioned and much relied on by Lord Mansfield; and, as is well known to the profession, has often been considered of itself decisive in enlarging the estate to a fee. The will began, "as touching my worldly estate," etc. Then, after some intermediate provisions, "I give unto John and Robert Mudge all and singular my lands and messuages, by them freely to be possessed and enjoyed alike." It is true, Lord Mansfield relied on the introductory words, as manifesting an intent in the testator to dispose of all his worldly interest; and with that he joined the words freely to be possessed, etc. And he agreed that, independent of these and other circumstances which he took up and connected together from the whole will, there were no words of limitation, such as heirs, or what were tantamount. Introductory words of much stronger import have always been denied as sufficient of themselves, though they may help other words. *Vid.* Ram. on Wills, 65, 66. And no case holds that simply connected with the words *freely to be enjoyed, etc.*, the whole will carry a fee. To do this, where there are no words of express limitation, all the cases agree that the will should contain some provision in respect to the land necessarily inconsistent with the estate being for life. *Freely to be enjoyed, etc.*, may come much short of this.

I have thus, in some measure, followed the counsel for the defendant, who has much elaborated the case in Cowper. I entirely agree with him, that it will be found on due consideration, to have been so mixed and compounded with various circumstances in the will, as by no means to form a reliable guide in deciding the case at bar. I do not find, however, that the force of the words in question were at all reconsidered, as he supposes, in *Denn ex dem. Gaskin v. Gaskin*, Cowp. 657, or in *Wright ex dem. Shaw v. Russell*, id. 661, the case stated by Ashurst, J. from MSS.; though I really think either of them stronger for a fee than the one at bar; and the general reasoning of the court is quite in point against seizing on equivocal words, in order to give the will such an effect. It is remarkable, that in each of the latter cases a disinheriting legacy was given to the heir at law; a circumstance which I should suppose of much more decisive weight than the doubtful provision, *freely to be*

enjoyed, etc. The wills also contained the usual general clause, manifesting the testator's intent to dispose of all his estate. Yet they were held to carry but life estates, and the heir at law recovered.

Thus stopping with Lord Mansfield's decisions alone, one would suppose it impossible to maintain the plaintiff's pretensions upon the will before us. But I am surprised that the defendant's counsel should have overlooked the case of *Goodright ex dem. Drewry v. Barron*, 11 East, 220, decided A. D. 1809, in which his own views were adopted by the King's Bench, and which I cannot distinguish from the case before us. There the will was thus: "As touching such worldly estate wherewith it has pleased God to bless me in this life, I give, devise and dispose of the same in manner following: "1. A cottage to T. D. and his heirs." Then: "Also I give and bequeath to my wife Elizabeth, whom I likewise make my sole executrix, all and singular my lands, messuages and tenements by her freely to be possessed and enjoyed." The question was whether the wife took a fee; and held not. The case was ably argued; and Lord Ellenborough, C. J., Le Blanc, J., and Bayley, J., who spoke to the question *seriatim*, they being the only judges who heard the argument, all concurred. [The case in Cowper, 352, was fully considered; and they agreed, that the introductory words, and the words freely, etc., as used in East, would not of themselves carry a fee, because they were not necessarily incompatible with an estate for life. They agreed that the case in Cowper, 352, must have gone, not on these alone, but only as considered in connection with various other explanatory circumstances, such as incumbrances imposed, etc. Only one of the learned judges, Le Blanc, J., adverted to the use of the word heirs in the devise to T. D. as indicating that the testator understood the value of that word. Lord Ellenborough and Bayley, J., took up the matter on the neat point as presented in the principal case. The former agreed that the introductory words might be material; but alone they made nothing. "They were not sufficient of themselves to carry a fee, but *juncta juvant*." He said that, in the absence of express words to limit the estate in fee, there must be some words from which an intention to pass the fee would be necessarily implied. Bayley, J., taking up this rule, said "the only words on which any doubt could arise are 'freely to be possessed and enjoyed;' but they may mean freely during her life; they may mean free from all charges; free from impeachment of waste; they may indeed also mean freely for all purposes against the heir; but as it is not certain that the testator used them in this latter sense, we cannot give them so extended a meaning against the heir."

The reasoning of the counsel for the plaintiffs in the case at bar is

this: First, the testator indicated his general intention thus: "As to all my worldly interest, all my property, all my estate, I dispose of the same," etc. Then, says the counsel, he in fact gives the same; and the counsel relies on these two words in the introductory clause, to bring it down, and connect it with the devise to the testator's wife. But precisely the same words holding the same relation, presented themselves in *Goodright v. Barron*; yet held they were entirely inefficient, for the purpose now claimed. "The word estate," said Lord Ellenborough, "used in the introductory clause, is completely disjoined from the devise in question, and cannot be brought down to join in with the latter clause, without doing violence to the words." I will only add, it is impossible to distinguish the case at bar from the principle of that to which he was speaking, and scarcely from the very words.

The adjudication, we think, accords with the sound rule of construction.

There must be judgment for the defendant.

d. By devise under modern statutes.

(1) All the States except Connecticut and Florida have shifted the presumption by statutory enactment.¹

e. The rule in Shelley's Case.

OLDS, J, IN *TANEY v. FAHNLEY*.

126 INDIANA, 88. — 1890.

THAT the rule in *Shelley's Case* is recognized as law, and a rule of property in this State is too well settled to admit of controversy. *Andrews v. Spurlin*, 35 Ind. 262; *Siceloff v. Redman*, 26 Ind. 251; *Small v. Howland*, 14 Ind. 592; *Hull v. Beals*, 23 Ind. 25.

In *Doe v. Jackson*, 5 Ind. 283, the rule is stated as follows: "Where a freehold is limited to one for life, and by the same instrument, the inheritance is limited, either mediately or immediately, to heirs or heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail; and the words 'heirs' or 'heirs of the body,' are words of limitation, and not of purchase."

In the case of *Hochstedler v. Hochstedler*, 108 Ind. 506, in construing a will, this court says: "But the word 'heirs,' as Mr. Preston says, 'is a powerful one,' and it must be given its legal force and

¹ See N. Y. R. P. L. § 210. The common law rule is said still to prevail in the District of Columbia. Dembitz on Land Titles, vol. 1, p. 99. — ED.

effect, unless the words of the will clearly assign it a different signification." Again in the same case, it is said: "When an interest or estate is given in one clause of a will in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, not by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate." "

In the case of *Shimer v. Mann*, 99 Ind. 190, this court says: "The word 'heirs' written in a deed or will is one of great power, and its force is not impaired by the mere use of negative or restraining words. Fearné expresses this doctrine in very strong words, for he declares that 'the most positive direction, will not defeat the operation of the rule in *Shelley's Case*.'" Continuing, the court further say: "It may be that this statement of the law is somewhat too strong under the doctrine of later cases, but certainly the law is that mere negative words cannot restrain or impair the force of the word 'heirs.'" "

2. THE DIFFERENT KINDS OF FEES.

a. *The fee-farm or socage-tenure fee.*

INGERSOLL v. SARGEANT.

1 WHARTON (PA.), 336. — 1836.

[*Reported herein at p. 86.*]

VAN RENSSELAER v. HAYS.

19 NEW YORK, 68. — 1859.

[*Reported herein at p. 81.*]

¹ See index under *Shelley's Case*. The rule in *Shelley's Case*, originally a "rule of law" and property, has become by statute, in some States a mere rule of construction or presumption. In some of the States it has been abolished leaving no rule of construction in those cases other than the general one that the intention of the grantor or testator is to be sought as expressed in the instrument. There are several other statutory modifications of the rule for which see Jones' Law of Real Property in Conveyancing, §§ 601-610. See also the American note, p. 407, of Hutchins' Williams on Real Property. For the New York rule see § 44 N. Y. R. P. L. — ED.

b. The modern fee simple absolute.¹

c. Qualified or defeasible fees.

(1.) DETERMINABLE FEES; FEES UPON [SPECIAL OR COLLATERAL] LIMITATION.

LEONARD *v.* BURR.

18 NEW YORK, 96. — 1858.

EJECTMENT. Plaintiff Susan Leonard is the mother and only heir-at-law of Sidney S. Mills. Mills by his last will and testament devised to Benjamin Bailey, "the use of three and one-half acres, lying east of the road opposite the homestead, and being a part of the same, until Gloversville shall be incorporated as a village, and then to the trustees of said village to be by them disposed of for the purpose of establishing a village library, provided an amount of money equal in value shall be raised and invested by said trustees in the purchase of books for said library."

After the death of Mills, Bailey conveyed the premises in question to defendant. The answer alleges that the village has never been incorporated. The court excluded evidence offered by plaintiff to prove the incorporation of the village, and held as matter of law that the devise to Bailey was absolute and in fee simple. Plaintiff excepted to these rulings. Judgment for defendant. Plaintiff appeals.

STRONG, J. — The devise to Bailey is, by the terms of it, "until Gloversville shall be incorporated as a village." These words are part of the devise itself. The use of the land, which imports the land, is given to him until the happening of that event. The event was contingent when the will was made, and at the death of the testator. Had the will stopped here, in respect to a disposition of this land, no one would doubt that the estate of Bailey would have been limited in duration to the contingency mentioned. He would have taken a base or qualified fee; an estate which might have continued forever, but which would have been liable to determination by the occurring of the contingency. The qualification to the devise would have created what is termed in the books a collateral limitation, making the estate determinable upon an event "collateral to the time of its continuance." 4 Kent's Com. 129; Fearn, ed. of 1826, 12 to 15, and notes. Among the instances of collateral limitations are, to a man and his heirs, tenants of the manor of Dale; or

¹ Many illustrations of the nature and qualities of such estates appear herein. For definition see N. Y. R. P. L. § 21. — Ed.

to a woman during widowhood; or to C. till the return of B. from Rome; or until B. shall have paid him twenty pounds. 4 Kent, 129; 1 Shep. Touch. 125; 2 Crabb's Law of Real Prop. § 2135; 2 Bl. Com. 155; Fearn, 12, 13, and notes. In respect to such limitations, the rule is, that "the estate will determine as soon as the event arises, and it never can be revived." 4 Kent, 129, and cases cited; Lewis on Perpet. 657; Crabb's Real Prop. § 2135.

I am unable to see how the devise to Bailey, by the words of the will giving him the use of the land until the event above specified, is affected, as to the duration of the estate, by any other part of the will. The devise over, in the same clause of the will — when Gloversville shall be incorporated — to the trustees of said village, to be disposed of for the purpose and with the proviso therein stated, is a further disposition of the land, to take effect upon the termination of the estate of Bailey. It was not intended thereby to abridge Bailey's interest, but to give the land to others when his interest had ceased. The language of the devise over is "and then," obviously upon the incorporation of the village, "to the trustees." The incorporation is fixed as the limit of the prior estate and the period of commencement of the subsequent one.

Whether, therefore, the latter can be upheld, or is invalid for any cause, can make no difference with the former estate, which had come to its appointed end by an event wholly independent of the operation or failure of that attempted to be created by the will to succeed it.

If the devise of the first estate had been in fee, with a proviso, that, upon the contingency expressed in the will, the trustees should have the land, the case would be very different. The first estate would then be determined only by the second taking effect. That would be according to the language and spirit of the limitation. The limitation, in such a case, would be what is denominated a conditional limitation. There would be an estate in fee, determinable, during the regular period of its continuance, by another estate taking effect in an event provided for. And if the trustees could not take the land, the estate in fee would continue, as if no provision for another estate, in defeasance of it, had been made. 4 Kent, 127; Lewis on Perpet. 531, 535, 657, 658.

It was doubtless the intention of the testator to dispose absolutely of the entire interest in the land, but he intended to give the land to Bailey until a particular event, and then to the trustees. Assuming the devise to the trustees to be void, his intent, as to that, must fail; but there is no ground for claiming that, in that case, he intended Bailey's estate should continue beyond the limit prescribed

in the devise to him. The event was not foreseen, and consequently no provision was made for it. The court cannot supply what probably the testator would have done, if he had known the law when he framed the will. *Pickering v. Langdon*, 22 Maine, 428, 429; *Chapman v. Brown*, 3 Burr, 1634; *Doo v. Brabant*, 4 Durn. & East, 706.

Several cases arising upon the Eden will are referred to and relied upon in favor of the defendant. *Anderson v. Jackson*, 16 John. 382; *Lion v. Burtiss*, 20 John. 483; *Wilkes v. Lion*, 2 Cow. 333; *Waldron v. Gianini*, 6 Hill, 601. By that will certain lands were devised to each of two sons of the testator in fee. It was then directed that if either should die without issue, his share should go to the survivor; and in case of both their deaths without issue, the testator's brother and sister should have all the property. It was held that the limitation over to the surviving son was valid as an executory devise, and, having taken effect in his favor, the Supreme Court held that he became seized of the land devised to the deceased son, in fee tail with a remainder expectant in favor of the brother and sister, which estate tail the statute converted into a fee simple absolute. In the Court of Errors the devise to the brother and sister was held void, the Chancellor concurring with the Supreme Court as to the ground of invalidity; but one of the senators placed his opinion on the ground that the latter devise was originally limited upon too remote a contingency—an indefinite failure of issue of the previous devisees. No division of the court was taken as to the ground. There is nothing here to conflict with the views above presented, or which can aid the defense.

Some other cases are cited by the defendant's counsel. In *Jackson v. Brown*, 13 Wend. 437, the testator devised lands to his son, S. B., for life, with remainder to the first son of S. B. for life, with remainder to the first and every other son and sons of the eldest son of his son, S. B., successively, to hold the same in tail male. The court decided that the limitation over to the great-grandson was too remote, and that the particular intent of the testator, to give life estates to the sons, must therefore fail; but, to effect the general intent, to keep the estate in his family as long as possible, construed the devise to give a life estate to the son and an estate tail to the grandson. The point of the case is, that the general intent of a testator, apparent upon a will, will be carried into effect, if practicable, although his particular intent cannot prevail. In the present case no intention of the testator as to the disposition of the land after the termination of the first estate, appears upon the will, except that which, assuming the devise over to be void, the law will not execute.

In *Doe ex dem. Cannon v. Rucastle*, 8 Man. Grang. & Scott, 876, the testator devised land to his son for life, and from and after his death gave the same to the issue of his son, and if he should not have any, to the testator's heirs-at-law. The court decided that the son took an estate tail. In *Ibbetson v. Ibbetson*, 10 Simons, 495, the only point adjudged was that a trust of personal estate was void for remoteness. These cases, and *Tollemache v. Coventry*, 8 Bligh, N. S. 547, cited in the last case, have no application to the one before the court, *Mortimer v. Frost*, 2 Simons, 274, and *Mackworth v. Hinkman*, 2 Keen. 658, are similar to *Jackson v. Brown*, before stated.

The foregoing are the principal cases cited on the part of the defendant; the remaining ones are to rules about which there is no dispute.

I am satisfied, for the reasons stated, that if Gloversville has been incorporated, and the devise to the trustees cannot have effect, the defendant, as the grantee of Bailey, has no estate in the premises in question, and, therefore, that the court below, at the trial, erred in deciding the contrary, and in the rejection of the evidence offered to prove that the incorporation had taken place.

If the village of Gloversville has been incorporated, and the trustees have an estate in the land under the devise to them, the plaintiffs, of course, cannot recover, as they must have title in themselves to maintain the action. The defendant may avail himself of the title of the trustees, although not connected with it, as a bar to the action. But if the trustees cannot take the estate designed to be given them, which appears to have been assumed by the counsel and the court at the trial, and Bailey's title has ceased by its own limitation, the testator, as to this land, after the determination of Bailey's interest, died intestate, and it belongs to the plaintiff, in right of the wife as heir-at-law.

The question of the validity of the devise to the trustees does not arise in this appeal, as it does not appear that Gloversville has been incorporated. Until that fact is proved, it will not appear that the estate of Bailey has terminated, and the question upon the devise will not be reached. It was considered, at the trial, that the point was involved in the question of evidence, in reference to materiality; that if the devise to the trustees was void, the estate of Bailey was an absolute fee; if valid, the title would be out of the plaintiffs, and, therefore, the evidence excluded was immaterial — it would not, in either case, benefit the plaintiff. But this view is erroneous in two respects; it could not properly be assumed, if the devise over was valid, that the plaintiffs had not the title, as the trustees may have refused to accept the devise, or lost their rights under it and the

plaintiffs were entitled to give proof on the subject, and the evidence was important to show that Bailey's estate had ceased. It is not intended now to express or intimate any opinion as to the validity of the devise over.

My conclusion is, that the judgment should be reversed and a new trial granted, with costs to abide the event.

ALLEN, J., IN FIRST UNIVERSALIST SOCIETY OF NORTH
ADAMS *v.* BOLAND.

155 MASSACHUSETTS, 171. — 1892.

THE grant to the plaintiff was to have and to hold, etc., "so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Walsingham's Case*, 2 Plowd. 557, is "as long as the church of St. Paul shall stand." *Brattle Square Church v. Grant*, 3 Gray, 142, 147; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Ashley v. Warner*, 11 Gray, 43; *Attorney General v. Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Fifty Associates v. Howland*, 11 Met. 99, 102; *Owen v. Field*, 102 Mass. 90, 105; 1 Washb. Real Prop. 3d ed. 79; 2 Washb. Real Prop. 3d ed. 20, 21; 4 Kent Com. 126, 127, 132, note; 2 Crabb, Real Prop. §§ 2135, 2136; 2 Flint, Real Prop. 230, 232; Shep. Touchst. 121, 125.

A question or doubt, however, has arisen, though not urged by

counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *quia emptores*. See Gray, Rule against Perpetuities, §§ 31-40, where the question is discussed and authorities are cited. We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159, 168; *Leonard v. Burr*, 18 N. Y. 96; *Gillespie v. Broas*, 23 Barb. 370; *State v. Brown*, 3 Dutch. 13; *Henderson v. Hunter*, 59 Penn. St. 335; *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 94 Ill. 83, 93; 1 Washb. Real Prop. 3d ed. 76-78; 4 Kent Com. 9, 10, 129. See also, of English works in addition to citations above, Shep. Touchst. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise, Dig. tit. 1, §§ 72-76; 2 Flint. Real Prop. 136-138; 1 Prest. Est. 431, 441; Challis, Real Prop. 197-208.

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark. This is similar to, though not quite identical with, the possibility of reverter which remains in the grantor of land upon a condition subsequent. The exact nature and incidents of this right need not now be discussed, but it represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines. Challis, Real Prop. 31, 63-65, 153, 174, 198, 200, 212; 1 Prest. Est. 431, 471; *Newis v. Lark*, 2 Plowd. 403, 413; Shep. Touchst. 120; 2 Washb. Real Prop. 3d ed. 20, 579; 4 Kent Com. 10; *Smith v. Harrington*, 4 Allen, 566, 567; *Attorney General v. Merrimack Manuf. Co.*, 14 Gray 586, 612; *Brattle Square Church v. Grant*, 3 Gray, 142, 147-150; *Owen v. Field*, 102 Mass. 90, 105, 106; *Gillespie v. Broas*, 23 Barb. 370; Gray, Rule against Perpetuities, §§ 33, 34, 39, and cases cited.

Clark's possibility of reverter is not invalid for remoteness. It has been expressly held by this court that such possibility of reverter upon breach of a condition subsequent is not within the rule against perpetuities. *Tobey v. Moore*, 130 Mass. 448; *French v. Old South Society*, 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness, the other should not be. The very

many cases cited in Gray, Rule against Perpetuities, §§ 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous in principle.

(2.) FEES UPON CONDITION.

(a.) *In general.*

NICOLL *v.* NEW YORK AND ERIE RAILROAD CO.

12 NEW YORK, 121. — 1854.

EJECTMENT to recover certain lands conveyed by one Dederer to the Hudson and Delaware Railroad Co. and by that company to this defendant under authority of statute.

Nicoll has succeeded to Dederer's interest in the premises, subject to the rights of the railroad company, and now claims to be entitled to the lands freed from such rights because of an alleged breach of a condition under which the railroad company held. Further facts appear in the opinion. The last judgment below was for defendant. Plaintiff appeals to this court.

PARKER, J. — The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. 2 Kent, 281; Co. Litt. 44a., 300b.; 1 Kyd. on Corp. 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the ninth section of the charter, Sess. Laws of 1835, p. 113; and by the sixteenth section there were given to it the general powers conferred upon corporations, 1 R. S. 731, one of which is that of holding, purchasing and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest

shall appear by express terms or be necessarily implied in the terms of the grant. 1 R. S. 748, § 1.

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years, Laws of 1835, p. 110, § 1, therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. 1 R. S. 748, § 1. The change made by the statute favors the grantee, where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate, Viner's Ab. Estate, L. 3, or to a mayor or commonalty, Ib. 3, conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant. 1 R. S. 748, § 1.

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our

revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that 'no implication shall be allowed against an express estate limited by express words.' Viner's Ab. Implication, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. 5 Denio, 389; 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509.¹ Large sums of money are accordingly expended by railroad companies in erecting extensive station-houses and depots, and by banking corporations in erecting banking-houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson and Delaware Railroad Company, then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by that company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition. This is apparent from the language employed in the grant and from the character of the transaction. There are no technical words by which to distinguish between conditions precedent and subsequent. Whether a condition be one or the other is matter of construction, and depends upon the intention of the party creating the estate. 4 Kent, 124; 1 Term R. 645; 2 Bos. & Pull. 295; 3 Peters' U. S. R. 346. In the latter case, Marshall, Ch. J., said: "If the act (on which

¹ It is now settled in New York that there is no reverter if the corporation be one having stock and stockholders. *Heath v. Barmore*, 50 N. Y. 302. — ED.

the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it if this is to be collected from the whole instrument, the condition is subsequent." In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition, it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition. See also, 5 Ham. Ohio Rep. 389; 9 East R. 170; 5 Pick. R. 528; 18 Martin's Louis. R. 221; Co. Litt. 246*b*. Kent says (4 Kent, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them. 4 Kent Com. 122, 127; 2 Black. Com. 154. The plaintiff took his deed of the farm on the first of April, 1844. This was one year before the expiration of the time for constructing the road, and two years before the Hudson and Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by 32 Henry VIII., ch. 34; and similar enactments have been made in several of the States. In this State, these provisions will be found at 1 R. S. 748, §§ 23, 24 and 25, and are limited to grants or leases in fee reserving rents, and to leases for lives and for years.¹ As to other grants upon condition, the common law is unchanged. 2 Kent, 123.

¹ See § 193 N. Y. R. P. L. — Ed.

There was a reason for the statutory change in the particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter. In the cases of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rents reserved, and in the cases of leases for lives and years, he has an actual reversion of what remains after the expiration of the particular estates. In these cases, therefore, he has a vested interest, and may well be permitted to assign with it, and his assignee to take with such interest, his right of entry for non-performance of a condition subsequent; for the right to enforce a forfeiture is necessary to the collection of the rents and to the protection and enjoyment of the reversion. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said such possibilities were assignable in equity; but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent, Com. 130): "A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent," and the chancellor acted upon that rule in *Livingston v. Stickles*, 8 Paige, 398.

All contingent and executory interests were assignable in equity, and would be enforced if made for a valuable consideration. 4 Kent, 269. But these words had an ascertained legal signification; and it was never claimed that they were applicable to a case like that under consideration. It will hardly be pretended that Dederer's possibility of reverter was a contingent or an executory interest, in the legal sense of these words.

By the Revised Statutes (1 R. S. 725, § 35), expectant estates are descendible, devisable and alienable, in the same manner as estates in possession; and it is claimed that Dederer had an expectant estate. But we are relieved from all doubt on this point, by the fact that the statute itself has furnished the definition of the term "expectant estates." They are described (1 R. S. 723, § 9) as including future estates and reversions; and these expressions are also defined in §§ 10 and 12. A future estate is one limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. And by § 13, a future estate is said to be vested, where there are persons in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or pre-

cedent estate; and "contingent," whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. A reversion is defined as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of the particular estate granted or devised. I have been thus particular in transcribing these statutory definitions of "expectant estates," to show, what is apparent, that they are not in the least applicable to the case under consideration.¹ Though, as Chancellor Walworth said in 7 Paige, 76: "They include every present right and interest, either vested or contingent, which may by possibility vest at a future day," yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living. The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which, before, were only assignable in equity. They are now assignable at law as well as in equity.

Kent says (4 Com. 370), that the grantor of an estate upon condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says, "there is only the possibility of reverter left in the grantor and not an actual estate," citing *Martin v. Strahan*, 5 Term R. 107, note. For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent Com. 262, note *b*, and *Jackson v. Waldron*, 13 Wendell, 178, and *Fortescue v. Satterthwaite*, 1 Iredell N. C. R. 570.

Suppose A. sell to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it till the expiration of its charter, it will revert to him, or, if he be dead, to his heirs. Now what estate had A. after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter — a naked and very remote possibility, but nothing that he could convey to an assignee. He had sold his entire interest and received the full value of it. The presumption was it would never return. The law would not favor its return; and the grantee, who enjoyed the entire estate and upon whose volition alone it could return, would not be likely to so far neglect his own interests as to permit its return. A voluntary reconveyance would be hardly more improbable than a reverter. Just such an estate and no other had Dederer in this land when he conveyed to the plaintiff. In both cases, the estates granted were

¹ See §§ 49, 27-30 N. Y. R. P. L. — ED.

upon condition. In the case of the bank the condition was implied in law. Angell & Ames on Corp. 128. In this case, the condition was expressed.

What is meant by possibilities coupled with an interest is of a very different character, as may be seen by reference to 4 Kent Com. 262 and cases there cited, and 13 Wend. *supra*. Jicklings in his treatise on the analogy between legal and equitable estates, says, that under the generic term of possibilities coupled with an interest may be classed all contingent and executory interests in land, as springing and shifting uses, contingent remainders and executory devises.

The cases cited by the plaintiff's counsel, for the purpose of showing that the common-law rule has been changed by the Revised Statutes, have no applicability. In *Lawrence v. Bayard*, 7 Paige, 70, the litigation was concerning personal property only, and the general remarks of the chancellor, as to the extent of the change made by the Revised Statutes, I have already quoted.

Upon the whole, my conclusion in this case is, that the Hudson and Delaware Railroad Company took from Dederer a fee upon condition subsequent, that at the time of the conveyance by Dederer to the plaintiff, there had been no forfeiture; and that Dederer had, at the time of such conveyance, no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.

UPINGTON *v.* CORRIGAN.

151 NEW YORK, 143. — 1896.

GRAY, J. — The question which this appeal presents is both interesting and important and its answer turns upon the construction to be given to the provisions of our Statute of Wills. I think, too, that there have been certain decisions made by the courts of this State upon the general question, the effect of which it would be very difficult to overlook, however much inclined we might feel to differ in our reasoning. The question is, can the plaintiff, claiming as heir-at-law of Mrs. Davey, maintain this action to recover the possession of the premises in question for the breach of the express condition in her grant; or has such a right passed under Mrs. Davey's will to her residuary legatee? The learned counsel for the appellant has argued, with ability and with force, against the plaintiff's right and the contention which he makes is that an interest remained in the grantor, which, being descendible to her heirs, was made devisa-

ble by the Revised Statutes, and, therefore, passed under her will. If it is true that the plaintiff must rest her right to enter for breach of the condition upon the descent of some estate or interest left in the grantor, then, I think, the appellant's contention is right and this action should fail. But if, on the other hand, and as argued for the respondents, the plaintiff has the right to enter, not through the operation of the law of descent, but merely representatively, as heir-at-law, and the rule at common law has not been changed by our statutes, then, I think, we will find ourselves obliged to conclude that the devisee of Mrs. Davey was incapable of possessing a right of entry and that it belonged solely to her privies in blood.

— At common law, the benefit of such a condition in a grant of real estate could be reserved only to the grantor and his heirs. It was not considered to be a devisable interest in the grantor and the right of re-entry for a breach could not be assigned to a stranger. It was a non-assignable right and no other person than the grantor, or his heir, could take advantage of a condition which required a re-entry in order to revest the former estate. See vol. IV., Kent's Com. pp. 122, 127; *Jackson v. Topping*, 1 Wend. 388, 395; *Goodright v. Forrester*, 8 East, at p. 566. The reason, quaintly given in Lord Coke's Institutes, was that "under color thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Coke upon Littleton, § 347. In Greenleaf's Cruise on Real Property, (vol. 1, title 13, chap. 1, § 15), the reason of the rule is thus given: "That it is a maxim of law, that nothing which lies in action, entry or re-entry, can be granted over; in order to discourage maintenance." Whatever criticisms may be made upon the reasons for the rule at common law, it must be recognized as a continuing rule of property; if not changed or done away with by the Revised Statutes. The effect of section 17 of article 1 of the State Constitution was to retain so much of the common law of England as formed the law of the colony of N. Y. on the 19th day of April, 1775; where not repugnant to our form of government, or inapplicable to our institutions, and subject to such alterations as the Legislature should from time to time make. The appellant, feeling bound to concede that the right of re-entry was not devisable at common law, claims that the Revised Statutes have altered the law, by the provision that "every estate and interest in real property descendible to heirs may be devised." 2 R. S. 57, § 2. Undoubtedly, this language of the Statute of Wills is as comprehensive as it can be to cover real interests; but we are remitted, nevertheless, to the inquiry whether, here, what the grantor

had with reference to the estate she had granted amounted in law to an estate or interest in the real property and therein lies the difficulty. At common law it was only a possibility of reverter and not a reversion. 4 Kent, 370; *Martin v. Strachan*, 5 Term Rep. 107. Until the happening of the breach of the express condition in the deed and a revesting of the estate through re-entry, the whole title was in the grantee. Have the Revised Statutes changed the grantor's status? In chapter 1, part 2 of the Revised Statutes, upon the nature, qualities and alienation of estates in real property, article 1 of title 2 creates various estates in lands and divides them into those in possession and in expectancy.¹ The latter class is again divided, first, into future estates limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination of a precedent estate; and, second, into reversions; which latter are defined to exist where the residue of an estate is left in the grantor, or his heirs, commencing in possession on the termination of a particular estate granted. By section 35 of the same article, it is also provided that "expectant estates are descendible, devisable and alienable in the same manner as estates in possession." If, therefore, there was any estate left in Mrs. Davey, upon her grant to Hughes, it was one not known to our statute on real property and all expectant estates, within which class it would have to fall, are abolished by the article, except such as are therein defined and which must be either estates limited to commence in possession at a future day, or reversions. The real interest contended for here would not satisfy the requirement of either class. The mere possibility of reverter, which was all there was in this case, could not be included within the "reversions" spoken of by the statute, within its letter or spirit. The Statute of Wills, through the use of such precise words as "every estate and interest in real property descendible to heirs," obviously, must have reference to such as are recognized by the Revised Statutes to be estates of inheritance. We would be without warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at common law or under the Revised Statutes. She had an election to enter for condition broken and she could release her right to do so. To those rights her heirs, after her decease, succeeded by force of representation and not by descent. There was no estate upon which the Statute of Descents could operate; but as heirs, there devolved upon them the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor. Her legal personalty was continued in them. [*Here fol-*

¹ See N. Y. R. P. L. §§ 25-29; 49. -- ED.

lows a discussion of *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121, and cases in 20 Barb. 455; 46 Barb. 109. 70 N. Y. 312 and 106 N. Y. 287.] In a case arising in the courts of the State of New Jersey, the common-law rule in question was considered in language which I shall quote. That was the case of *Southard v. The Central Railroad Company*, 26 N. J. Law, at p. 21, and it was said: "If, however, the evidence had clearly established a breach of the condition, and a consequent forfeiture of the estate, the plaintiff could not have availed herself of the forfeiture. She claims, not as heir, but as devisee of the grantor. She is a privy in estate, and not a privy in blood. It is a rule of the common law, that none may take advantage of a condition in deed, but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deeds, as grantees of reversions; nor privies in estate, as he to whom the remainder is limited, shall take benefit of entry or re-entry by force of a condition. *Shep. Touch.* 149; *Co. Litt.* 214a; *Lit.* § 347; *Doct. and Student*, 161, ch. 20; *Perkins*, § 830; 4 *Kent*, 127; 2 *Cruise Dig.* ch. 2, § 49." See, also, upon this subject, *Schulenberg v. Harriman*, 21 Wall. 44, and *Ruch v. Rock Island*, 97 U. S. 693.

In this case, as it is in every case of a deed of the fee upon condition subsequent, the grantor parted with every interest and estate in the real property conveyed. That was her intention, within the legal presumption from the terms of the deed, and it was, also, the legal presumption that the condition would be performed by the grantee. That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute. Until the law is changed by some legislation, it must be regarded as still the settled rule that no one can take advantage of the breach of a condition subsequent, annexed to the grant of a fee, but the grantor or his heirs; or, in the case of an artificial person, its successors. Every estate and interest formerly enjoyed by the grantor were vested by the deed in the grantee. He undertook and agreed to perform the condition which is annexed to the grant, and the presumption was that he would perform. If he, or those who succeeded in interest, failed to do so within a reasonable time, then it became optional with the grantor to enter for a breach of the condition and to have a forfeiture of the estate declared. The grantor having died, the right to insist upon a forfeiture for breach of the condition remained in the heir, as the person who occupies the place of the deceased.

The further point is made by the appellants that if the clause in the deed to Hughes created a condition subsequent, it could not be broken after his death, as there was no mention therein of his heirs, executors or assigns. I do not think, upon reading the whole of the *habendum* clause in the deed, that we can say that the condition amounted only to a personal covenant with the grantor. The language is, "to have and to hold the . . . premises . . . unto the said party of the second part, his heirs and assigns, to his and their own proper use, etc., forever, upon the conditions following, to wit: That said party of the second part shall consecrate, or cause to be consecrated, the said property for the purpose of erecting a church building," etc. The intention seems plain that the conveyance of the estate was upon condition, and I do not think that the construction is permitted that it was a mere covenant on the part of the grantee, personal to him. The condition was one which, in its nature, was so annexed to the conveyance by the deed as to qualify it. 2 Wash. Real Prop. *p. 455. The language does not provide that the party of the second part, alone, shall consecrate, but that he shall cause to be consecrated the property, and, therefore, it was within his power, if he did not do so himself, to provide, in any disposition which he made of it, that his successors in interest should do so. They took the estate with knowledge of the condition affecting its title and cannot complain if bound by it. It seems to me that the natural and ordinary interpretation of the *habendum* clause is to create a condition subsequent, as the effect of which, in case of a failure to perform it, within a reasonable time, on the part of Hughes, or his heirs or assigns, the estate granted might be defeated, at the option of Mrs. Davey, or her heirs. The language of the clause is not merely descriptive of the consideration upon which the deed was given; but qualified the conveyance to the extent, or in the manner named. Considering the purpose of the grant by Mrs. Davey, we could not with reasonableness of construction say that the condition she imposed was merely personal to Archbishop Hughes.

A careful consideration of these questions, and no other require discussion here, must lead us to the conclusion that the appeal cannot be sustained.

Judgment affirmed.

TRYON v. MUNSON.

77 PENNSYLVANIA STATE, 250. — 1874.

EJECTMENT by Tryon and others claiming under the heirs of James Wilson, deceased, against Munson and others, claiming the property under and by virtue of a sale on foreclosure of a mortgage given by said Wilson. Judgment below for defendants. Plaintiffs bring error.

AGNEW, Ch. J., [after disposing in defendants' favor of several other questions.] — The last question and the most important is, whether the title of the heirs of Judge Wilson was extinguished by the sale? This depends on the view which the law takes of the mortgage, as a mere debt or as an estate in the land. The position of the plaintiff is, that the descriptive lists of the tracts or subject of the mortgage being omitted in recording the mortgage, it is to be viewed as an unrecorded mortgage in its effect upon the estate of the heirs, and that as a debt its lien had expired under the operation of the Act of 1797. *Nice's Appeal*, 4 P. F. Smith, 200, is referred to. If it be conceded that the mortgage is merely evidence of a debt, and conveys no estate in the land to the mortgagee, it must be admitted that the lien of the debt was gone when this proceeding took place, and that, according to the doctrine of *Bailey v. Bowman*, 6 W. & S. 118, and other cases, the title of the heirs was not extinguished. We are, therefore, cast upon the decisions in this State to ascertain the nature and effect of a mortgage. That the debt secured by it is personal in its nature and qualities of transmission is undoubted. Ownership of the debt carries with it that of the mortgage; and its assignment or succession in the event of death, vests the right to the mortgage in the assignee or the personal representative of the deceased owner. But there is a manifest difference between the debt, which is a mere chose in action, and the land which secures its payment. Of the former there can be no possession, except that of the writing, which evidences the obligation to pay; but of the latter, the land or pledge, there may be. The debt is intangible, the land tangible. The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may, therefore, enter at pleasure, and take actual possession — use the land and reap its profits. Now this title or lawful right to possess, and actual *pedis possessio*, are not ideal or contemplative merely, but are real and tangible. True, the right is conditional, and will cease on payment of the debt; but until the condition is performed, the title and possession are as substantial and

real as though they were absolute. The evidence of this is that the mortgagee may dispossess and hold out the mortgagor until he performs the condition, or until the perception of the profits reaches the same result. Thus we perceive an interest or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere lien or potentiality, to follow it by legal process and condemn it for payment. The land passes to the mortgagee by the act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate, and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited. It is true, if the mortgagee be held out, he may have to resort to ejectment, but this is to avoid a conflict, and the statutory penalties for forcible entry, for otherwise he may take peaceable possession, and is not liable as a trespasser. The difference between title by deed, and a lien by law, is clear, and hence the former is not governed by the rules which apply to the latter. The title by deed, which is good against the mortgagor, is necessarily good against the heirs, who are mere volunteers, and take the place of the ancestor. But a lien by law is a mere incident to the debt, which may be limited by the law in its recovery from a descended estate. In the former case, death makes no change in the title conveyed; in the latter, it brings into operation a law specially applicable to the descended estate. That these are the principles governing the law of mortgage is evidenced by numerous decisions. Thus in *Levine v. Will*, 1 Dallas, 430, it was held that the Act of 28th of May, 1715, enacting that no mortgage or defeasible deed shall be good or sufficient to convey or pass a freehold of inheritance or less estate, unless it be acknowledged, proved and recorded within six months, does not avoid an unrecorded mortgage as against the mortgagor. C. J. McKean said: "We think it is sufficient against John Levine (the mortgagor) that the deed so far is sufficient to pass the lands, and that under it the possession of the premises might be recovered in ejectment." As to the right to maintain ejectment, and that the remedy by *scire facias* is not exclusive, see also *Smith v. Shuler*, 12 S. & R. 240; *Fluck v. Replogle*, 1 Harris, 405; and *Martin v. Jackson*, 3 Casey, 504. A mortgage acknowledged before and recorded by officers whose commissions had become void by the Declaration of Independence, was held to be good against a subsequent judgment-creditor and purchaser at sheriff's sale, who had notice. *Parker v. Wood*, 1 Dallas, 436. So a *scire facias* on a mortgage not recorded according to law, was held to be good against a purchaser with notice *Stroud v. Lockart*, 4 Dallas, 153. In *Semple v. Burd*, 7 S. & R. 291, Judge Duncan gives the true reason why an

unrecorded mortgage is good against the mortgagor, because, he said, "it injured no one, affected not the rights of any third person, and was binding on the man who executed it as a mortgage." That an estate passes by a mortgage which descends to the heir, is distinctly asserted in *Simpson's Lessee v. Ammons*, 1 Binn. 175. "As to the second point," says C. J. Tilghman, "the legal estate in the two-thirds, conveyed to Marshall (the mortgagee), descended on his death to his heirs; but the mortgage being in effect only a security for a debt due to the estate of Marshall, his heirs were trustees for the benefit of the administrators, who were entitled to the debt. It was determined in *Kennedy v. Fûry*, 1 Dallas, 72, that a certain *cestui que trust* may support an ejectment in his own name." This case also explains the theory of the action of the personal representative, which, as the Chief Justice states, is founded on the want of a court of chancery in this State. *The Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, 7 W. & S. 335, affords another illustration of the character of a mortgage as an estate. There the mortgage was imperfectly recorded, and was not good as a lien against subsequent judgment-creditors, but it was held good as against a second mortgagee, with notice of it, whose lien was prior to the judgments, and the money was therefore awarded to the first mortgagee. Another test is found in *Scott v. Fields*, 7 Watts, 360, in which it was decided an action of debt will not lie on a mortgage containing no express covenant to pay the debt. In *Philips v. The Bank of Lewistown*, 6 Harris, 394, Justice Lewis treats both the mortgage and assignment of it as formal conveyances of the land. Judge Strong states the principles governing mortgages more at large and very clearly. *Britton's Appeal*, 9 Wright, 172. He says "that mortgages are sales, and that they must be, therefore, within this doctrine, is shown by many cases. Mortgagees are purchasers as between each other; *i. e.*, a subsequent mortgage recorded is postponed to a prior mortgage unrecorded, of which the second mortgagee had notice. They are purchasers as against subsequent purchasers absolutely, with notice. They are purchasers under powers to sell. They are within the recording acts as to assignments of the same security to different parties. They are in form defeasible sales, and in substance grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, with all its incidents. And though it is often decided to be a security or lien, yet so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title." Mortgagees, he observes, have rights both as grantees and lien-hold-

ers; and their rights as grantees are not forbidden by the Act of 1820, which touches the lien only, and not the estate. The same key unlocks the question before us. The lien of the debt, under the Act of 1797, was gone against the general estate of Judge Wilson; but the special estate, granted by him in the mortgage, remained and preserved the debt against it. This effect might be seen in the case of a mortgagee in possession at the death of a mortgagor. Clearly, the lapse of time would not oust him, if his debt were unpaid. He could hold the land until the heirs tendered payment, or his debt was made out of the profits. The proceeding by *scire facias* against the administrators was valid, and the judgment being before the Act of 1834, bound the heirs. Probably the case would be different since the passage of that act, and the heirs would be permitted to make the same defense to the ejectment which they might have set up to the *scire facias*, if they had been served. *Wallace v. Blair*, 1 Grant, 75; *Murphy's Appeal*, 8 W. & S. 165; *Benner v. Phillips*, 9 W. & S. 13; *Atherton v. Atherton*, 2 Barr. 112. Even an irregularity in the proceeding, as a judgment upon one return of *nihil*, has been held not to affect the purchaser at the sheriff's sale. The effect of the sale is to transfer the estate to the purchaser as fully as it existed in the mortgagor at the time of the mortgage. *Hartman v. Ogborn*, 4 P. F. Smith, 120. The sale in this case, therefore, extinguished the title of the heirs, notwithstanding the great lapse of time from the death of Judge Wilson until the proceeding upon the mortgages. If the heirs had a defense they ought to have gone into court and asked the judgment to be opened to let them into a defense. The judgment was final, and bars any defense which existed before it was rendered. Though the jurisdiction of the court may not be denied, as we have seen, because of an omission of part of the instrument in recording it, it may be conceded that the omission of a material part, necessary to identify the subject-matter, will reduce the whole instrument to the condition of an unrecorded mortgage in its effect upon the estate of the heirs. In this view, *Nice's Appeal*, 4 P. F. Smith, 200, is relied on by the plaintiffs in support of their position. But that case concedes the effect of an unrecorded mortgage upon the estate as against the mortgagor and his heirs, and only denies to it a higher place as against creditors than that of a specialty debt, in a distribution proceeding, after a conversion of the property through an Orphans' Court sale. It is there shown that to allow it precedence over the general debts of a decedent, which are fixed in position by law at death, would disturb the harmony of the system relating to the estates of decedents and the payment of the debts. In this case, the simple

question is, whether the mortgage, considering it as unrecorded, could be enforced against the heirs of James Wilson? After a full consideration of the assignments of error, we find none which ought to reverse the judgment.

Judgment affirmed.¹

(b.) *Void conditions and conditions impossible of performance.*²

BOSTICK *v.* BLADES.

59 MARYLAND, 231. — 1882.

ALVEY, J, delivered the opinion of the court. — * * *

It would seem to be well settled by a great number of adjudications both in England and in this country, that conditions in general restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy, and therefore void. But this rule has never been considered as extending to special restraints, such as against marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good, on breach of the condition. A condition, therefore, that a widow shall not marry, is, by all the authorities, held not to be unlawful. *Scott v. Tyler*, 2 Dick. 712; *Jordan v. Holkham*, Amb. 209; *Barton v. Barton*, 2 Vern. 308; 2 Pow. on Dev. 283; *O'Neale v. Ward*, 3 H. & McH. 93; *Binnerman v. Weaver*, 8 Md. 517; *Gough and Wife v. Manning*, 26 Md. 347; *Clark v. Tennison*, 33 Md. 85.

In the cases a distinction is taken between those where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent; and the decisions have generally been made to turn upon the question, whether there be a gift or devise over or not. But if the gift or devise be to a person until he or she shall marry, and upon such marriage then over, this is a good limitation, as distinguished from condition; as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation ceasing or commencing; and this whether the

¹ See also *Lane v. King*, p. 197, *supra*, for another illustration of the common-law view of a mortgage. — ED.

² See pp. 561, *infra*, for cases on conditions held void as unreasonably restraining alienation. — ED.

devisee be man or woman, or other than husband or wife. *Morley v. Rennoldson*, 2 Hare, 570; *Webb v. Grace*, 2 Phill. 701; *Arthur v. Cole*, 56 Md. 100.

In this case, if the devise to the husband had depended alone upon the terms of the first part of the devise, that is to say, the terms "to have and to hold to him for and during the term or period after my death that he shall remain unmarried," there could be no doubt it would have been a good limitation, and the estate devised to him would have terminated upon his second marriage. But we must read the whole clause together, and take one part in connection with the other, and so reading the terms of the devise, the terms that follow those just recited clearly put the devise in the form of a condition subsequent. The estate is given to the husband for life, but in the event of his second marriage it is devised over to the brother of the testatrix; or, in other words, the devise is to the husband for life, subject to a defeasance in the event of a second marriage. By the terms of this devise a vested estate passed to the husband for a definite duration, but by the happening of the event that was contemplated as possible, the estate, according to the contention of the plaintiff, became divested and passed over to the plaintiff.

Now, there being no question of the power of a husband to effectually impose such a condition in restraint of a second marriage of his widow, the question here is, whether a wife by a devise or gift to her husband can effectually impose a like condition in restraint of his second marriage. * * *

In the courts of England the direct question here presented does not appear to have arisen until very recently. In 1875 the case of *Allen v. Jackson*, L. R. 19 Eq. Cases, 631, was decided by Vice-Chancellor Hall. In that case, the testatrix gave the income of certain property to her niece (who was her adopted daughter) and the husband of the niece during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived the wife and married again; and the vice-chancellor held, that the attempted defeasance of the husband's life interest, was void as a condition subsequent in restraint of marriage. He said he could not hold the law to be the same as to the second marriage of a man as it is to the second marriage of a woman. That the law as regards the second marriage of a woman is exceptional, and that he did not think he could extend the exception to the case of a man.

That case was taken into the Court of Appeal (1 Ch. Div. 399), where it was fully argued upon all the principal authorities, before

the Lord Justices, James, Mellish and Baggallay; and upon full consideration, they all concurred in holding that the proviso was valid as a condition, and that the gift over took effect; and consequently reversed the judgment of the vice-chancellor.

Lord Justice James reasoned the matter upon principle; and he said that as there was no statute or express decision of any court to the effect, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man, he was unable to see any principle whatever upon which the distinction could be drawn between them. He then shows to what injustice and hardship the distinction would lead. In the case of a widow, he said, it has been considered to be very right and proper that a man should prevent his widow from marrying again; and after stating the probable reasons for the rule, he proceeds to show with what reason and force they apply to the case of a gift or devise to a man with condition that he should not marry again. Suppose, he said, "we had the case of a married woman having property which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left; it would be monstrous to say that when she provided for the contingency of the husband marrying a second time, and having a new wife and a new family, she should not be able to say, 'In that case he is to lose the estate, and it is to go over for the benefit of my children.' " "In this particular case," speaking of the case before him, "it was not the wife who was doing it, but it was a person who places herself in the position of the wife — the wife's mother — and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it, after her death, to her surviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for — a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it."

In the reasoning of Lord Justice Mellish he was equally explicit in holding the condition against the second marriage of the husband valid, and the gift over on breach of the condition effectual. And in the concurring opinion of Justice Baggally, the present state of the English law upon the subject is summed up and stated with admirable clearness. He says: "Now the present state of the law as regards condition in restraint of the second marriage of a woman

is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favor of his mother. That, I think, is laid down in *Godolphin's Orphans' Legacy*, p. 45. Then came the case before Vice-Chancellor Wood of *Newton v. Marsden*, 2 J. & H. 356, in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this — that they all had reference to the second marriage of a woman, and this case has reference to the second marriage of a man; but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man; and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason. Here is a gift in favor of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably or very possibly settle upon a second wife, and altogether deprive the original family, which was the object of the testatrix's bounty."

We have thus stated somewhat at large the reasoning of that case, because of the entire absence of any direct authority in our own courts; and the conclusion of the Court of Appeal, founded as it is upon such cogent reason, and deduced from the principles of the common law, commends itself strongly to our assent. In the absence of any binding authority to the contrary, we are of opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. As the one is valid and effectual, so is the other; and we, therefore, hold that the devise over to the plaintiff in this case, on breach of the condition by the defendant, is valid, and that the plaintiff is entitled to recover. * * *

Judgment affirmed.

HOGAN v. CURTIN.

88 NEW YORK, 162. — 1882.

ANDREWS, Ch. J. — We do not deem it essential to determine the question which has been argued at the bar, whether the condition in abridgment of the legacy to the daughter, in case of her marriage without consent, is precedent or subsequent, as we are of opinion that, while in some cases this would be a controlling consideration, in this case the same result will follow either construction. But we think the condition was subsequent. The gift to the daughter in the fourth clause is immediate, but the payment is postponed until she shall attain the age of twenty-one years, with a provision for the acceleration of the payment on her marriage with consent before that age, and a gift over by way of substitution to the sons, in case of the daughter's dying unmarried during her minority, and a revocation of the gift to the daughter, except as to the sum of \$5,000 in case of her marriage before twenty-one, without consent. The time is annexed to the payment and not to the gift. In *Garret v. Pritty*, 2 Vern. 293, more fully reported in a note to *Lloyd v. Branton*, 3 Mer. 118, the will contained a provision similar to that in the will in question. In that case the testator bequeathed to his daughter, Elizabeth, £3,000, to be paid in manner following: £2,000 when she should attain the age of twenty-one, or upon the day of her marriage, which should first happen, etc., and £1,000 at the end of two years, etc., and the will provided that in case the daughter should be married before she attained the age of twenty-one without consent, etc., then the legacy of £3,000 before given to her should cease and be void, and in lieu thereof, the testator gave her £500 only. In *Harvey v. Aston*, 1 Atk. 378, Lord Chief Justice Lee, referring to *Garret v. Pritty*, said: "In the case of *Garrett v. Pritty*, the portion was plainly a vested portion, and the proviso comes in afterward and is to be considered as a condition subsequent." In *Graydon v. Hicks*, 2 Atk. 16, the will was, "I give the sum of one thousand pounds to my only daughter, Mary Graydon, to be paid to her at her age of twenty-one years, or on the day of her marriage, which shall first happen, provided she marry by and with the consent of my executor, but in case she dies before the money becomes payable on the condition aforesaid, then I give the said one thousand pounds equally between my two youngest sons," etc., and Lord Hardwicke said that he was of opinion that this is only a condition subsequent, to divest a legacy in case of a marriage before twenty-one. It may be observed that in the present case the words "here-

tofore bequeathed to her," in the clause providing for an abridgment of the legacy in case of marriage without consent, naturally refer to a legacy which had been given by the preceding clause, which, by the second clause, was to be in part divested by a marriage contrary to the condition. We think the authorities sustain the view that the condition in this case was subsequent and not precedent. See Roper on Legacies, vol. 1, p. 554, and cases cited.

The next question is, whether the marriage of the daughter, under the circumstances stated, was a breach of the condition. The language is, that if the daughter should marry "against the consent of my said executors and her mother," etc. The finding is that she married with the consent of the sole executor, but without the consent of her mother. It is claimed that a marriage without the mother's consent is not a marriage against her consent. It was said by Lord Hardwicke in *Reynish v. Martin*, 3 Atk. 334, that there was a material distinction between a condition that the legatee should not marry without consent, and a condition that she shall not marry against consent. The precise distinction which Lord Hardwicke had in mind is not pointed out. It could hardly be claimed that a condition not to marry against consent could be broken only where there was an affirmative prohibition of the marriage before it took place. Such a construction would permit a clandestine or secret marriage to be contracted, without involving a forfeiture of the legacy. But without undertaking to trace the alleged distinction, it is sufficient to say in this case, as was said by Sir John Leach in *Long v. Ricketts*, 2 Sim. & Stu. 179, that, "to make the will consistent, the word 'against' here must read in the sense of 'without.'" The testator evidently uses the word against, in the last sentence of the fourth clause, as the correlative of with, in the first sentence. In the first sentence he gives the legacy, on the daughter's marriage before twenty-one, with consent, and in the last, he abridges it in case of her marriage against consent, using that word as the synonym of without. This is also rendered clear by the language of the eighth clause, which provides for the daughter's maintenance by the executors, out of the proceeds of the real estate until twenty-one, "and until my said daughter shall get married, with their consent and that of her mother, as hereinbefore stated."/

We are of opinion, therefore, that the daughter's marriage without the consent of her mother, was a breach of the condition. The consent of the executor alone, was not sufficient. The testator required the consent of both the mother and the executors. In *Clarke v. Parker*, 19 Ves. 17, Lord Eldon said: "There is no case, in which it has been held, that, the consent of three trustees being required,

that consent, which, if there were only two, would have been quite sufficient, would do, the third not having been at all consulted. There was a discretion in him as well as in the others; and there is no authority that, if the consent of three is required, a marriage with consent of two only is that which the will has prescribed." [The remarriage of the mother did not dispense with the necessity of her consent to her daughter's marriage.] The will does not provide that in the event of the mother's marriage, her consent shall be no longer necessary. The testator transferred the custody and guardianship of his children to his executors in the event of the remarriage of his wife. He probably deemed it prudent, to put it out of the power of a second husband to intermeddle with the persons or estate of the children. But he uses no language indicating any intention to dispense with the mother's consent to the daughter's marriage before twenty-one, in case the mother married. Her natural love and duty may well have been regarded by the testator as affording a sufficient guaranty that the power to give or withhold consent would not be abused.

The condition, therefore, of the legacy to the daughter having been broken by her marriage without consent, the question remains, whether the condition is effective to limit the legacy to the sum of \$5,000. If the question depends upon the general rules of law applicable to conditions, it is plain that the daughter, by breach of the condition, forfeited the primary legacy. [A condition prohibiting marriage before twenty-one without consent, is by the common law valid and lawful. It is otherwise of conditions in general restraint of marriage, they being regarded as contrary to public policy, and the "common weal and good order of society."] But reasonable conditions designed to prevent hasty or imprudent marriages, and to subject a child, or other object of the testator's bounty, to the just restraint of parents or friends during infancy, or other reasonable period, are upheld by the common law, not only because they are proper in themselves, but because by upholding them the law protects the owner of property in disposing of it under such lawful limitations and conditions as he may prescribe. Story's Eq. Jur. § 280 *et seq.*, and cases cited. Now it is the general rule of law that a breach of a lawful condition annexed to a legacy either divests it, or prevents an estate therein arising in the legatee, depending upon whether the condition is precedent or subsequent. In accordance with this general principle, it was held in *In re Dickson's Trust*, 1 Sim. (N. S.) 37, that a condition subsequent that the legatee should not become a nun was valid, and that the legacy was forfeited by breach of the condition, although there was no gift over. But it

has been the settled law of England for a long period, that a condition subsequent annexed to a legacy, in qualified restraint of marriage, although the restraint was lawful and reasonable, nevertheless did not operate upon breach to divest the title of a legatee, unless there was an express gift over on breach of the condition, or a direction that the legacy should fall into the residue, and pass therewith, which is deemed equivalent to a gift over. The condition, where there is no devise over, is said to be *in terrorem* merely, a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition. *Harvey v. Aston*, *supra*; *Reynish v. Martin*, 3 Atk. 330; *Wheeler v. Bingham*, Id. 364; *Lloyd v. Branton*, *supra*; *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *In re Dickson's Trust*, *supra*; *Marples v. Bainbridge*, 1 Mad. 590. In *Lloyd v. Branton*, Sir William Grant, referring to the subject, says, "Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced." It is not necessary to state at length the reason of the apparent anomaly in the law upon the subject. This is fully explained in the judgment of Lord Thurlow, in *Scott v. Tyler*, 2 Bro. Ch. 432, and of Lord Loughborough, in *Stackpole v. Beaumont*. Suffice it to say, that it grew out of the adoption, by the English ecclesiastical courts and the courts of equity, of the rules of the civil and canon law, by which all conditions in restraint of marriage (with very limited exceptions), or conditions requiring consent, were held to be void. The ecclesiastical courts, having jurisdiction to enforce the payment of legacies, adopted the rule of the civil law in all cases, without considering that by the common law reasonable conditions in restraint of marriage were valid. The distinction made in cases where there was an express devise over does not seem to be founded upon any principle, and may possibly have grown out of an effort to partially restore the harmony of the law.

—It is a clear proposition, therefore, that according to the settled law of England, the legacy in this case, if it is regarded as a purely personal legacy, was not forfeited by the marriage of the testator's daughter without consent. There was no devise over on breach of the condition. The only gift over was in the event of the daughter's dying unmarried before twenty-one. It has been frequently decided that a general gift of a residue is not a gift over within the rule. *Wheeler v. Bingham*, *supra*; *Lloyd v. Branton*, *supra*. The condition, therefore, in this case would be *in terrorem* only within the cases cited.

But the legacy is not a purely personal legacy. The testator charges the lands devised as an auxiliary fund for the payment of debts and legacies, and there is no personalty out of which the legacy can be paid. If it is paid, therefore, it can be only by a sale of the land on which the legacy is charged. This presents a case where the condition must be construed and effect given to it according to the general rules of the common law. *Reynish v. Martin* was the case of a legacy upon a condition in restraint of marriage without consent, charged upon land in aid of the personalty. The legatee married without consent, and afterward suit was brought to compel a sale of the land to pay the legacy, and Lord Hardwicke denied this relief, saying that "where a legacy is a charge upon the lands, to be raised out of the real estate, as the ecclesiastical courts have no jurisdiction, it must be governed by the rules of another *forum*, to which the jurisdiction properly belongs;" and in *Scott v. Tyler*, Lord Thurlow said, "Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in land (though I do not find this yet resolved), follow the rule of the common law and are to be executed by analogy to it." And Judge Story, speaking of the distinctions between conditions in restraint of marriage, annexed to a bequest of personal estate, and the like conditions annexed to a devise of real estate, or to a charge upon it says: "In the latter cases (touching real estate) the doctrine of the common law, in respect to conditions, is strictly applied. If the condition be precedent it must be strictly complied with in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent its validity will depend upon its being such as the law will allow to divest an estate." Story's Eq. Jur., § 288; see, also, *Cornell v. Lovett's Ex'r.*, 11 Casey, 100; *Comm. v. Stauffer*, 10 Barr. 350; Williams on Pers. Prop. 341.

On the ground, therefore, that the condition in this case was lawful, and that there is no personal estate to pay the legacy, and that it cannot be enforced as a charge against the real estate by reason of the breach of the condition, we think the judgment should be affirmed.

Judgment affirmed.

PARKER v. PARKER.

123 MASSACHUSETTS, 584. — 1878.

GRAY. C. J. — All the lands of which partition is sought were devised by David Parker to Loring Parker upon the condition subsequent that he should support George Parker. On the death of

George, in the lifetime of the testator, the performance of the condition became impossible by the act of God, and Loring cannot be said to have neglected or refused to perform it, but holds the lands by an absolute title. 4 Kent Com. 130; *Merrill v. Emery*, 10 Pick. 507, 511.

Petition dismissed.

(3.) FEES UPON CONDITIONAL LIMITATION.¹

HATFIELD *v.* SNEDEN.

54 NEW YORK, 280. — 1873.

[*Reported herein at p. 641.*]

d. The fee-conditional of the common law.

BURNETT *v.* BURNETT.

17 SOUTH CAROLINA, 545. — 1882.

McIVER, J. — The principal questions in this case arise upon the construction of a deed which is couched in very informal and inartificial language. Its material terms are as follows: "Know all men by these presents that I, Mark Cantrell, for the bare affectionate love I have to my daughter, Mary Burnett, and having special confidence in my brother Lanceford Cantrell and Joseph W. Martin as trustees, I give to my daughter and the lawful heirs of her body the following property, or to the trustees for her and her heirs' use and benefit ninety-two acres of land lying . . . reserving the use of the same during my life. And if my wife, Sarah Cantrell, is a longer liver than me, she is to have the use of the home tract of land, for her support, and choice of the negroes and mares — two cows and other household and kitchen furniture, as my trustees for my daughter and her lawful heirs think proper, during life or widow-

¹ For the various uses of the term "conditional limitation," see note to § 22 of Gray's "Restraints on Alienation." It seems, on the whole, best that the phrase should be used as a generic term covering shifting uses and shifting executory devises. This is the sense in which we find it used in the N. Y. Real Prop. Law., § 43. "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation." Shifting uses and shifting executory devises are termed remainders in New York. R. P. L., §§ 25-28, and 43. See the chapter on future estates, *infra*. — ED.

hood. And it is my earnest desire that my trustees attend to [here some words are manifestly omitted] agreeable to the intention of this writing or conveyance."

The grantor's wife predeceased him, and Mary Burnett, who subsequently intermarried with one Hammett, died in 1877, leaving no issue of her second marriage; Margaret, the wife of the plaintiff, J. W. Burnett, and the defendants, Marcus Burnett, Matthew Burnett and Mrs. McKinney, being her issue by her first marriage. By her will she appointed the defendant Davis executor, directing him to sell sufficient of her personal and real estate to pay her debts. The executor sold all of her property, both real and personal, including the lands conveyed by the above mentioned deed, and the object of this action is to set aside the sale of these lands and to have the same partitioned amongst the above named heirs of Mary Hammett, formerly Mary Burnett.

The first question presented is as to the nature of the estate which Mary Hammett took in the lands conveyed by said deeds. Both the referee, to whom the issues in the action were referred, and the circuit judge held that she took an estate in fee conditional, and we concur with them in so holding. The deed, as will be seen, is very informal, but the conveying words are to Mary Burnett "and the lawful heirs of her body." The authorities universally hold that these are the apt words, to create an estate in fee conditional, and we are unable to discover anything in the terms of this deed to take this case out of the well-settled general rule. The subsequent words "or to the trustees for her and her heirs' use and benefit," cannot have this effect, for the word "heirs" as there used must be construed as meaning the same class of heirs — heirs of the body — which had previously been designated. The same remark will apply to the words "lawful heirs" as used in the latter part of the deed. These words are not found in the *habendum* clause, as suggested in one of the arguments, for there is no such clause in the deed, and must be regarded as used to indicate the same class of persons referred to in the conveying part of the deed.

Nor can the fact that trustees are interposed affect the question. For, even if the deed should be regarded as a conveyance to the trustees for the use of Mary and the lawful heirs of her body, about which there might be a serious question, it would not take the case out of the operation of the rule in *Shelley's Case*. It is true that the case of *Austin v. Payne*, 8 Rich. Eq. 9, does hold that where the estate of the ancestor and that limited to the heirs are not of the same quality, that is, where one is equitable and the other legal, the rule in that celebrated case will not apply. But that case recog-

nizes the doctrine that where both estates are equitable it will apply. If, therefore, the deed should be regarded as creating an equitable estate, originally, in Mary, it created the same kind of an estate in the heirs of her body, and both estates lost that character when there was nothing for the trustees to do, as the statute would then execute the uses. *Bouknight v. Epting*, 11 S. C. 71, and the cases there cited. The only duty imposed upon the trustees was an exercise of their discretion as to what property the wife of the grantor should be allowed the use of, in the event she survived him; but as she died before the grantor, there was absolutely nothing for the trustees to do, and hence, even if it should be regarded that the deed conveyed the estate to the trustees, the statute would execute the uses, and the estates would become legal both in Mary and the heirs of her body.

Regarding, then, the estate as a fee-conditional, our next inquiry is, whether it was liable for the debts of Mary Hammett, the first taker, in the hands of her heirs. In the case of *Izard v. Middleton*, Bail. Eq. 228, cited with approval in *Pearse v. Killian*, McM. Eq. 231, it was held that lands held in fee-conditional are bound, after the birth of issue, by the lien of a judgment or decree, against the tenant in fee, in bar of the right of the issue to take *per formam doni*. It seems to me that the same reasoning which led to this conclusion would necessarily lead to the conclusion that land so held would be assets for the payment of debts even though not reduced to judgment; and such was the opinion of the distinguished Chancellor Harper, who delivered the opinion of the court in *Izard v. Middleton*. At page 235 he says: "But if there had been no decree against Mr. Izard in his lifetime, yet if the heir takes only by succession from the ancestor, and in his right, it would seem to follow that whatever would be liable to debts in his hands must be assets in the hands of the heir; and such is the purport of the Statute 5 Geo. 2, chap. 7." It is true that this was only a *dictum*, inasmuch as in that case the debt had been reduced to judgment and had become a lien on the land during the lifetime of the first taker, yet it is a *dictum* supported not only by the great name of that eminent jurist, but by the unanswerable reasoning employed by him in that case.

The fundamental difference between an estate in fee-conditional, after the condition has been performed, and an estate in fee simple is, 1st, that in the former the course of descent is confined to a particular class of heirs, and upon failure of such heirs the estate reverts to the donor; 2d, that the holder of such an estate can only dispose of it by some act which takes effect during his life. In all other respects their qualities and incidents are the same. In a grant of an

estate in fee-conditional, heirs of the body are not named on account of any benefit intended for them, or for the purpose of controlling or limiting the ancestor's power of disposition during his life, but simply for the purpose of prescribing the course of descent, in case no such disposition is made. In the case of a fee simple estate the law prescribes that the estate shall descend to the heirs generally, in case the ancestor makes no disposition of the estate, while in the case of an estate in fee-conditional the instrument creating the estate confines the descent to a particular class of heirs. Both classes of heirs take by succession from the ancestor, and as in fee simple estates the heirs generally take the estate subject to a liability for the debts of the ancestor, we see no reason why, in estates in fee-conditional, the heirs of the body to whom the descent is confined should not take the estate in the same way.

Our next inquiry is as to the effect of the disposition made by Mary Hammett, by will, for the sale of the lands held by her in fee conditional. In this State it has been settled that an estate in fee conditional is not the subject of devise. *Jones ads. Postell*, Harp. 92. To allow such a power to a tenant in fee conditional would be to give him the power to disturb the course of descent fixed by the instrument creating the estate, and hence it cannot, consistently with the nature of the estate, be allowed. The moment the first taker dies, without having alienated the estate in his lifetime, it descends to and rests in the heirs of his body, and his will, which can only take effect after his death, cannot divest the heirs of the estate. So, at common law, a joint tenant could, during his life, alien his estate, but he could not devise it for the reason that "no devise can take effect till after the death of the devisor, and all the land presently cometh by the law to his companion who surviveth," and the commentator remarks that Littleton "by the words *post mortem* and *per mortem* used in the text, though they jump at one instant, alloweth priority of time in the instant, which he distinguisheth by *per* and *post*. And the reason of this priority is that the survivor claimeth by the feoffer, and therefore in judgment of law his title is paramount to the title of the devisee, and consequently the devise is void." Co. Litt. 180a. It follows, therefore, that Mary Hammett had no right to devise the lands conveyed by the deed from Mark Cantrell, her power of disposition ceasing with her life, and that the sale thereof made by the executor, under the directions of her will, even though for the payment of debts, was without authority.

The points raised by the plaintiff's third, fourth and fifth grounds of appeal cannot be considered by us, as there is no copy of the

pleadings set out in the "Case," and we are not at liberty to assume that the circuit judge went beyond the scope of the pleadings in rendering his decree. He was bound by the 55th rule of the Circuit Court to make due provision for the payment of debts before ordering the partition asked for; and the counsel for the plaintiff is in error in supposing that it did not appear that the personal estate was insufficient for the payment of the debts, for the referee distinctly reported that the debts of Mary Hammett "amounted to very nearly the value of her whole estate."

The judgment of this court is that the judgment of the Circuit Court be affirmed.¹

c. The fee-tail.

SHOPE, J., IN LEHNDORF *v.* COPE.

122 ILLINOIS, 317. — 1887.

It is contended by defendant in error, that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehndorf and her heirs by her present husband, Henry Lehndorf," Mrs. Lehndorf took a fee simple estate in the lands conveyed, while plaintiffs in error contend that she thereby took a life estate only, with remainder in fee to her children by said Henry Lehndorf.

The deed being statutory in form, contains no *habendum* limiting or defining the estate taken by Mrs. Lehndorf, and although the deed must be held equivalent to one containing full covenants, *Elder v. Derby*, 98 Ill. 228, it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they may be. If Mrs. Lehndorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life estate, and the remainder in fee to whomever would take upon determination of her estate. Therefore, as said by counsel for defendant in error, the determination of the question depends upon a construction of the granting clause of the deed, which is, that the grantors, in consideration, etc., "convey and warrant to Maria Anna

¹ In England the statute *de donis conditionalibus* (West. II, 1285) compelled the courts to construe such estates as that above "according to the form of the gift," and the resulting estate was known as an "estate-tail." See *Lehndorf v. Cope*, *infra*. This statute was understood to be in force in the other original States, but not in South Carolina. See Gray's "Rules Against Perpetuities," §§ 18 and 14, for the general principles and for citation of other South Carolina cases. — ED.

Lehndorf, and her heirs by her present husband, Henry Lehndorf, of," etc., the lands in controversy.

The legitimate purpose of all construction of a contract or other instrument in writing, is, to ascertain the intention of the party or parties in making the same, and when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed, but it is the intention apparent and manifest in the instrument, construing each clause, word and term involved in the construction according to its legal import, and giving to each thus construed its legal effect. Washburn on Real Prop. 404; *Bond v. Fay*, 12 Allen, 88; *Lippett v. Kelley*, 46 Vt. 516; *Price v. Sisson*, 13 N. J. Eq. 178; *Caldwell v. Fulton*, 31 Pa. St. 489; *Wager v. Wager*, 1 S. & R. 374.

It cannot be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first notice the contention of counsel for defendant in error, that by virtue of section 13 of the Conveyance act, (as there is here no express limitation upon the estate of Mrs. Lehndorf, and as no one can have heirs while living,) the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to, was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows:

"Sec. 13. Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law."

It is not necessary, as seems to be supposed, that to create a less estate than the fee, there should be expressed words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate was

granted. In an early case, *Frogmorton v. Wharrey*, 2 W. Black. 728, where there was a surrender of copyholds by R., who was seized in fee to M., his then intended wife, and the heirs of their two bodies, etc., Wilmot, C. J., delivering the opinion of the court for himself, Bathurst, Gould and Blackstone, JJ., after holding, on authority of *Gossage v. Taylor*, Styles 325, and *Lane v. Pannel*, 1 Roll. 438, that the children thus begotten took as purchasers and not as heirs, says, the only difference in the cases is, that in those cases "the wife had an express estate for life, and here not. But upon legal principles the cases are just alike. An estate 'to A., and the heirs of his body' is the same as an estate 'to A. for life, remainder to the heirs of his body.' " By operation of law, the added words created, in the case cited, in M. a life estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A., and the heirs of his body," by operation of law creates an estate tail in A., remainder in tail. And this has been the uniform holding.

The sixth section of the Conveyance act provides, that in cases where, by the common law, any person or persons might, after its passage, become seized in fee tail of any lands, etc., by virtue of any gift, devise, grant or conveyance "hereafter to be made," or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his natural life only, and the remainder shall pass, in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee or donee, pass, according to the course of the common law, by virtue of such gift, devise or conveyance. It is apparent, if at common law, by virtue of this conveyance, Mrs. Lehnendorf would take an estate tail, whether an estate tail general, or an estate tail special, the thirteenth section would be inoperative, and by virtue of section six she would become seized of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estates tail came into general use upon construction by the courts of the statute *de donis conditionalibus*, 13 Edw. 1, c. 1, § 1, and while no extended discussion will be necessary, an examination sufficient to determine if this case falls within the rules creating an estate tail, will be proper.

To create an estate in fee simple, at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation, in the regular course of descent. A tenant in fee simple is defined by Blackstone to be, "he that hath lands, tenements or hereditaments, to hold to him and his heirs forever, generally, absolutely, simply, without mentioning what heirs, but

referring that to his own pleasure or the disposition of the law." Com. 11, 104. Estates in fee tail were of two kinds. Estates tail general, as where the grant was to one and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni*; and estates tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. Blackstone's Com. 11, 113, 114; 4 Kent's Com. 11; 1 Washburn on Real Prop. 66. In a grant of lands, words of inheritance were necessary, at common law, to the creation of a fee, but in the creation of a fee tail estate more was required. There must also be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A;" but there was no especial efficacy in these particular forms of words, and it was requisite, only, that in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. Blackstone's Com. 11, 114; 1 Washburn on Real Prop. 72; 2 Preston on Estates, 478, and cases cited; 2 Jarman on Wills, 325.

The necessary words of inheritance are not here wanting to create a fee simple, or fee tail, at common law. The grant is to Mrs. Lehndorf and her heirs, and if the description had stopped here, a fee simple estate would, at common law, have passed by the deed. The grant is not, however, to her and her heirs *simpliciter*, but to her and her heirs by a particular husband, and by necessary implication excludes the construction that heirs generally were intended. Heirs, generally, would include not only those designated, but children she may have or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so as that it would have read, "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that equivalent words, which, by necessary implication, describe and designate the particular body out of which the heir should proceed, would suffice to create an estate tail at common law, which seems to be done by the cases and text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband" could be no other than the issue of her body by him begotten. No other person, or

class of persons, would answer the description, and they would and do fill it in every particular.

This precise point was ruled in *Wright v. Vernon*, 2 Drewry, 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Samwell, by a particular wife, forever,' is precisely the same as that of a limitation to the heirs of his body by that particular wife, forever. The words, 'of his body,' are not in the least degree necessary to this construction of the term 'heirs,' or 'right heirs,' because without their insertion the full and absolute effect of them is involved in the description, 'his right heirs, by Mary, his second wife,' which description limits the meaning of the term 'heirs' to heirs especial, procreated by himself, as effectually and as necessarily as the words, 'of his body,' could do if they had been added." This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows, that Mrs. Lehdorf would, at common law, be seized, by virtue of this conveyance, of an estate tail special in the lands conveyed, and therefore, under the statute, would take an estate for her life only, and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband, *in esse* at the time of making the deed, subject possibly, however, to be opened to let in after-born children of the same class. If no issue of her body "by her present husband" had been then living, the remainder would have fallen under Fearn's fourth and Blackstone's first definition of a contingent remainder, *i. e.*, when the remainder is limited "to a dubious and uncertain person." But here, at least two of the children who would, under the statute, take the fee simple estate upon the determination of the life estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the possible contingency of being divested *pro tanto*, if opened to let in after-born children answering the same description. The person to whom the remainder is limited is ascertained, the event upon which it is to take effect is certain to happen, and although it may be defeated by the death of such person before the determination of the particular estate, it is a vested remainder. "It is the uncertainty of the right of enjoyment which renders a remainder contingent, — not the uncertainty of its actual enjoyment." 2 Blacks. Com. 169; Fearn on Rem. 149; Kent's Com. 203; 2 Sandf. C. R. 533; *Hawley v. James*, 5 Paige, 467; *Moore v. Lyons*, 25 Wend. 144.

But it is said that the rule in *Shelley's Case* should be applied; but it will be seen that its application will produce the same result. That rule, as formulated in 2 Jarman on Wills, page 332, will best illustrate the position here. It is: "The rule simply is, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation, — *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple." The rule operates upon the words of inheritance without affecting the words of procreation, so that if, in any case, the words, "heirs of his body," or other equivalents sufficient to create an estate tail, are used, a fee tail is vested in the first taker, and not the fee simple, as seems to be supposed. Therefore, if the rule be applied, Mrs. Lehndorf would, at common law, be seized of an estate in fee tail, and brought directly within the terms of section six of the Conveyance act, before cited. When, therefore, Mrs. Lehndorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee, and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.¹

3. THE NECESSARY INCIDENTS OF A FEE.

a. Alienability.

(1.) IN GENERAL: VOLUNTARY AND INVOLUNTARY.² INTER VIVOS AND BY DEVISE.

MUNROE *v.* HALL.

97 NORTH CAROLINA, 206. — 1887.

[Reported herein at p. 561.]

¹ Estates-tail are practically non-existent as such in the United States, — the statutes converting them, at the moment of their creation, into some other form of estate or estates. In New York and several other States, they become estates in fee-simple, some of these States preserving any remainder in fee under certain circumstances. N. Y. R. P. L., § 22. Other States follow the rule of *Lehndorf v. Cope*. In Massachusetts and Pennsylvania the estate seems to remain in-tail until a conveyance occurs by some tenant-in-tail. See the American note, p. 121, Hutchins' Williams on Real Property. — ED.

² "Involuntary," *i. e.*, by process of law for the payment of debts of its owner and for taxes and assessments; also in the exercise by the State of its right of eminent domain. — ED.

(2.) VALIDITY AND EFFECT OF CLAUSES INTENDED TO RESTRAIN THE
ALIENATION OF A FEE.(a.) *Conditions, limitations and conditional limitations.*¹ *Declarations that the fee shall be inalienable.*² *General restraints.*

MUNROE v. HALL.

97 NORTH CAROLINA, 206. — 1887.

ACTION by the children and heirs-at-law of Thomas Munroe to recover certain lands from the heirs of W. S. Hall to whom they were conveyed by Annabella and Mary Munroe.

The lands in question were deeded by N. Munroe to his children, Thomas, Patrick, Annabella and Mary, their heirs, etc., upon certain terms and conditions set out in the opinion. Defendants succeeded below.

MERRIMON, J. (after stating facts). — The sole question presented by the record in this case for our decision is, did the deed in question operate to convey the fee simple estate in the land therein described as situate and being on the north side of the road mentioned to Annabella Munroe and Mary Munroe?

We cannot hesitate to answer this question in the affirmative. The deed by appropriate terms for that purpose, conveys the fee to them, and there is nothing in it that at all indicates a contrary intention on the part of the donor, except the words limiting the estate to these sisters "as long as either of them is single," and the *proviso* in a subsequent part of it, that they should never "sell or dispose of any part of the above named land . . . in any manner whatever."

The effect of the words "as long as either of them is single," need not be considered, because both the sisters died many years ago, and were never married. In any possible view of these words, they could only indicate a purpose to give the land to Patrick in a contingency that never happened and never can happen. There is no intimation of any purpose to abridge the estate given them, unless in the contingency of marriage.

¹ "No attempt is made to attach any character of inalienability to the estate, but the estate is given either on condition that it shall not be alienated, or until it is alienated." Gray's "Restraints on Alienation" (2d ed.), § 10. That no special favor is shown to limitations or conditional limitations in restraint of alienation over conditions, see §§ 29a-29c. Id. — ED.

² See Gray's "Restraints," § 10. With a third class of attempted restraints — covenants not to alien — we have here nothing to do. See, however, note to § 19 of Gray's "Restraints." — ED.

As to the *proviso* recited above, it is repugnant to the fee simple estate previously conveyed, and is in absolute restraint of all alienation, and is, therefore, simply void. An important incident of the fee simple estate is the right of alienation, and hence, any condition in a deed conveying lands or a devise that seeks to prevent alienation altogether, is void, being repugnant to the estate conveyed. The rule, however, is not so comprehensive in its operation as to prevent all conditions and restraints upon the power of alienation. Such as are limited and reasonable in their application, and as to the time they must operate, are valid and will be upheld. 1 Wash. on R. P. 67-69; 4 Kent Com. 135; Pearson's Law, Lec. 135

There is no error and the judgment must be affirmed.'

CHRISTIANCY J., IN MANDELBAUM *v.* McDONELL.

29 MICHIGAN, 78. — 1874.

THIS devise, it is true, is not in form a devise of the lands themselves, but of the proceeds when sold. If, however, there is anything in the will made perfectly clear and placed beyond all possible doubt, it is that the proceeds should be the absolute and exclusive property of the devisees (except the interest of Ellen Daily and Ann Baxter might be defeated by a condition subsequent), and that no other person should, in any event, have any right or interest in them under any circumstances. Not even the violation by them of the provisions restricting their power of sale, was to defeat or affect their interest, forfeit it to the heirs, or pass it over to others; but all conveyances of that kind, it is declared, shall be void; and the testator even goes so far as to declare it to be his intention "that no proceedings whatever, either in a court of law or chancery, shall in any way impair or deprive any of (his) devisees of any of the bequests in this will made, before the same is actually paid into the hands of such devisees." It is very clear, therefore, that though the word "condition" is used in connection with this

¹ The rule is the same in the case of attempts to restrain the alienation of equitable interests in the nature of a fee. *Potter v. Couch*, 141 U. S., 296. But see *Claffin v. Claffin*, 149 Mass., 19, and the discussion in Gray's "Restraints," §§ 120-124p.

A provision (conditional limitation) that a fee shall be forfeited in case the grantee aliens a life interest in another parcel conveyed by the same deed would seem to be a purely collateral condition, and not void. *Camp v. Cleary*, 76 Va., 140. See, however, Gray's discussion of this case in his "Restraints on Alienation" (2d ed.), §§ 29a-29c. — Ed.

devise, the devise is not made upon the condition that it shall be forfeited on a sale, or an attempted sale, and that the interest of the devisees shall terminate, or go to the heirs, nor is it limited over to any other person upon a breach of the restriction upon the power of sale, but that the devise and the interest intended to pass by it were to be absolute and unconditional in this respect, whether the restriction should be observed or violated. And as to the agreement to these restrictions, which the devisees were required to sign, supposing it to have been signed, who were the parties whose interests were to be affected by it? Who had a right to insist upon its performance, or to any remedy for its breach? Clearly none but the devisees themselves, who might, therefore, mutually release, abandon and put an end to it, at least with the unanimous consent of all, which they did by their conveyances, if these were in other respects valid. It was, in fact, very frankly admitted by the counsel for the defendants that the interest given by the will to these devisees was a present vested interest, though it was insisted that it was not properly an interest in the land, but the proceeds; that these proceeds could only be obtained through the execution by the executors of the power of sale.

But when such a bare power of sale is given to the executors merely to sell the lands for the purpose of paying over the proceeds to devisees, whose right under the will to such proceeds is an absolute and vested right, we understand the law to be settled, not only that all such devisees may collectively, before the power of sale is executed, elect to take the land, instead of the proceeds, according to their respective interests in the latter, and thus prevent a sale, but that each of them may ordinarily so elect as to his own share. See *Reed v. Underhill*, 12 Barb. 113; *Kirkman v. Miles*, 13 Ves. 338; *Craig v. Leslie*, 3 Wheat. 563; *Tazewell v. Smith's Admrs.*, 1 Rand. (Vir.) 313; *Burr v. Sim*, 1 Whart. 252; *Broome v. Curry's Admrs.*, 19 Ala. 805; *Quin v. Skinner*, 49 Barb. 132; Story's Eq. Jur. § 793. This is the effect which the law itself gives to such devise, — which gives a vested interest in the whole proceeds to the devisees, — whether the will provides for such an election or not, and even though it should expressly forbid the election.

Whether it would be competent to make a devise upon the express condition that the proceeds alone should be received or the devise to be forfeited, or the property or proceeds go over to another in case of a refusal to accept the proceeds, or of claiming the land, we need not consider, as this devise is not made dependent upon any such condition. And though the language makes it in form a devise of the proceeds instead of the land, yet so far from providing in

reference to this devise or that of other property in Detroit, against the election (as it may be said the testator has undertaken to do in reference to the devise of other portions of property which the executors might sell at any time), the last provision of the will in reference to the property in Detroit seems to me to recognize the right of the devisees to elect to hold the land instead of the proceeds, and dispense with a sale as soon as the time should arrive, when, by the will, the executors were to be authorized to sell, viz.: as appears in a former provision in reference to this particular devise, upon Breckenridge reaching the age of twenty-five and the death of the testator's widow, etc.; thus recognizing the right to elect at that time, but undertaking to restrict the right until that time.

We must, therefore, hold that the devise to the widow was of a life estate (should she remain unmarried), and that to the other devisees it was a devise of the fee subject to the life estate; in other words, the remainder in fee. And though they might at their election permit or prevent a sale by the executors for their benefit and on their account, it was a present vested remainder in fee, or the entire estate in fee, subject to the life estate of the widow.

Now, as to the restriction against alienation, while there is, as to the particular lands here in question, a direct and express restriction upon the executors not to sell it until Breckenridge should reach the age of twenty-five, or during the life of the widow if she remained unmarried, the restriction upon the devisees not to sell this property is not so direct and express. It is clear, however, and admitted, that the result of all the provisions taken together is a sufficiently clear expression of intention to forbid and restrict the devisees from selling the property or its proceeds, in other words, the estate devised so far as these lands are in question, until the period last above mentioned. { The estate devised being an absolute vested estate in fee, the only remaining question is whether such a restriction of the right of the devisees to sell such an estate is valid. } This is the main question in the case and was very properly so treated and discussed by the counsel on both sides. And before proceeding to determine this question, it may, for the sake of clearness and to avoid the confusion which might arise from confounding questions which might otherwise seem analogous, be as important to point out what the question does not involve, as what it does. It does not, then, involve the question whether a restraint upon the sale of this property for an equal length of time might not have been rendered legally effective by the conveyance of the legal title to trustees, in trust for the benefit of these devisees, according to instructions as

to time of sale, which might have been inserted in the will; in which case the validity of the restrictions as to time would depend mainly upon the question whether the period exceeded that allowed by the rule against perpetuities. Nor does the question involve an inquiry how far a somewhat similar object might have been accomplished by making this estate in fee in these devisees defeasible, upon the condition of their executing, before a certain period, a conveyance to certain persons, or to any other than certain persons, or to any party whatever, or of their becoming bankrupt, or allowing a sale upon execution, or permitting a judgment to become a lien, or upon condition of using the property in some particular way, the property being limited over to another, or to be forfeited and revert on breach of the condition. In these cases there would be some party besides these devisees interested in the observance of the condition, with a right to take advantage of the breach, viz., the heirs of the deviser, or the person to whom the property was limited over. It is quite possible that many restrictions or qualifications upon the right of devisees or grantee may be made effectual by making the estate itself dependent upon such condition, to which it could not be subjected if the estate given is absolute, as it is admitted to be here.

Nor does the fact that, in the case of an executory devise, or in that of a contingent remainder, or any other interest not vested, a restriction upon the power of the devisees to sell before it shall become vested in interest, would be good,¹ in any manner tend to sustain such a restriction upon a vested estate in fee.

This devise is not made to trustees for the benefit of the devisees, but directly to the devisees themselves. The estate devised is not a conditional one to be forfeited or to revert to the heirs of the testator, or to go over to others on a breach of the restrictions, nor one which is to vest at some future day, or upon the happening of some future event, but an absolute vested remainder or estate in fee, and though not to come into actual enjoyment until the death of the widow, to whom a life estate is given, it is just as much vested and the devisees have just as much right to sell the interest or estate devised as if there had been no intervening estate for life.

And the question of the validity of the restriction is, in my view, precisely the same in all its legal aspects as if no life estate had been given to the widow, but the whole had been given in fee directly to these devisees, as an absolute estate in fee and in possession, with the same provisions restricting the power of sale. My first difficulty in holding the devisees or their estate bound by the

¹ See § 46 Gray's "Restraints on Alienation" — Ed.

restriction is this: A legal obligation always involves the idea, not only of a party upon whom it rests, but of another party in whose favor, or for whose interest or benefit it is imposed, and who, therefore, has the right to call for its enforcement.

To give vitality and force to the current of a legal obligation, it requires, like the galvanic current, a battery with two opposite poles, between which the current is to pass and the force to operate. A circuit formed upon only one remains quiescent. The force of gravitation itself would cease to act, if not to exist, without at least two bodies (or particles) between which it could be exerted. And it is not easy to see how this restriction can impose any legal obligation upon the devisees or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own; and it has not been claimed that any other interest could be affected here. Let us test this a little further by a few analytical questions. In whose behalf, for whose interest, is the restriction imposed? Is it not solely for that of the devisees themselves? And who has a right to enforce it or complain of its breach. What species of legal tie or obligation is that which attaches only at one end, and, ending where it begins operates only in behalf of the very party upon whom, or on whose property it is imposed, making him at the same time the obligor and obligee? May not a party in whose behalf an obligation exists forego or release its performance? If not, then at whose instance will the court compel him to insist upon its performance? It must be admitted that such a restriction, in such a case, is not naturally calculated to lead to litigation, since, if the party in whose favor the obligation exists insists upon its performance, it would in all probability be performed; and if the party upon whom it rests, should refuse to obey the restriction, the party in whose favor it was imposed would not be likely to insist upon it, both these parties being one and the same. But does it not seem to result that he may do very much as he pleases about performing such an obligation? I confess my inability to see how the restriction is any more binding upon the devisees or their estate than it would have been upon the heirs or their estate, had the testator disposed by the will, only of the life estate to the wife, and left the remainder to descend to the heirs, and undertaken to impose the same restrictions upon them or upon the estate in their hands. In either case the whole estate (subject to the life interest) is equally centered in the devisees, in one case, and in the heirs in the other, and no interest but their own to be affected by its observance or violation. In neither case, as it seems to me, can the restriction be regarded as anything more than the expression of

a desire, or the mere advice of the testator, which though the devisees might choose more or less to respect, they had a clear legal right to disregard. To make it obligatory would be to sanction a testamentary guardianship over parties not subject to that species of control.

These considerations seem to me sufficient to dispose of this case, and to show that, as in *Hall v. Tufts*, 18 Pick. 459, and *Blackstone Bank v. Davis*, 21 Pick. 42, the intent expressed is contrary to law, or, at least, one which courts cannot enforce. See, also, *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sims. 66; *Rochford v. Hackman*, 9 Hare, 479; *Doebler's Appeal*, 64 Penn. St. 9; *Kepple's Appeal*, 53 Penn. St. 211; *Craig v. Wells*, 11 N. R. 315.¹

(b.) *Qualified restraints.*

SCHERMERHORN v. NEGUS.

1 DENIO (N. Y.), 448. — 1845.

EJECTMENT. The will of Ryer Schermerhorn devised to each of his six children for life a one-sixth part of certain premises and after their decease, respectively, the share of each was to go to his children. The will contained this provision: "No part or parcel of the real estate herein above by me devised shall be sold or alienated by any of my above named children, or by any of their descendants or posterity, except it be to each other, or to their and each of their descendants, upon pain that he, she or they shall forfeit the same and be debarred of holding any part thereof." One child died in 1838, leaving children of whom plaintiff is one.

The defendant offered to prove a conveyance in fee of the premises from Jeremias Schermerhorn, the plaintiff's father, and a possession by the defendant and those under whom he claimed title under that conveyance for twenty-six years which, being objected to by the

¹ Here follows this paragraph :

"But lest this may be thought too narrow a ground, and since the question in all its aspects, with the authorities upon it, has been argued and fully considered, at the risk of being charged with entering upon a discussion which does not properly belong to the case, I proceed to inquire whether the result will be different if this restriction is to be placed upon the same grounds as if it had been made a condition, the non-observance of which had been declared by the will to forfeit or defeat the estate."

The remainder of the opinion (which is very long) contains the best discussion of this branch of the subject to be found anywhere in the books, reviewing the authorities at length. —ED.

plaintiff's counsel, was overruled by the court. The defendant's counsel insisted that the provision restraining alienation, except among the devisees and their descendants, rendered the devise void, for creating a perpetuity; and also that the plaintiff's title did not take effect in possession until after the decease of all the devisees for life; which objections were overruled by the circuit judge, and a verdict for the plaintiff was taken subject to the opinion of the court.

By the Court, BEARDSLEY, J. — I think the objections which were taken on the trial, to a recovery in this case, cannot be sustained. The will of Ryer Schermerhorn was not annulled by the clause which it contained against alienation, although that clause, being repugnant to the nature of the estate devised, was void, at least as to those who were to take a fee under the will. 4 Kent's Com. 131; *Newkirk v. Newkirk*, 2 Caines, 345; 2 Cruise's Dig. 6; *McWilliams v. Nisby*, 2 Serg. & Rawle, 513; Co. Litt. 222, 223.

Under the will, the children of the devisor were tenants in common for life. When Jeremias, one of those children, died, his share passed by the will to his children, who thereby became tenants in common with the surviving devisees for life.

As the plaintiff's right did not accrue until the decease of his father, the tenant for life in 1836, the adverse possession, had it been proved, would have been no bar to the action. The testimony offered was therefore properly excluded, and the plaintiff is entitled to judgment on the verdict.

Judgment for plaintiff.¹

WALKER v. VINCENT.

19 PENNSYLVANIA STATE, 369. — 1852.

LOWRIE, J. — Under the will of P. S. V. Hamot, Mrs. Walker takes a fee simple, and not a life estate, and therefore the judgment should have been entered for the plaintiff, instead of the defendant.

The will is, "I devise to my daughter, Josephine M. Walker, and to her legal heirs," and then it proceeds to describe the property, and adds, "all of which I devise to my said daughter, and to her heirs forever, with this express condition and provision, that she

¹ But such a condition has been held valid in England. *In re Macleay*, L. R. 20 Eq. 186. See, however, criticism on this case in *In re Rosher*, 26 Ch. Div. 801. See also *In re Dugdale*, 38 Ch. Div. 176. See the summing up of the cases as to restraints on alienation qualified as to persons in Gray's 'Restraints,' §§ 41-43. — ED.

shall not alien or dispose of the same, or join in any deed or conveyance with her husband for the transfer thereof during her natural life, but the same shall be and remain during the period aforesaid inalienable."

This devise is very like that in the will of James Hunter, who gave a farm to his "son John and to his heirs, with this proviso, that he shall not have any right to sell nor convey the said farm to any person or persons whomsoever, but at his death all the right, title, and interest shall be and remain full and perfect in his lawful heirs;" and this was held at our late term at Harrisburg, in the case of *Reifsnyder v. Hunter*, to convey a fee. [19 Pa. St. 41.]

The law does not pretend to carry out the intention of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a degree that is totally incompatible with any real enjoyment of them, and which the law does not allow. Hence, many of the rules of law are designed to control and frustrate the most manifest intent. The great merit of the rule in *Shelley's Case* is, that it frustrates and is intended to frustrate unreasonable restrictions upon titles; for when an estate is declared to be a fee simple or fee tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary.

There can be no doubt that in the present case the testator meant to give an estate that should descend exactly as if it were a fee simple, for it is to Mrs. Walker and her proper heirs. This, then, is his primary intent, and the attempt to restrain the power of the first taker is his secondary intent; and it is entirely ineffectual, under the rule that where the primary and secondary intent of the testator are inconsistent with each other, the primary intent shall prevail.

It makes no difference that the testator has expressly withheld one of the rights essential to a fee simple, for the law does not allow an estate to be granted to a man and his heirs with a restraint on alienation, and frustrates the most clear intention to impose such restraint, just as it allows alienation of an estate tail, though a contrary intent is manifest. And it would be exceedingly improper in any court, in construing a devise to a man and his heirs, to endeavor to give effect to the restraint upon alienation by changing the character of the estate to a life estate, with a remainder annexed to it, or with an executory devise over.

The law is wise in not consenting to give effect to all the intentions of testators, for if it did, it would not be many generations before all the land of this country would be effectually shackled, so that

the generations in possession of it would have but little power over it. To prevent even stray instances of this kind, the rule that avoids all restraints upon grants to a man and his heirs is most valuable in its influence.

Let this judgment be reversed, and the record remitted to the Court of Common Pleas of Erie county, with directions to enter judgment in favor of the plaintiff, in accordance with the terms of the case stated.

Judgment reversed, etc.

TWITTY v. CAMP.

PHILLIPS, EQUITY (N. C.), 61. — 1866.

BATTLE, J. — In the events which have happened since the death of the testator, it has become unnecessary for us to decide the question raised in respect to the slaves given to his daughter, Mary Jane.

The only inquiry pressed upon us relates to the clause of non-alienation annexed to the devises of land to each of the testator's children. These devises are in fee simple, and the condition, by which the testator has attempted to restrain the alienation of the land before the devisees respectively attain the age of thirty-five years, is contrary to the nature of the estate, and is therefore void. See *Pardue v. Givens*, 1 Jones Eq. 306, where a condition restrictive of the power of free alienation was pronounced a nullity. The present case differs from that only in the circumstance, that here the restriction is confined to a disposition of the land under the age of thirty-five years. But this, we think, makes no difference. If the testator had the power to impose such a condition for thirty-five years, he might have imposed it for fifty, seventy or a hundred years, for we are not aware of any particular age up to which the restriction would be good, and beyond which it would be bad. Coke, Blackstone, and other elementary writers, lay down the rule generally, that a condition of non-alienation annexed to the conveyance *inter vivos*, or to a devise of a fee, is void, because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies. } Our conclusion is, that the devisees in fee under the will before us have the full power of selling, or otherwise disposing of their lands respectively, without the danger of incurring a forfeiture for so doing. A decree to that effect may be drawn accordingly.

Decree accordingly.¹

¹ But "a condition or conditional limitation upon alienation of a contingent interest before it vests is good." Gray's "Restraints," § 46. For "restraints

(c.) *Exception in case of separate estate of married woman.*¹

FEARS v. BROOKS.

12 GEORGIA, 195. — 1852.

By the Court., NISBET, J., delivered the opinion. — Whether the demurrer to the bill ought to be sustained or not depends upon two questions.

First. Does the will create a separate estate in the testator's daughter? If it does not, upon her marriage, the property left to her, vested in her husband by the marital right, and his assignment of it to Brooks, the complainant, was good.

Second. If the will creates a separate estate in the daughter, does it at the same time restrain her power of alienation? If it does not, as she joined with her husband in the assignment to Brooks, his title is good, and he ought to recover.

(1) As to the first, I remark, that a separate estate may be made in a *feme sole*, as well as in a married woman, which, upon marriage, will be good against the marital right; and this although no particular marriage be in contemplation. Upon marriage, the trust will immediately attach upon the property, so as to exclude the husband's title, although no further settlement be executed. *Anderson v. Anderson*, 2 M. & R. 427; *Davis v. Thorneycroft*, 6 Sim. 420; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & Cr. 390; *Scarborough v. Bowman*, 1 Beav. 34; 4 M. Cr. 377.

The contrary was held by Lord Cottingham, in *Massey v. Parker*, 2 M. & R. 174. In that case, it was ruled, that when property is given or settled to the separate use of an unmarried woman it vested in her husband upon her marriage. In the subsequent cases of *Tullett v. Armstrong* and *Scarborough v. Bowman*, his decision was overruled; and in affirming these decisions on appeal, Lord Cottingham overruled himself. 4 M. & Cr. 377. So the doctrine is to be considered settled as first stated.

(2) The interposition of a trustee to protect the separate estate was at first deemed essential, because the interest of a married woman is the subject only of equitable cognizance. *Harvey v. Harvey*, 1 P. Williams, 125; s. c. 2 Vern. 659; *Barton v. Pierpont*, 2 P. Williams,

on alienation qualified as to manner," see §§ 55-56g of Gray. Fines for alienation and provisions as to the payment of quarter sales are now forbidden in New York by the Constitution. Art. 1 § 14. — Ed.

¹ See Gray's "Restraints," §§ 125 to 131k. As will be seen, the restraint may be good though there be no gift over and no forfeiture of any kind imposed. This class of estates, however, is likely soon to be obsolete in the United States. — Ed.

79. It is, however, now settled that a separate estate may exist, without the intervention of trustees. In that case, the husband will take the legal interest, but equity will treat him as a trustee for his wife. *Bennet v. Davis*, 2 P. Wil. 316; *Darley v. Darley*, 3 Ath. 399; *Lee v. Prideaux*, 3 Bro. C. C. 383; *Parker v. Brooke*, 9 Vesey, 583; *Major v. Lansley*, 2 R. & M. 355.

The better course is to provide a trustee. 2 Roper, H. & W. 152. In this case, the testator appointed a trustee.

(3) My next proposition is that no particular form of words is necessary to create a trust for a *feme's* separate use. It may be declared in express terms, or it may be inferred, from the provisions or directions as to the mode of enjoyment, or management of the property. *Hill on Trustees*, 420; *Stanton v. Hall*, 2 R. & M. 180; *Tyler v. Lake*, b. 188.

The intention, however, to create a separate estate must be clearly expressed. Lord Brougham held, in *Tyler v. Lake*, 2 R. & M. 189, that the expressions must be such as "leave no doubt of the intention, and which forbid the court to speculate on what the probable object of the donor might have been." Taking this stringent rule as our guide, we think that a separate estate was created by the will now under consideration, and that there really is no room to speculate about what the object of the father was, in the provision which he made for his daughter. There are two clauses of the will which bear upon the question. The testator, Andrew Hall, divides the *residuum* of his estate equally among his nine children and directs that "the shares of his daughters be paid over, by his executors, to the trustee afterwards appointed, for their use." The seventh item of the will appoints Mr. Fears trustee for his daughters, one of whom, Amanda, after his death, intermarried with Cate, who assigned her interests in the estate to Brooks, the complainant. The duties of the trustee he proceeds to define thus: — "to receive from and receipt to my executors for the distributive shares due to each of my daughters, and to be vested by him in such property as, in his judgment, may be most conducive to their comfort and interest, and to have the title to such investment made to him, as trustee, for their use and benefit."

It is conceded that the limitation implied in the words, to their use and benefit, will not alone make this a separate estate. A limitation to the separate or sole use of a *feme* has been held sufficient. 1 Beav. 34, 4 M. & C. 377. The testator clothes the trustee with the legal estate of each daughter's share, and puts him in possession and also authorizes and directs him to invest it in such property as, in his judgment, may be most conducive to their comfort and interest,

and requires the title of the property when bought, to be made to him, as trustee, for their use and benefit. From the mode of managing the share of his daughter, prescribed by the testator, to her trustee we infer, necessarily, that the estate was intended for her separate use. The testator intended that it should be held by the trustee, for her use, against the right or title which a future husband might acquire by marriage. This is consonant with the reason of the thing. Not only is the fund left with him, to be invested according to his discretion, with reference to the comfort and interest of his daughter, but he is required to have the title to the investment made to him, as trustee, for her use. This direction unequivocally indicates the purpose of the father to create a trust, and to hold it up, that his daughter might be the sole beneficiary of his bounty. The very thing which seems to be guarded against is a title and management of the property in anybody else. No doubt the title of a future husband was just what he had in view. The right of investment (and of re-investment, which we think is implied), and the directed tenure of the title, is incompatible with a purpose to let the property take its usual course, upon the event of marriage. The title, in the event of marriage, could not be in the trustee and the husband at one and the same time. Which, then, should yield, the marital right or the intention of the testator? Clearly the former; because in the construction of wills, the intention of the testator must be carried out, unless in violation of law. There is no law violated in the creation of an estate which defeats the marital right. The testator left it with the trustee to determine what kind of investment would most conduce to the comfort and interest of his daughter; that discretion is defeated, if the husband may sell the interest. Indeed, if he can do this, then the creation of the trust, and all the powers of the trustee, are nugatory. But it is said that the trust was fully executed when the daughter married — his powers being only such as appertain to a testamentary guardian. Such a limitation of his powers cannot be inferred from the will, and seems to be gratuitous. Why appoint a trustee at all? Why not leave the share of his daughters with the executors? Why not say that Mr. Fears is to be her guardian, *eo nomine*, if such was the intention of the testator? The case is one where extreme legal subtlety must be invoked, to arrive at a result manifestly repugnant to the intention of a testator. We will not labor, with far-fetched learning, to defeat a father's purpose in making provision, at death, for his child, when such purpose, if carried out, contravenes no law of the land. We are, moreover, clear that the daughter herself is restrained from alienating this property.

(4) A married woman, unless restrained in the settlement, is a *feme sole* as to her separate estate. *Wyly et al. v. Collins & Co.*, 9 Ga. 223. If altogether restrained, she has no power of alienation; and if partially restricted, she is a *feme sole, sub modo*, and must alien alone according to the restriction. (If, for example, she is forbid to dispose of her separate estate, without the consent of her trustee, a disposition without his consent is invalid.) *Weeks and Wife v. Sego and another*, 9 Ga. 199.

If there is a prohibition against alienation, it is a part of the separate estate, and must stand or fall with it. And it is no objection to the validity of the restriction, that the woman is unmarried at the time of the creation of the trust. 1 Beav. 1; 4 M. & Cr. 290; 1 Beav. 34; 4 M. & Cr. 390; 4 M. & Cr. 377.

(5) It has been held that nothing short of an express negative declaration, will suffice to deprive a *feme covert* of her right of disposing of her separate estate. This rule seems to be stringent. Wills in reference to this very point are more liberally construed than deeds. If the intention to restrain the power of alienation be clearly collected from the several clauses of a will, they will all be construed together, and effect will be given to the intention. *Baggett v. Moore*, 1 Coll. 138. There is no reason why the intention of a testator to restrain alienation should not be collected, just as intention is ascertained in regard to anything else; nor is there any reason why intention to restrain should not be enforced as well as any other intention. In this will there is no express prohibition against alienation, but it is plainly the intention of the testator, derived from the several clauses in relation to this estate, to restrain his daughter from disposing of it.

The reasons already stated to prove this to be a separate estate, demonstrate a purpose to prohibit its alienation by the daughter. The great reason is this, to wit, the power of alienation is expressly given to the trustee; he is authorized to invest the fund derived from the estate, to buy and sell, and such a power is wholly incompatible with the same power in the woman. He is directed to take the titles of the investment in himself — if he must take, he must hold them; and this authority is inconsistent with a power to sell in the woman. Direction to manage the fund, by investing it according to his judgment, and to take the titles of the property bought as trustee, negatives the idea that the testator left the power to dispose of it in his daughter.

The demurrer, we think, therefore, ought to have been sustained, and we reverse the judgment of the court below.

b. Descent, dower, curtesy, eminent domain and escheat.

OVERTURF *v.* DUGAN.

29 OHIO STATE, 230. — 1876.

[*Reported herein at p. 20*].¹

HOUGHTON *v.* HAPGOOD.

13 PICKERING (MASS.), 154. — 1832.

[*Reported herein at p. 24*].²

DURANDO *v.* DURANDO.

23 NEW YORK, 331. — 1861.

[*Reported herein at p. 658*].

II. Freeholds not of inheritance, — life estates.

I. IN GENERAL — NATURE AND CLASSIFICATION

a. Absolute and defeasible.

BEARDSLEY, J., IN ROSEBOOM *v.* VAN VECHTEN.

5 DENIO (N. Y.), 414, 424. — 1848.

UNDER the will of Jacob Roseboom, his widow acquired an estate *durante viduitate* in this lot of land. That was an estate for her life, determinable on her ceasing to be such widow, and during its continuance was a freehold. 4 Kent, 26; 1 Inst. 42, a; 1 Cruise's Dig. 115, § 8; Watk. on Convey. 30 to 35. In the year 1800, the widow, Hester Roseboom, executed a deed in fee of this land to Guert Van Schoonhoven, which, although it did not give him a fee simple, as the grantor had not such an estate, was effective to transfer the life estate of the grantor to the grantee. In 1806, Van Schoonhoven made a deed in fee, for the same land, to Leonard Gansevoort, who thus acquired a freehold estate therein for the life of the widow Roseboom. Gansevoort died in 1810, having made his will in 1800,

¹ See also *March v. Berrier*, *supra*, p. 70. — ED.

² See also *Hatfield v. Sneden*, p. 641, *infra*. — ED.

by which all his estate, real and personal, was, in terms, devised to his wife for life, and she was made sole executrix of the will. This will being made before the deviser had any interest in the land now in question, it did not pass by the will, but vested in the widow as executrix. 1 R. L. 365, § 4; 1 K. & R. 178, § 4; *Doe v. Robinson*, 8 B. & C. 296. In 1814, the widow of said Ganesvoort united with two other persons in a deed of this land, in fee, to the present defendant, who thereby acquired a valid title to said land, for the life of the widow Roseboom. She did not die until 1826, having remained a widow since the decease of her husband, Jacob Roseboom, and, as the defendant had not conveyed his interest in said land, he had a freehold estate therein when the fine was levied in 1824. The defendant was therefore competent to levy this fine, and the proclamation being completed in 1825, it became effective against the plaintiff, whose right to bring suit accrued in 1826. This action was not brought until 1843, more than five years after the right accrued. The fine was therefore, an insuperable bar to a recovery.

WARNER v. TANNER.

38 OHIO STATE, 118. — 1882.

ACTION by Warner as administrator of L. Bartlett, deceased, for the value of a lease alleged to have been converted by Tanner to his own use.

In 1864 Tanner leased to Bartlett certain premises, Bartlett to build a cheese house thereon and to pay for the use of said premises thirty dollars per annum "while said premises shall be used as and for manufacturing cheese; and when said premises shall no longer be used for such purpose, the premises . . . shall again revert to said Tanner, said Bartlett having the privilege of removing all buildings and fixtures put upon said premises by him." Bartlett came into possession under the lease and so continued until his death in 1874, at which time rent was paid to February 1, 1875.

In February, 1875, Tanner (having previously requested the administrator to remove the buildings and fixtures) went into possession of the premises against the protest of Warner, who thereupon brought this suit. Judgment on verdict for plaintiff was reversed by the District Court. The administrator brings error to this court.

OKEY, C. J. — In the Court of Common Pleas, the jury was charged, that the instrument executed by the parties was not a lease at will.

nor for years, nor of perpetual duration; "that said lease is not real property;" that it "was a lease which continued and run for an indefinite period, and so long as the lessee, or his assigns or personal representatives, should use the property covered by said lease for the purpose of manufacturing cheese thereon;" that upon the death of Bartlett, the interest passed to the administrator and not his heir; and that the administrator could maintain a suit against the Tanners in the nature of an action of trover for the conversion of the fixtures and the lease. To state such a position is to refute it. The only instance of a similar action which I remember was met in *Railroad Co. v. Robbins*, 35 Ohio St. 531.

Leases may be at will, for years, for life, or of perpetual duration. *Foltz v. Huntley*, 7 Wend. 210; Taylor's Land. & T., § 72. Indeed, they may be made for any period which will not exceed the interest of the lessor in the premises. And whatever the term, it may be subject to a condition which is a qualification annexed to the estate by the grantor, *Sperry v. Pond*, 5 Ohio 387, s. c., 24 Am. Dec. 296, or lessor, *Foltz v. Huntley*, *supra*, whereby the estate or term granted may, among other things, be defeated or terminated.

In this case the question as to the rights and interest which Bartlett acquired under the instrument, is one of construction. The fact that he was required to and did place upon the premises valuable structures, which he could only remove when the premises were no longer used for the manufacture of cheese thereon, satisfies us that this was not a lease at will nor a lease from year to year. On the other hand, the instrument contains no words indicating an intention to grant a fee in the premises; and yet the construction which the Court of Common Pleas placed upon it would render it, in effect, precisely the same as though the grant had been to Bartlett, his heirs and assigns. It would endure, according to that construction, until the premises were no longer used for the manufacture of cheese, or the lessee ceased to pay rent precisely as in the case of a grant in fee with such condition. Having regard to the whole instrument, and not overlooking the fact that the right to remove the fixtures is, in terms, limited to Bartlett, we are satisfied that a lease for life was granted to him, subject to be defeated when the premises were no longer used for the manufacture of cheese thereon, or by the non-payment of rent. *Hurd v. Cushing*, 7 Pick. 169, *Sperry v. Pond*, *supra*; *Foltz v. Huntley*, *supra*; *Rowle's Case*, Tudor's Lead. Cas. Real Prop. 2d ed. 27-100; 4 Wait's Act. & Def. 502. Indeed, it is well settled that if one grant an estate to a man and woman during coverture, or as long as the grantee or lessee shall dwell in such a house or use the premises for a specified purpose,

as for instance, the manufacture of cheese thereon, or for any like uncertain time, the grantee or lessee has in judgment of law a freehold. 1 Williams on Ex. (6 Am. ed.) 749; Taylor's L. & T., § 52; *Beeson*, App., *Burton* res. 12 C. B. (74 E. C. L.) 647; and see cases cited, *supra*. The cases relied on by the plaintiff in error *White v. Fuller*, 38 Vt. 194; *Lewis v. Effinger*, 30 Pa. St. 281; *Cook v. Bisbee*, 18 Pick. 527, are in no respect inconsistent with the view here stated; and the statutes and decisions relating to permanent leasehold estates in this state, which are also cited and relied upon by the plaintiff in error, shed little light on the case.

The administrator of Bartlett had no right of action, except with respect to property merely personal, which may have remained on the premises when this suit was brought; nor had he a right of action with respect to such personal property, unless the Tanners converted it to their own use. Leases of land of a chattel quality are chattels real, and go to the administrator; in other words, all interests for a definite space, measured by years, months or days, are deemed chattel interests, and, independently of statutory provisions, *Northern Bank v. Roosa*, 13 Ohio, 334, 30 Ohio St. 285, go to the administrator; but he has no interest in a lease, like this, for a freehold term. See authorities cited in the last paragraph.

Judgment affirmed.

b. For one's own life and pur autre vie.

(1.) PUR AUTRE VIE: DIRECT AND INDIRECT CREATION.

REYNOLDS *v.* COLLIN.¹

3 HILL (N. Y.), 441. — 1842.

[Reported herein at p. 13.]

BEARDSLEY, J., IN ROSEBOOM *v.* VAN VECHTEN.

5 DENIO (N. Y.), 414. — 1848.

[Reported herein at p. 575.]

¹ For a special limitation as to number of lives in N. Y., see N. Y. R. P. L., § 35. — ED.

(2.) PUR AUTRE VIE: EFFECT OF DEATH OF FIRST-TAKER IN POSSESSION.

(a.) General and special occupants.

ATKINSON *v.* BAKER.

4 DURNFORD AND EAST (ENG.), 229. — 1791.

DETINUE to recover certain deeds.

One Foster being seized of a life estate in certain lands conveyed them to one Williams and his heirs, who took in trust for W. Atkinson, his heirs, executors and assigns. Atkinson received the deeds of the premises. On his death they came into the possession of his heir-at-law Baker. Plaintiff, as administrator of Atkinson, brings this action to recover them. Defendant demurred insisting that plaintiff was not entitled to the deeds, the defendant being a special occupant of the estate. It was further stated that prior to the statute, 29 Car. 2, c. 3, every estate *pur autre vie* of which there was no special occupant marked out by the grant, belonged to the person who first took possession of it. "But this being found inconvenient, that statute was passed to remedy it; and it enables the proprietor to devise it, and enacts, That if no devise be made it shall be chargeable in the hands of the heir, if it comes to him by reason of a special occupancy, as assets by descent, as in case of land in fee simple; and in case there is no special occupant, it shall go to the executor or administrator and be assets in their hands." In case of a surplus, if not devised and there be no special occupant, by 14 Geo. 2, c. 20, § 9, such surplus is distributed as personalty. "Now these statutes only apply in cases of abstract possession; but here there is a special occupant."

On the other side it was urged among other points that though the heir is favored over the devisee, "Yet he is not favored under the statute of frauds," and that if this estate vested in the heir it would only be liable to specialty debts, whereas if the administrator were entitled, he would hold it for all the creditors of the intestate."

LORD KENYON, Ch. J. — The law on this subject has been truly stated by the defendant's counsel. If an estate *pur autre vie* be limited to a man, his heirs and assigns, and if it be not devised, it goes to the heirs, under the statute of frauds, and is liable to the same debts as a fee simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it subject to the same debts as personalty of any other description is; and by the 14 Geo. 2, it is distributable. Now in this case, before the plaintiff can recover the deeds in question, she must show a title to

the estate in respect of which she claims the deeds; but she objects to the defendant's retaining them, because his title, if any, is only equitable and cannot be inquired into in a court of law. Now, this court either has or has not a right to inquire in whom the equitable title is vested; and in either way of considering the question there must be judgment against the plaintiff. If it be so doubtful a point that we cannot decide it in a court of law, the plaintiff must seek redress in equity; because the rights to these documents must follow the title to the estate, and if we can examine into the title the defendant, who is the heir at law of the tenant *pur autre vie*, must have judgment. The estate in question was conveyed to Williams, his heirs and assigns; and it appears by the deed of trust, which, as being a declaration in writing, is valid by the statute of frauds, that Williams held the estate in trust for Atkinson, his heirs, executors, administrators, and assigns. The first limitation is to the heirs; and in the ordinary course of this species of property it goes to the heir at law, because it is a real estate. Then it is urged, that we ought to exclude the heir, in order to let in a more numerous class of creditors; but however convenient it might be if such were the law, when we are deciding according to law, we must take care not to infringe one of its first rules; and here the heir at law is entitled to the estate as a special occupant; and has consequently a right to detain the possession of those documents which belong to the estate.

Judgment for the defendant.

(b.) *The modern statutes.*

REYNOLDS *v.* COLLIN.¹

3 HILL (N. Y.), 441. — 1842.

[Reported herein at p. 13.]

¹ For the present New York Statute see the New York Real Property Law, § 24. In Michigan the executor takes the residue. In Massachusetts and several other states the estate *pur autre vie* is realty after the death of the first taker and descends to his heir in the same manner as a fee-simple. Pub. Stat. Mass. (1882), chap. 125, § 1.

For the mode of ascertaining the death of the *cestui que vie* or of a life tenant in N. Y., see Code Civ. Proc., §§ 2302-2319. For the statutory presumptions as to the death of a person on whose life an estate in real property depends, see § 841 Id. — ED.

c. Conventional and legal life estates.

MCCORMICK HARVESTING MACHINE CO. *v.* GATES.

75 IOWA, 343. — 1888.

[*Reported herein at p. 581.*]¹

WATSON *v.* WATSON.

13 CONNECTICUT, 83. — 1839.

[*Reported herein at p. 626.*]

d. Incidents of life estates.

(1.) ALIENABILITY — VOLUNTARY AND INVOLUNTARY.²

(a.) *Restraints upon alienation.*³

MCCORMICK HARVESTING MACHINE CO. *v.* GATES.

75 IOWA, 343. — 1888.

SUIT in equity to subject certain real estate to the payment of a judgment against defendant. A demurrer to the petition was overruled. Defendant appeals.

SEEVERS, C. J. — The plaintiff obtained a judgment against the defendant A. C. Gates, and in this action seeks to subject certain real estate, which said Gates has a title to, or interest in, to the payment of said judgment. Whatever right or interest A. C. Gates may have in the real estate was derived under the will of E. M. Gates, and it is as follows: “I have placed my son, Alvin C. Gates, on a farm near Colfax, in said county, described as the southwest quarter, and the north half of the southeast quarter of section eleven, township seventy-nine, range twenty-one, situated in said Jasper county, State of Iowa, which it is my will that he occupy and enjoy during his natural life, but without the power or ability to convey or incumber the same, and that its productions and rents are intended by me to insure a support for himself and his family; and it is not my will that he have the power to mortgage

¹ See also cases under “2” below. — ED.

² For cases of voluntary alienation, see *supra*. Compare with cases on alienability of a fee, pp. 560-574, *supra*. — ED.

³ Not involving forfeiture. See p. 561, *supra*. — ED.

or incumber the rents, profits or productions of said farm, either above or under ground, or that the same be subject to attachment or levy for the debts of said Alvin. It is my will that he have such an estate as will allow of his farming the same himself or renting to others, or as will allow him to mine the coal that is supposed to be under it, or contract with others to mine it, so that nothing is done which will allow the income from the same to escape from the said Alvin or his said family. And it is my will that, upon the decease of said Alvin, the title to said land descend to Glen Gates, daughter of said Alvin, if she is the only child of his then living, or jointly to said Glen and any other child or children that may be born to said Alvin, to share and share alike; and it is my will that if no children of said Alvin are living at the time of his decease, that then and in that case, the title in fee-simple to vest in my sons, Sumner E. and Lorin A. Gates, and, if they are not living, in their legal representatives." The question to be determined is whether A. C. Gates has such an interest in the land as can be alienated or sold on execution for debts created by him. It is stated in the will that the testator had placed A. C. Gates on the land, and he was to "occupy and enjoy it during his natural life." Conceding that there is no qualifying provision in the will, this is a devise of a life estate. 2 Jarm. Wills (5th ed.), 404; 2 Washb. Real Prop. (3d ed.), 450; *Reed v. Reed*, 9 Mass. 372; *Blanchard v. Brooks*, 12 Pick. 63; *Lewis v. Palmer*, 46 Conn. 460; *Bowman v. Pinkham*, 71 Me. 295; but such devise is coupled with conditions; it being provided that A. C. Gates shall not convey nor incumber the land or the rents and profits, nor shall the same be subject to attachment or levy for the debts of said A. C. Gates. Counsel for the appellee insist that, as a life estate is vested in A. C. Gates, the provision against the alienation by him or through judicial process is void, because it is inconsistent with the estate vested in him; that is to say, the argument is, if a person is vested with an estate for life or in fee simple of real estate, he must necessarily be vested with the right to alienate such estate, and that such right cannot be in any respect controlled. If the power to alienate is restricted, the estate ceases to be an absolute one, whether it be for life or in fee simple. In this respect there is no difference in the two estates; both are absolute, or neither exists. The authorities, without serious conflict, except as hereafter indicated, are in accord upon this subject, and sustain the views above expressed. 2 Jarm. Wills (5th ed.), 538; 1 Perry, Trusts, § 386; *Blackstone Bank v. Davis*, 2 Pick. 42; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236; *McCleary v. Ellis*, 54 Iowa, 311. We have doubts whether any adjudged case can be found

which holds otherwise, unless the legal title to the property has been vested in a trustee, for the use, under specified conditions, of the beneficiary. Many such cases have been cited by counsel for the appellants, but they are clearly distinguishable, unless it can be said that under the will in question a trust estate was created. But it is too clear for controversy, we think, that a life estate was vested in A. C. Gates. He could not hold such estate in trust for himself. The two estates are inconsistent, and cannot exist in the same person at the same time. In fact, the will does not create a trust estate, but vests an estate for life in A. C. Gates.

The petition states that an execution was issued on the judgment and returned "No property found." This, being admitted by the demurrer, constitutes a sufficient basis for and warrants this proceeding in equity to determine the nature and extent of the estate of A. C. Gates in the property in controversy. The demurrer was properly overruled, and the judgment of the court subjecting the life estate to the payment of the judgment must be

Affirmed.¹

TILLINGHAST *v.* BRADFORD.

5 RHODE ISLAND, 205. — 1858.

AMES, C. J. — The demurrer to this bill is attempted to be supported, substantially, upon two grounds: First, that Hezekiah Sabin, Jr., had not such an equitable interest, under his father's will, in the trust property in question, that he could aliene the same to the plaintiff in trust for his creditors; and, second, that in legal intendment he did not, by the assignment executed by him under the poor debtor's act, aliene the same to the plaintiff upon such trust.

The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life with a power of disposing of the remainder in fee by will; in default of such disposition, such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents

¹ This case lays down the settled rule as to restraints (not involving forfeiture) upon the alienation of legal life estates. Of course there exists here, as in the case of fees, an exception in favor of married women having a separate estate, legal or equitable, subject to a restraint on alienation. See *Fears v. Brooks*, *supra*, p. 571. See Gray's "Restraints on Alienation," §§ 134, 140. The cases which follow are intended to indicate the conflict of authority as to the validity of such restraints in the case of trusts where the interest of the beneficiary is in the nature of a life estate. — ED.

and profits during the debtor's life. It is quite clear, that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate, alienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property — and so far as subjectiveness to debts is concerned, to the honest policy of the law — as to be totally void, unless, indeed, which is not the case here, in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since *Brandon v. Robinson*, 18 Ves. 429; and in application to such a case as this, is so honest and just that we would not change it if we could. Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice.¹

STEIB *v.* WHITEHEAD. ✓

III ILLINOIS, 247. — 1884.

MULKEY, J. — Asahel Gridley, by his last will and testament, devised to trustees certain valuable real estate, upon the following trusts, namely: "To keep said lands and tenements well rented; to make reasonable repairs upon the same; to pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash, into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. At the death of the said Juliet said trust estate shall cease and be determined, and the said lands shall vest in the heirs of the body of the said Juliet, and in default of such heirs, shall descend to the heirs of my body then living according to the laws of Illinois then in force regulating descents." After the death of Gridley, his will was duly probated, and no question is made as to its form, or the capacity of the testator to make

¹ See also the early New York case of *Bryan v. Knickerbacker*, 1 Barb. Ch. 409, decided on principles in force before the R. S. of 1828-30. North Carolina, South Carolina, Georgia, Alabama, Ohio and Kentucky also have decisions in accord with the case above. See Gray's Restraints, §§ 178-1901. This was also the English rule. For a summary statement of the English law, see Gray's Restraints, § 167j. — ED.

a will. The trustees named in the will having refused to act, by a proper proceeding in chancery, William H. Whitehead the defendant in error, was duly appointed trustee in their stead, and thereupon took possession of the devised premises and otherwise assumed the duties of the trust. Certain moneys, being a part of the rents and profits of the estate, having come into his hands, as trustee, and which, under the provisions of the will, it was his duty to pay over to Juliet, the daughter, were attached in his hands by one of her creditors. The trustee appeared and filed an answer, as garnishee, setting up the trust and the special provisions of the will above cited, and the question presented for determination, is, whether the money thus held by him was subject to garnishment.

The authorities are not in accord on this subject. Under the rule as laid down by the courts of England, and by the courts of final resort in a number of the States of the Union, the fund attached would clearly be subject, in equity, to the payment of the daughter's debts. *Tillinghast v. Bradford*, 5 R. I. 205; *Smith v. Moore*, 37 Ala. 330; *Heath v. Bishop*, 4 Rich. Eq. 46; *McIlvain v. Smith*, 42 Mo. 45. A contrary rule prevails in Pennsylvania, Massachusetts, and perhaps other States, which seems to be supported by the reasoning of the Supreme Court of the United States in *Nichols v. Eaton*, 91 U. S. 716. The question, so far as we are advised, is a new one in this court, and in view of the respectable authority to be found on either side of it, we feel at liberty to adopt that view which is nearest in accord with our convictions of right and a sound public policy.

That it was the intention of the testator to place the net income of the property beyond the control of his daughter and her creditors while in the hands of the trustee, is manifest, and we perceive no good reason, nor has any been suggested, why this intention should not be given effect. We fully recognize the general proposition that one cannot make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself, for that would be, in effect, to give and not to give, in the same breath. Nor do we at all question the general principle that upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or to curtesy, or that it should not descend to the heirs gen-

eral of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either of these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by mere private contract. This cannot be done. But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life, and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would in many cases fall far short of the object of its creation, if the father, in such case has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settlor is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers.

The tendency of present legislation is to soften and ameliorate, as far as practicable, the hardships and privations that follow in the wake of poverty and financial disaster. The courts of the country, in the same liberal spirit, have almost uniformly given full effect to such legislation. The practical results of this tendency, we think, upon the whole, have been beneficial, and we are not inclined to render a decision in this case which may be regarded as a retrograde movement. The creditors of the daughter have no ground to complain that they have been misled or wronged in consequence of the provision made for her by her father. It was his own bounty, and so far as they are concerned he had the right to dispose of it as he pleased. The property was not placed in her possession so that she might appear as owner when she was not, and thereby obtain credit. An examination of the public records would have shown that she had no power to sell or assign her equitable interest, that the extent of her right was to receive the net accumulation of the trust estate from the hands of the trustee, and that these accumulations did not become absolutely hers, so as to render them subject to legal process for her debts, until actually paid to her.

The McLean Circuit Court, and the Appellate Court for the Third District, having reached a conclusion in accord with the views here presented, the judgment will be affirmed.

Judgment affirmed.¹

LEGGETT *v.* PERKINS. ✓

2 NEW YORK, 297. — 1849.

EJECTMENT. — Both parties claim title under the will of Gerardus Post, deceased. Defendant is lessee of the trustee appointed by the will. Plaintiff Susan Leggett is one of the beneficiaries under the trust in the will, but now claims that the trustee did not take the legal estate and that the trusts were void, and that she is entitled to the possession of the land. Judgment for defendant below. Plaintiff appeals.

GARDINER, J. — I think that the trustees took a fee in the premises in question by implication.

The devise to the daughters of the testator is not absolute, but (in the language of the will) "so that each may have and enjoy the income of an equal fifth thereof during their several natural lives." The testator then constitutes his executors trustees of their estate, authorizing them as such trustees "to take charge of, manage, and improve the same and to pay over to them, from time to time, the rents, interest and net income thereof." It is very obvious that a legal estate in the premises was necessary to enable the trustee to discharge these duties. *Oates v. Cook*, 3 Burr. R. 1684; *Doe v. Woodhouse*, 4 T. R. 89, 92; Fletcher on Trustees, 27; Greenleaf's Cruise, tit. 12, Trust, ch. 1, § 14, and note; Jickling's Analogy, p. 15, note. To put the matter beyond a doubt, the testator has provided that the net income should be paid to the daughters after mar-

¹ But one cannot make such a settlement in his own favor so as to be good against creditors. *Ghormley v. Smith*, 139 Pa. St. 584; *Bank v. Windram*, 133 Mass. 175. For further discussion of this subject, see *Nichols v. Eaton*, 91 U. S. 716. Besides the courts of the United States, the decisions in Pennsylvania, Massachusetts, Maine, Maryland, Mississippi, Vermont and Missouri are in accord with the principal case. See Gray's "Restraints on Alienation," § 178. The doctrine is supposed to have originated in Pennsylvania. See Gray, §§ 214-235h, 170-174. In several States there is a statutory system of "spendthrift trusts." These usually follow the system originated in New York by the revisers of 1830. N. Y. R. S., Part II., ch. 1, Title II., Art. II, § 55, subd. 3, etc. Some New York cases construing these statutes follow here. See for the New York Statute in its present form, N. Y. R. P. L., §§ 76, 78, 80, 83, 85.

riage without the consent of their husbands, with like effect as if they were unmarried. If the husband took an estate by the curtesy, as he would if the fee vested in the daughter, he would be entitled to the rents and profits, and the separate provision for the daughter would be wholly ineffectual. *Greenleaf's Cruise*, tit. 12, ch. 1, § 16; *Doe v. Hoffman*, 6 Adolph. & Ellis, 206; 2 Jarman on Wills, 202, 203, and cases cited. Again, if the trust to receive rents and profits and pay them over to the daughters is authorized by the third subdivision of the 55th section of the statute of "Uses and Trusts," the whole estate in law and equity, by the 60th section, vests in the trustees. 1 R. & S. 729, § 55, sub. 3, § 60.¹ If not authorized, the trust is void, whatever may have been the intention of the testator. *Id.* 727, § 1.

Whether such a trust is within the statute is therefore the great question in the cause. The decision of the chancellor in *Gott v. Cook*, affirmed the validity of a trust of this character. 7 Paige, 523. The decree in that case was pronounced after an elaborate argument, with all the light afforded by the opinion of Judge Savage, in *Coster v. Lorillard*, and of Judge Bronson in *Hawley v. James*, and has never been reversed or shaken by any adjudication in this State, to my knowledge. As trusts are the peculiar subject of equitable cognizance, the principle thus established has become practically the law of the State. The same construction has been given to the statute by the Superior Court of the city of New York, by the Supreme Court, sitting in the Sixth district, by the same court in the First district in *Mason v. Jones*, the decision in the last case being affirmed in this court upon an equal division of the judges. Nor is this all. In *Parke v. Parke*, in the court for the correction of errors, the point was distinctly presented, and the validity of a trust of this description affirmed by their judgment. The question should be at rest upon authority. The conflicting opinions of eminent judges are evidence that it was originally a doubtful question; and no one is authorized to assume now that he is infallibly right, to whichever side of the controversy he may incline. I shall adhere to the decisions that have been made, because upon such a question the judgment of the court of last resort sustained as it is by the authority of every other adjudication made upon the same subject, is entitled to respect here. If, however, the question is deemed open, I shall follow those decisions because I think them right, and the exposition they have given to the statute the correct one.

I shall confine myself to a review of the more prominent objec-

¹ See §§ 76 and 80, N. Y. R. P. L. — Ed.

tions urged against the validity of a trust of this description. 1st. It is said that the trust authorized by the statute "to receive the rents and profits of land, and to apply them to the use of any person," by necessary implication clothes the trustee with a discretion in the expenditure of the fund; that a trust to pay over the rents and profits to the beneficiary, deprives the trustee of all discretion and is consequently void. It should be remembered in considering this proposition, that the statute in reference to express trusts is merely permissive. It creates nothing. We might infer from the argument addressed to us, that the Legislature had in the first instance annulled all trusts, and then proceeded to a new creation. It is more correct to say that they abolished all that they have not recognized as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by the application of common-law principles. By that law the trustee must apply the trust fund according to the instructions of its author. His duty is the same now, if the directions given do not contravene the general object for which the trust is authorized by the statute. With this limitation the authority of the donor is as absolute now as before the statute. Now an express trust may be created according to the third subdivision of the 55th section, "to receive and apply the rents and profits of land to the use of any person." The subject is the rents and profits of land; the object, an application to the use of any person. When a trust is created of this nature, it is recognized as existing with all its common-law incidents. The relation of the donor and trustee, the power of the former and the duty of the latter, are precisely what they were by the common law.

The statute no more prescribed the mode in which the profits must be applied, than the manner in which they are to be received. The details may be arranged by the donor in both cases for himself, or left to the discretion of the trustee. If the trustee may apply the fund to the education of the beneficiary, where no instructions are given, (and this is conceded,) the creator of the trust may direct it to be done. Because, in either case, the application would be to the use of the person designated and within the letter and spirit of the statute. It is believed that in all cases, before and since the statute, the rule is uniform, that the creator of the trust may direct specifically the performance of those things which the trustee, whose authority is derived from him, might himself perform, in the lawful execution of the trust, if no specific directions were given. The proposition under review annuls this power of the donor. It transfers to the trustee alone, a discretion in the application of the

fund, which the donor could exercise himself by the rules of the common law, and declares that the relation between the trustee and beneficiary is fixed by statute, and must be the same in all cases, any differences in the character or circumstances of the latter to the contrary notwithstanding. This theory is to be established, if at all, by implication. The statute says nothing of the discretion of the trustee; it speaks only of the power of the creator of the trust. It does not in terms compel a donor, who may be supposed to feel the strongest interest in the beneficiary, and to possess an equal knowledge of his character and necessities, to lean exclusively upon the discretion of a trustee, in the administration of his bounty. The implication should be strong, that leads to such results. I will glance briefly at the argument by which it is maintained.

And first, it is alleged that the Legislature had in view a particular class or description of persons as beneficiaries. "Persons who could not safely be trusted with the management of their own affairs, and for that reason a trustee was allowed to make the application for them." *Hawley v. James*, 16 Wend. 157; 14 Id. 321. The answer to this view is to be found in the law itself. The rents and profits arising from such a trust may be applied to the use of "any person," without regard to his condition, habits, character, or mental capacity. No judge or lawyer has ventured to deny this directly; or to assert that a trust for the benefit of a millionaire, in the full vigor of health and intellect, is not as effectual, as though its subject was a lunatic pauper. And yet to support this construction it has been constantly assumed that the Legislature, in this respect, intended not only what they have not said, but the reverse of what they have declared. This assumption, indeed, is indispensable to the support of the hypothesis under review. According to that, the trustee, as remarked, must always sustain the same relation to the *cestui que trust*. He is to exercise a kind of guardianship in the expenditure of the fund, (16 Wend. 158,) and a guardianship of precisely the same character in all cases. Such a doctrine would be anything but a necessary implication from a statute, which admitted all persons without exception to the class of beneficiaries.

To give plausibility to a doctrine which places all *cestuis que trustent* upon the same statute level of incapacity, as to the management of their own affairs, a common disability must in some way be established. Hence the attempt in all the arguments addressed to us, and all the opinions delivered upon this subject, sometimes from the history of this section, and sometimes from its language, to group the beneficiaries into classes, between which there was some supposed resemblance, and as to all of whom, a guardianship of the

kind alluded to might exist without manifest inconvenience or absurdity. 14 Wend. 321. It is this preconceived notion, which has induced those by whom it was entertained, to restrict the obvious meaning of the words occurring in the third subdivision of this section. "Apply," for example, which means the act of applying, and includes obviously any act of the trustee by which the trust fund is applied for the benefit of the *cestui que trust*, whether expressly directed by the donor, or performed according to the discretion of the trustee, is limited to the latter exclusively; and the trustee by force of it constituted, in all cases, the discretionary almoner of the donor's bounty. "In no other way," it is said, "can we give force to the word apply." It seems to me very clear, that the term is robbed of half its power by the restriction. "Use," also one of the most comprehensive words in our language, and adopted by the revisers for that reason, is in this way held to mean a sort of benefit, conferred according to the discretion of a trustee; and "any person," as we have seen, to stand for some persons in particular.

There is nothing in the history of the law to give countenance to this construction. The section, as originally framed and passed, authorized a trust "to receive the rents and profits of lands, and apply them to the education and support, or either of them, of any person," etc. By this provision, the trust was restricted to certain definite uses, education and support, but without limitation as to persons. A few months' reflection satisfied the revisers that a trust thus limited would not answer the exigencies of families or society, and on the 20th of April following, they recommended the substitution of "use," for "education and support, or either of them." They remark in their report, that the word "use" includes "education and support," and that "it will also include other purposes which ought to be provided for." The revisers sought to generalize what was before specific. The construction in question reverses this order, and gives to general terms a special and restricted application.

A third reason assigned is, that a trust created in the language of this section, or by equivalent words, would vest a discretion in the trustee as to the application of the trust fund; and hence it is inferred, that such discretion is in all cases essential. One obvious answer to this position is, that it was not the object of the Legislature to prescribe a formula to be followed in the creation of a trust, but to designate in general terms the purposes for which they might be created. 3 R. S. 582. These general terms were intended to include within them an indefinite number of particular and special

trusts, adapted to exigencies of families, or the wants of individuals. If these terms are transferred from the statute to a trust deed, or a devise, they must necessarily give, as to all these particulars, a discretion to the trustee. For, in such cases the trust would confer upon the trustee all the power which the law conferred upon the author of the trust. But it by no means follows that the lawmakers intended that in all cases he should possess such discretion, under penalty of avoiding the trust. If the statute should authorize a married woman to execute a power of attorney, to convey her interest in real estate, it might be as plausibly contended, that she could not designate the vendee, the terms of the sale, or the amount of the consideration, because a power in the words of the statute, or in equivalent terms, would give a discretion to the attorney in all these particulars. By adopting the language of this subdivision, the trustee, for example, must apply all the rents and profits to the use of the *cestui que use*. But Judge Bronson, in *Hawley v. James*, remarks, it can make no difference whether the trust extends to all the rents and profits, or is confined to a specified sum of money. The donor may settle for himself the amount to be applied.

But there is an obvious difference in the legal effect of an instrument requiring the trustee to apply the rents and profits of the lands conveyed, and one directing "a specific sum of money" to be applied out of those rents and profits, and yet both are within the statute, by the concession of the advocates of the construction in question. So the trust authorized by the same section of the statute, to sell lands for the benefit of creditors, if created in the language of the statute, would oblige the trustee to sell for cash, and to distribute the fund, when received, *pro rata* among all the creditors of the assignor. But the latter may, notwithstanding, direct that the proceeds be applied in discharge of a single debt, or a class of debts, in preference to others of the same character. The trusts, although different in terms and in their legal consequence, are both valid, and, for the same reason, they are each of them within the general purpose sanctioned by the Legislature.

Another, and to my mind conclusive, answer to this proposition is, that under a trust created in the language of the statute, the discretion of the trustee (if it exist at all) is wholly unlimited as to the mode in which the trust fund is to be applied to the use of the *cestui que trust*. He may expend it for the education, or support, or to gratify the taste, or caprice, of the beneficiary. The doctrine is, that the discretion implied from the terms of the statute, is essential to the validity of the trust. If so, the donor can no more restrict that discretion than he can annihilate it. But it is conceded that

he may direct a specific sum of money, less than the whole rents and profits, to be applied. This is a limitation of power. Again the revisers say that "Use includes education and support;" of course, if the statute is what they intended it should be, a trust to apply a specific sum for the education of any person designated, would be valid. But this is confining the trustee to a single use, instead of leaving to him, in the language of this section, the whole class of possible benefits, from which he might select one, or all, at his discretion.

Again, if a discretion is an essential element of a legal trust, I see no way to escape the conclusion that the trustee must administer to the necessities of the *cestui que trust*, from day to day, and hour to hour. To avoid this absurdity, which was pointed out by the chancellor, it was distinctly admitted upon the argument, that the trustee was at liberty to pay over to the beneficiary, from time to time, sums of money "to be applied by him to his own use." This concession is a virtual surrender of the whole controversy. For if the discretion of the trustee is indispensable, in the application of the fund, he cannot delegate it to another, and certainly not to the beneficiary. In a word, the payment of a sum of money to the *cestui que trust*, is an application to his use, or it is not; if the former, it is authorized by the statute, and may be directed in the trust; if not, the trustee cannot make such payment in his own discretion or otherwise, without a violation of duty.

What, then, is an application "to the use of a person," within the statute? The advocates for a discretionary power in trustees over the fund, have told us that a payment over is not such an application, but have not informed us in what it consists. "To apply to the use of," is to execute the trust *pro tanto*. It is such an application as will discharge the trustee from all responsibility on account of the fund, or the part of it thus applied. This requires, 1st. The authority, express or implied, of the creator of the trust. 2d. An act of the trustee in pursuance thereof. 3d. The assent, in some form, of the beneficiary, where he has legal capacity; or of his committee or guardian, where he has not. An application "to the use" of a person, like a delivery, or payment, implies an acceptance. The delivery of clothing to a madman, would no more be an application to his use than the payment of money; for he has not the capacity to assent to either. The nature of the property applied is of no consequence, whether money or chattels. Judge Savage observed in *Lorillard's Case*, "that to apply rents and profits to the use, does not mean to pay them over to the *cestui que trust*. In that case he would apply them himself to his own use." In what

other way can they be applied? If the learned judge had pursued the subject, he would have discovered that his remark applied with equal force, not only to a payment of money, but to every species of property, whether procured by the trustee or otherwise. In the final analysis it would be found that the beneficiary must in all cases apply the thing bestowed to his own use. The reason is, that the donee cannot be compelled to accept the gift, or any part of it. The trustee has to deal with free agents, when the beneficiaries have legal capacity, and with their legal guardians when they have not. He is trustee of the fund designed for their use, not a committee of their persons. If they refuse to accept what he has provided, and is ready to deliver, whether money, or necessities, there is no application; the trust is unexecuted; the property remains in the trustee, subject to his control, and for it he alone is responsible. On the other hand, if the trustee, in pursuance of an authority written out in the trust deed, or implied from it, delivers to the *cestui que trust* money or other property for his use, and it is accepted by the latter, the trust is so far executed, the application made, and if within the next hour, the gift is squandered or destroyed, the trustee is exonerated.

Again, it is said that if a person is competent to take care of the money when paid over, there is no reason why the estate should not be transferred to him out of which it is raised. The same reason might be urged against trusts of personal property of this kind, which are confessedly authorized by the statute. But to be influenced by this suggestion, we must shut our eyes to the light of history and experience. Every one knows that there are individuals in every society, who are neither imbecile nor profligate, nor united with those who are so, who could properly dispose of a fixed income, and yet who ought not, from prudential reasons, to control the capital out of which it is raised. The difficulty does not lie in a want of capacity; but it is to be found in their inexperience, the relation which they sustain to others, and sometimes in the nature of their pursuits. Of the men of the past age, whose labors in science and literature are now appreciated, how many might be named who, if living, would be deemed incompetent to manage an estate successfully. Yet men like these have their uses, although they know little of the value of property, or the modes of extracting rent from a refractory tenant. The statute does not exclude them from the class of beneficiaries; nor, as I read it, does it require a guardian or a trustee to supervise their expenses; or make their degradation an essential condition of the trust. We are told that persons of this class can appoint agents to superintend their estates.

So can the creator of the trust, and the law casts upon him this duty, whoever may be the *cestui que trust*. The chances of a judicious selection would be rather in favor of the man who provided the fund, than the one who was to expend the income.

And lastly, it is said that estates created under the third subdivision are alienable; that a trust to pay over is passive, and opposed to the policy of our law, and the intention of the Legislature. A trust to receive rents and profits, and pay them over, is essentially active in all its particulars. It was so at the common law and is so now. Jick. Anal. p. 15, note and cases; 3 R. S. 582; Reviser's Notes. To pay over is an active duty, and the successful management of real estate, with a numerous tenantry, demands not only integrity, but the exercise of vigilance, together with a knowledge of business, and of property. The revisers say, "that active trusts are indispensable to the proper enjoyment and management of property. They therefore propose to retain them, only limiting their continuance, and defining the purpose for which they may be created." 3 R. S., *supra*. I think effect should be given to their design, and that of the Legislature. The objection, indeed, is rather to the policy of the statute, than the validity of a trust to pay over. If the law was more questionable than I believe it to be, it is no reason why it should be made more odious by construction.

The judgment of the Superior Court should be affirmed.

WILLIAMS v. THORN.

70 NEW YORK, 270. — 1877.

RAPALLO, J. — This action is brought by a judgment creditor of the defendant Butterfield, after the return of an execution unsatisfied, to reach the surplus income of a trust estate, of which the judgment debtor is the beneficiary.

The trust estate consists of real and personal property, which was given by the will of the father of the defendant, Butterfield, to the defendants, Thorn and others, in trust, to receive the rents and profits of the real estate and the income of the personal estate, and to pay over the rents of the real estate and the income of the personal property to the defendant, Butterfield, during his life.

The complaint alleges that the income of the trust estate is much greater than is necessary for the support of the defendant, Butterfield, and those dependent upon him, and prays that the surplus may be applied to the payment of the plaintiff's judgment.

Proof was given on the trial to the effect that the gross rental value of the real estate was about \$4,000 per annum, and that the income of the personal property was \$600 per annum, out of which taxes and insurance were to be deducted. Some of the real estate was occupied by the defendant, Butterfield, and some was not let. The judge, however, did not pass upon the question whether there was any surplus, but decided, 1st. That the plaintiff was entitled to have the amount fixed, which should be a reasonable allowance for the support and maintenance of the debtor and those dependent upon him with the right to the debtor to apply for a modification, if his circumstances should thereafter change. 2d. That the surplus over and above such allowance, whether accrued or hereafter to accrue, should be paid to the plaintiff, or a receiver to be appointed, until the debt of the plaintiff and his costs should be paid. 3d. That the plaintiff had the right to have ascertained what amount, if any, of accrued income belonging to the debtor was in a certain undivided fund referred to in the complaint, and that such surplus, if any, should vest in said receiver, and be applicable on said debt when collected by him; and 4th. That a referee should be appointed to ascertain and report what amount would be the reasonable allowance above referred to, and also as to the above surplus, and that on the coming in of his report a final decree be made.

The defendants excepted to this decision, and made a motion, under § 268 of the Code, for a new trial on a case and exceptions. This motion was denied at General Term, and from that order the defendants appeal to this court.

By 1 R. S. 729, § 57, it is provided that "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law."¹

This provision is very plain, and there can be no question that the surplus income of the real estate, if there be any such surplus, is liable to be reached in some form by the creditors of the beneficiary. Most of the cases on the subject expressly hold this section equally applicable to a trust to receive and pay over the income of personal property, and no point is made on this appeal based upon any distinction between the two sources of the income in question.

¹ See § 78, N. Y. R. P. L. — ED.

The right of a creditor to maintain an action of this description in cases of trusts of personal, as well as real estate, has been recognized since an early period after the adoption of the Revised Statutes. In *Hallett v. Thompson*, 5 Paige, 586, it is observed by the Chancellor that as a general rule it is contrary to sound policy to permit a person to have the ownership of property for his own purposes and to be able at the same time to keep it from his creditors. That the Revised Statutes have made one exception to this rule to the extent of a provision for education and necessary maintenance merely, but that in that case the beneficial owner is himself deprived of the power of aliening or encumbering the property or his interest in the rents and profits as *cestui que trust*, and the surplus income, beyond what is necessary for his support, is in equity subject to the claims of his creditors. And that by the analogy which courts of justice have always endeavored to preserve between estates or interests in land, or the income thereof, and similar interests in personal property, the right of a judgment creditor to reach the surplus rents and profits of land, beyond what is necessary for the support and maintenance of the debtor and his family, entitles him to maintain a creditor's bill which will reach a similar interest of the debtor in the surplus income of personal property held by another for his use and benefit; but not that part of the income which may be necessary for the support of the judgment debtor.

The right to maintain such an action as the present was also sustained by V.-C. Sandford in *Rider v. Mason*, 4 Sandf. Chy. Rep. 351, where § 57 of 1 R. S. 729, is applied indiscriminately to the income of real and personal property, and in *Sillick v. Mason*, 2 Barb. Ch. Rep. 79, wherein the chancellor made a decree allowing the defendant to receive out of the income of a trust fund, accrued and to accrue, a specific sum fixed by the chancellor as sufficient for his support, and directing the surplus to be retained for the benefit of the creditor.

In *Bramhall v. Ferris*, 14 N. Y. 41, the remedy of the creditor to reach such a surplus by bill in equity, was also conceded, though that case was disposed of on the grounds that there was no allegation or proof that the income was larger than necessary for the support of the debtor and his family, and also that there was a provision in the will that the interest of the *cestui que trust* should cease on the recovery by creditors of a judgment to reach it, which provision was held to be valid. The same right is also conceded in *Scott v. Nevius*, 6 Duer, 672, and in *Graff v. Bonnett*, 31 N. Y. 9.

It is contended, however, that the case of *Campbell v. Foster*, 35 N. Y. 361, is an authority for the position that no part of the interest

of the *cestui que trust* in such income can be reached, and it is true that Wright, J., in that case, stated it to be his individual opinion that it could not. His argument is, that §§ 38 and 39 of 2 R. S. 173, except from operation of creditors' bills funds held in trust for the debtor, when the trust proceeds from a third person.¹ That § 63 of 1 R. S. 730, which provides that no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest, renders the interest of the beneficiary in a trust to receive and apply the income of personal estate inalienable, and therefore it cannot pass to creditors.² But he says it is not necessary to pursue the inquiry, whether the surplus can be reached; that his own opinion is that it cannot, but he says, "let that pass and let it be conceded that if there be any surplus, it may be taken. It has been held, and correctly, that such surplus is not ascertainable in supplementary proceedings to discover and appropriate the debtor's property, but only in a suit where the issue is directly made on the amount necessary for the debtor's support. If there were an accumulation in the hands of the trustee, it might possibly have been reached under § 294. But a receiver in supplementary proceedings cannot maintain a suit to reach so much of the income of a trust fund as is not required for the suitable support of the debtor."

That is the only point decided in *Campbell v. Foster*. The action was brought by a receiver of the property of the judgment debtor appointed in supplementary proceedings. The complaint set out a trust of personal property, created by the father of the judgment debtor, to pay the income to her, that it was more than sufficient for her support, and prayed that out of the surplus income derived, and to be derived from the trust estate, there be paid to the plaintiff, as receiver, a sum sufficient to satisfy the judgment. A demurrer to this complaint was sustained. Judge Wright rests his opinion on two grounds: First. That under §§ 38 and 39, 2 R. S. 174, the income is absolutely exempt; but, second, if he is wrong in that, the interest of the *cestui que trust* is inalienable under § 63, and cannot pass as property of the judgment debtor to a receiver. In this latter holding he only followed the decision of this court in *Graff v. Bonnett*, 31 N. Y. 9, where it was held in a similar action that it would not pass to a receiver until it had actually become due and payable, and perhaps not until it has been in some way determined that there will be a surplus. The same point was decided in *Scott v. Nevius*, 6 Duer, 672, but in both of those cases the right of

¹ See Code Civ. Proc., § 1879. — ED.

² See § 83, N. Y. R. P. L. — ED.

the creditor in a proper action to have the amount necessary for the support of the debtor ascertained, and to compel the application of the surplus, is fully recognized.

Woodruff, J., in his opinion in *Scott v. Nevius*, holding that an interest of the beneficiary in such a trust cannot pass to a receiver in supplementary proceeding, says: "If there was already an accumulation in the hands of the executors, it might doubtless be reached by an order in this proceeding or by a proceeding under § 294. But it has been held, that it cannot be anticipated. But this does not import that on a proper bill, filed, such surplus may not, by proper directions, be secured to the creditor. On the contrary, the court may order a reference, to ascertain and fix the amount necessary for his support, and direct the executor to pay over the surplus for the satisfaction of the judgment."

Locke v. Mabbett, 2 Keyes, 457, and s. c. 3 Abb. Ct. of App. Dec. 68, also decides that the surplus income cannot be reached by supplementary proceedings, but expressly leaves open the question whether it can be reached by action in equity. The learned judge in *Campbell v. Foster*, while holding that § 63, which renders the income inalienable, applies to trusts of personal estate, fails to advert to the fact that, if § 63 applies, § 57 must also, by the same reasoning, be applicable, and that that section expressly enacts that the surplus income shall be liable to the claims of creditors.¹

The argument of Judge Wright, that §§ 38 and 39 absolutely exempt the whole income from the claims of creditors, has been answered in many cases. It is obvious that the construction which he gives them would make them practically repeal § 57. Such a construction is by no means necessary. By § 38 jurisdiction is conferred upon the Court of Chancery in creditors' suits, to compel the discovery of any property belonging to the judgment debtor or held in trust for him, and to prevent the delivery or payment thereof to him. If the section had ended there, it is obvious that a literal interpretation of it would enable a creditor to stop all the income of a beneficiary under one of these trusts.

The exception is therefore added: "Except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." This does not necessarily conflict with the provision subjecting surplus incomes to the claims of creditors. Section 39 authorizes the Court of Chancery to decree satisfaction of the judgment out of any personal property held in trust for the debtor, "with the exception aforesaid." This exception was necessary. In its absence it might be

¹ See § 78, N. Y. R. P. L. — Ed.

held, that in case of a trust of personal property, satisfaction might be decreed out of the principal. But it is not inconsistent with the special provision, in case there is a surplus of income.

That these sections (38 and 39) do not present any obstacle to reaching surplus income under § 57, has been held in all the cases, except *Campbell v. Foster*, ever since the adoption of the Revised Statutes. In *Craig v. Hone*, 2 Edw. Ch. 569, 70, V.-C. McCoun says, the object of § 38 was to prevent express trusts proceeding solely from the bounty of some third person, from being overthrown by these creditors' bills. It was enough to say that all beyond necessary support should be liable to the creditors of the *cestui que trust*. In *Hallett v. Thompson*, 5 Paige, 583, the Chancellor says, that § 38 was intended to protect the beneficial interest of the *cestui que trust* only to the extent of a fair support out of the trust property. In *Rider v. Mason*, V. C. Sandford says, that §§ 38 and 39 are to be taken in connection with the statute of uses and trusts, and thus construed, limited to the portion of the trust fund necessary for the support of the debtor and his family. In *Sillick v. Mason*, 2 B. Ch. 79, these sections were not considered an obstacle to a decree in favor of the creditor for satisfaction out of the surplus income arising from real and personal property. In *Scott v. Nevius*, 6 Duer, 672, Judge Woodruff says, that § 38 forms no impediment to such a decree. In *Graff v. Bonnett*, 31 N. Y. 9, the right of creditors to reach the surplus is expressly recognized, and Hogeboom, J., in the prevailing opinion, construing §§ 38 and 39, holds that they do not conflict with that right. In *Campbell v. Foster*, the report of the case states that six judges affirm on the ground that the fund cannot be reached. But in view of the opinion in the case which discards as immaterial the question whether the surplus could be reached by a proper suit, and the weight of authority in support of the proposition that it can, I think the report must be understood as meaning that the six judges held that the fund could not be reached in the proceeding then before the court. Davies, J., who was one of the judges, concurring in the decision in *Campbell v. Foster*, says, in the case of *Locke v. Mabbett*, 2 Keyes, decided at the same time with *Campbell v. Foster*, that it is doubtful whether under §§ 38 and 39 such a fund can be reached, but he does not intimate that it had been so decided.

The case of *Wetmore v. Truslow*, 51 N. Y. 338, does not touch the present case. It was not a suit to reach surplus income, but the whole, on the ground that the beneficiary was also a trustee.

My conclusion is, that as to the income of the real estate, the surplus income, beyond what is necessary for the suitable support of

the debtor and those dependent upon him, in the manner in which they have been accustomed to live, is clearly applicable, under § 57, to the claims of his creditors. That as to the surplus income of the personal property, it is likewise so applicable. If it is alienable by the debtor, the cases concede that it can be reached. If inalienable, it is so only by virtue of § 63; and if § 63 applies to trusts of personalty, then § 57 also applies and subjects the surplus income to the claims of creditors.

The further point is made, that conceding the surplus income to be so applicable, no action can be maintained for its application until after it has accumulated in the hands of the trustees.

I find no authority for this proposition, except a single Special Term decision, *Hann v. Van Voorhis*, 15 Abb. Pr. (N. S.) 79, nor any reasonable ground upon which it can be sustained. It is only where the surplus is sought to be reached, as property of the debtor, or as a debt due from a third person, by supplementary proceedings, that such doctrine has been held, and as has already been shown by the cases cited, those very cases concede that a different rule would prevail in a suit like the present one. In *Sillick v. Mason*, 2 Barb. Ch. 79, the income of the beneficiary from the trust fund was \$2,500 per annum. The order was that \$2,000 per annum was sufficient for his support. That \$1,000 be allowed to him out of a half year's income due when the bill was filed, and \$1,000 out of each half year's income thereafter to accrue. The surplus was to be retained to abide the final decree, and was, of course, applicable to the claim of the creditor. In *Clute v. Bool*, 8 Paige, 83, the Chancellor held that such an income was inalienable, and said, for that reason that it could not be reached by a creditor before it was due, and he intimates that the intent of the 57th section was, that such surplus as might accrue from time to time, should be liable to the claims of creditors, after it was ascertained that it was not wanted and had not been applied to his support as it became due, whether it remained in the hands of the trustees or had been received by the *cestui que trust*. But no such point was decided in the case. The income was only \$400, and the creditor claimed the whole of it, and there was no allegation that it was more than sufficient for the debtor's support. It is manifest from the statement of the proposition, that if the views of the Chancellor were correct, the provision of the 57th section would afford no substantial protection to creditors and would simply announce a principle without affording any means of giving it practical operation. But such a construction is not admissible. The section does not say that the surplus not spent by the *cestui que trust* shall be liable for his debts, but the surplus beyond the sum

that may be necessary for his support and education. It is clear that when a case arose, the Chancellor himself did not adhere to his dictum in *Clute v. Bool*, for in *Sillick v. Mason*, he fixed the sum necessary for support and directed the retention of the surplus of future instalments of income. This was recognized by V.-C. Sandford and by Judge Woodruff as the proper course in the cases cited, and by Bosworth, J., in *Genet v. Foster*, 18 How. Pr. 50, also in *Moulton v. De Macarty*, 6 Rob. 533, and there is no case, except *Hann v. Van Voorhis*, holding that the provisions of § 57 can be carried into effect in any other manner. The cases which require that the income should have been realized are all cases of supplementary proceedings. *Hann v. Van Voorhis* was a motion for an injunction at Special Term, and was decided on the strength of *Campbell v. Foster*, the judge apparently considering that that case decided that no part of the income could be reached by a judgment creditor unless it had accumulated beyond the wants of the *cestui que trust*, and was in surplus by accumulation arising from the failure of the latter to spend or appropriate, or from some other cause. For the reasons already stated, I think *Campbell v. Foster* does not so decide, and that such would not be a reasonable interpretation of the statute.

Order affirmed.

RUGER, CH. J., IN *TOLLES v. WOOD*. ✓

99 NEW YORK, 616. — 1885.

NO SERIOUS dispute arose on the argument over the main questions of law involved in the controversy, and the following propositions may, therefore, be assumed as established for all of the purposes of this discussion:

1. When a trust has been created by one person for the benefit of another, which provides for the payment of the income of the trust fund to the beneficiary, a judgment creditor of such beneficiary is entitled to maintain an action in equity to reach and recover the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust*, and those dependent upon him. Code of Civil Pro., §§ 1871, 1879; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 Id. 9; *Craig v. Hone*, 2 Edw. Ch. 570.

2. This rule applies as well when the income is derivable from a trust of personal property as that from real estate. *Hallett v. Thompson*, 5 Paige, 583; *Williams v. Thorn*, *supra*; § 57, art. 2, tit. 2, chap. 1, Part 2, R. S., p. 2182.

3. The disposition of such an income cannot be anticipated by the

cestui que trust or encumbered by any contract entered into by him providing for its pledge, transfer or alienation previous to its accumulation. § 63 R. S., p. 2182; *Graff v. Bonnett, supra*; *Williams v. Thorn, supra*; *Scott v. Nevius*, 6 Duer, 672.

4. The creditor of such a beneficiary acquires a lien upon the accrued and unexpended surplus income, or that subsequently arising from such fund, superior to the claims of general creditors or assignees of the *cestui que trust*, by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment. *Williams v. Thorn, supra*.

The headnote of the case states that "what are necessities is a mixed question of law and fact, and therefore the opinion of a witness as to what was a proper expenditure is not admissible." The trust fund in this case consisted of both real and personal property, and the will creating it expressly provided that the *cestui que trust* should have no power to anticipate the rents, income or profits thereof.

The *cestui que trust*, although served with process in the action, suffered default, so far as he was individually concerned, but is defending as one of the trustees of the fund from which the income in dispute is derived.

The following facts, among others, were found by the referee upon the trial, and so far as they are supported by evidence, must be regarded as conclusively established in the consideration of this appeal: That Silas Wood died prior to the year 1852, leaving a last will and testament, whereby he devised certain real and personal property to his executors in trust to pay the rents, income and profits thereof to his son Wilmer S., for his use, but without any power of anticipation on his part; that the defendants are now the trustees of the said fund, the said Wilmer S. Wood having been duly appointed as such, on the death of one of the original trustees on the 21st day of March, 1863; that said Wilmer S. for a long time previous to the trial had been entitled to and in the receipt of said income, and that the complaint in this action was served on said Wilmer S. on the 27th day of January, 1883; that the net income of said fund accruing to the said Wilmer S. between the said 27th January, and the date of said report, December 4th thereafter, was \$4,159.86, and the amount paid personally to said beneficiary between said dates was \$1,375; that during the same time the trustees paid, by the direction of the *cestui que trust*, \$1,099.80 as interest upon a debt owing by him to one Robert Center, and the further sum of \$708.82 for premiums upon life insurance policies held by said trustees upon the life of said Wilmer S. as security for an indebtedness of \$27,000,

owing by him to the trust fund, and they retained the further sum of \$810 as interest upon such debt.

We are of the opinion that the judgment of the court below should be sustained upon the ground that there was an accumulated surplus in the hands of the defendants at the time of the rendition of the judgment which had accrued during the pendency of the action, and was applicable to the payment of the plaintiff's judgment, and was sufficient to discharge the same. The expenditure of that sum by them for the purposes, and under the circumstances found by the referee, was a violation of the rights secured by the plaintiff by the commencement of this action, and was unauthorized by any power vested in them. This sum was inalienable by the *cestui que trust*, and actual experiment had demonstrated that it was not needed for his support during the period of its accumulation. The amount of the accumulation would seem to be more than sufficient to discharge the obligations of the plaintiff, and if this should prove to be so, would render the provision in the decree for a further application of surplus income unnecessary.¹

¹ In another action against this same defendant and his trustees, *Kilroy v. Wood*, 42 Hun (N. Y.) 636 (1886), BRADY, J., says: "The evidence establishes that the beneficiary is in receipt of a handsome income, which the learned justice in the court below thought was not more than sufficient to support him in the manner in which he had been accustomed to live, and was not beyond what his father intended to provide for him. * * * In determining what is a proper amount to be allowed for his expenditures, it seems to be regarded as proper to consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. It was said in the case of *Sillick v. Mason* [2 Barb. Ch. 79]: 'It certainly was the misfortune of the defendant that he was brought up in idleness, under the idea that he was to inherit a large estate, and that it was unnecessary that he should acquire any business habits, so as to fit him to acquire property or to enable him to take care of it if given to him by others.' And in the same case the chancellor, after determining the amount which should be allowed the beneficiary, said: 'And they should not, upon a fair construction of the statute on this subject, be permitted to indulge in extravagant expenditures whilst the defendant's creditors remained unpaid.' The same observation applies in this case. But the difficulty in disturbing the judgment arises from the fact that there is not sufficient evidence to show, indeed it may be said that there is no evidence on the part of the plaintiff tending to show, what would be a proper amount to allow the beneficiary for his support. He is, as claimed in the defendant's points, a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the usages and customs of which he seems to be in harmony both in practice and expenditure, and it is insisted on his behalf that his income is not more than sufficient to maintain his position according to his education, habits and associations. And this may be so, yet it would seem that evidence might have been adduced which would establish his ability to live upon a smaller sum

(b.) *Forfeiture for alienation.*¹BRAMHALL *v.* FERRIS. ✓

14 NEW YORK, 41. — 1856.

COMSTOCK, J. — If we assume, as the appellants contend, that the trust which the executors hold under the will in respect to the interest of Myron H. Ferris, is technical and passive merely, the conclusion does not follow that the plaintiffs are entitled to the relief they claim.² By the express provisions of the will, reading the codicil as a part of it, his interest is to terminate on the event of a decree or judgment pronounced against him in a creditors' suit instituted for the purpose of obtaining the fund; and in that event the executors are directed to apply the income to the support of his family by paying the same to his wife, or in any other mode which they in their discretion may adopt. I know of nothing in the rules of law to prevent these provisions from taking effect according to the intention of the testator. It may and should be conceded, that if the bequest to Myron H. Ferris had been given to him absolutely

than the whole income, and thus relieve himself from the burden of a debt which seems to have been justly contracted. But the evidence is wholly insufficient on this subject on behalf of the plaintiff." See also *Stow v. Chapin*, 4 N. Y. Supp. 496 (1889). VAN BRUNT, P. J., says: "There is another ground upon which the court was also justified in denying the motion, and that is that there is no proof whatever contained in these papers as to what would be a sufficient income for the defendant Osborne. It is to be borne in mind that the creditor is not seeking to reach any property of Howell Osborne's, but is endeavoring to reach the income of a fund which his father placed in the hands of trustees to be applied to his benefit. Under these circumstances he is entitled to have so much of said fund as may be necessary to support him in the style in which he had been accustomed to live, and in which he had been brought up by his father, and for the maintenance of which this provision was made in the will of the father. It is not for the creditor to say that his debtor should live on two dollars a day or one dollar; that such a sum will keep the debtor from starvation, or that it will prevent his being clothed in rags. There is no such rule in cases of this description. The testator has the right to do as he pleases with his money, and if he desires to make provision for the support of a profligate son in such a manner that he cannot reach or anticipate this fund, or the income thereof, he has the right to do so, and he has the right to afford him the means of living in the manner in which he has brought him up, and to which he has been accustomed, and the creditor can claim only that which is in excess of this amount; and that such excess exists must be established by allegation of fact." — ED.

¹ The estate is upon condition, limitation or conditional limitation. — ED.

² While discussing the case fully from this point of view the court finds that there was in fact an active trust. — ED.

for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law. *The Blackstone Bank v. Davis*, 21 Pick. 42; *Hallett v. Thompson*, 5 Paige, 583; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429. This doctrine, however, and the cases on which it rests do not deprive a testator of the power to declare effectually that the bequest shall cease on the happening of an event which would subject it to the claims of creditors, and then to give it a different direction. "There is," said Lord Eldon, in *Brandon v. Robinson*, "an obvious distinction between a disposition to a man until he becomes a bankrupt and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it although it is his." See, also, *Shee v. Hale*, 13 Ves. 404; *Lewes v. Lewes*, 6 Sim. 304; and *Graves v. Dolphin*, 1 Id. 66. This distinction is one of substance, and we think the principle on which it depends will sustain the will of the testator in the present case. If a testator may provide that his bounty bestowed upon one person shall cease and go to another on the occurrence of bankruptcy, I can see no reason why he may not do so in the event of an execution returned unsatisfied, followed by a creditors' suit and judgment therein. * * *

MITCHELL, J. — * * * By the will the beneficial interest in a certain share was in Myron during his life, and might perhaps have been reached in part by his creditors. The testator then alters that interest, so that on a certain event it should cease and the income should thenceforth pass to others. As the will and codicil form but one instrument, the estate which the will might have given but for the codicil, never existed. The only estate or interest which Myron ever had was that which was created by the joint effect of the two instruments, [that was a right to have the income of a certain share paid over to him until a judgment creditor's bill should be filed against him and a decree had thereon, and then that right was to cease and to pass in favor of his family.] The father when he made the will and codicil owned the whole estate; he had the absolute power over it; he could carve out of it such interests as he pleased, if he violated no rule of law in doing so; he could give one-third to Myron so long as he lived in this State, or so long as he lived out of it, or until a third person should return from Rome or go to it, or

on any other similar arbitrary contingency, according to his will or caprice. He was under no obligation, legal or moral, to give his property so that the creditors of Myron could take it from him or his family. His moral duty and his duty to the State were greater to save Myron and his family from want or from being a burden on the public, than to devote his property to pay his son's creditors. There is, therefore, no public policy which should frustrate the testator's intention.

The testator has not, as supposed by the counsel for the plaintiff, given to his son a certain estate and then attempted while the estate continued to take from it one of the incidents which the law binds inflexibly to it, but he gives him a certain right in the property, which is to continue for a limited time until an uncertain event shall occur, and then, when that event occurs, is to cease entirely. While the son holds it he holds it with all the incidents which the law attaches to it; when the event, on which it is to cease, occurs, the son has no longer any right or interest in it, and with the loss of his right all right of his creditors also falls to the ground. If the creditors could find any previously arising income, which the son had not called for and could call for, undisposed of and in the hands of the executors, their rights to that would remain unimpaired; but when his right ceased, so also did theirs. * * *

Thus the rule is made not to depend on the question whether the act causing the termination of the estate comes from the tenant for life or from his creditors, but on its being made (whatever it may be) a cause for the transfer of the estate to another. In *Hallett v. Thompson*, 5 Paige, 583, there was no bequest over on any contingency. In *Degraw v. Clason*, 11 Paige, 136, there was what the chancellor considered an absolute estate in the legatee, alienable by her although held in trust for her, and there were no words showing that the bequest was for the personal support of the legatee, and there was no bequest over.

Judgment affirmed.

(2.) RESPONSIBILITY OF LIFE-TENANT FOR INCUMBRANCES AND TAXES.

THE VICE-CHANCELOR IN *COGSWELL v. COGSWELL*.

2 EDWARDS' CHANCERY (N. Y.), 231. — 1834.

THEN, as to the two mortgages existing on parts of the real estate. The question is, who are to bear the burden of them, and in what proportions and how and by whom are the principal and interest of such mortgages to be satisfied?

By the R. S. vol. 1, 749, § 4,¹ the devisee of real estate, subject to a mortgage executed by the testator, is bound 'to satisfy and discharge it out of his own property, without resorting to the executor, unless there be an express direction in the will to the contrary. Here there is no such direction. A life estate in the house and lot in Cedar street (encumbered by a mortgage of ten thousand dollars, being one of the houses there situated of which the testator died seized), is given under the trusts of the will, to the widow of the testator and to his brother Jonathan and sister Lois in equal thirds; and by the residuary clause, an estate in fee in remainder in the same property is given to the two nieces, Mary and Elizabeth L. Cogswell, subject to the contingency of their dying without issue. The same is the case with respect to the ten vacant lots on Front street, which are under a mortgage of two thousand six hundred and ninety dollars. Now, as between the tenants for life and those entitled in remainder, the former are bound to keep down the interest on the mortgage debts, and they must contribute alike out of their respective shares of the rents and profits during life to pay the interest on those sums. As the life estates fall in, the principal sums remain a charge upon the inheritance and must be borne by those who succeed to it. The tenants for life are not bound to extinguish the incumbrances. They are only to keep down the annual interest: 4 Kent's Com. (1 ed.) 72, 73; and as a consequence of this rule, in case the mortgagees should call in their money or if it should be found expedient to pay them off out of the residuary personal estate belonging to the nieces Mary and Elizabeth, they will be permitted to stand in the place of the mortgagees so far as to collect the interest payable by the tenants for life.

It appears that the executors have already paid off the mortgage of ten thousand dollars. The life estates must bear the interest which accrued upon it from the death of the testator to the time of such payment; and they must continue to be charged with the interest on the principal sum in the same manner as if the mortgage remained. And the same rule must be observed with respect to the two thousand six hundred and ninety dollars whenever that mortgage shall be paid.

¹ Now N. Y. R. P. L., § 215. — Ed.

CANNON *v.* BARRY.

59 MISSISSIPPI, 289. — 1881.

[*Reported herein at p. 433.*]¹

REYBURN *v.* WALLACE. ✓

93 MISSOURI, 326. — 1887.

BLACK, J. — This case is here on an appeal from the judgment of the Circuit Court sustaining a demurrer to the petition. The petition, which is a bill in equity, in substance, states that Mrs. Reyburn, the wife of the plaintiff, died in 1879, seized of a large real estate situate in St. Louis; that she left surviving her one child, five years old, and her husband, the plaintiff, who was twenty-eight years of age; that, by her will, she devised her real estate to her husband for life, in case he should remain unmarried, but in case of his marriage, then to her heirs, and if she had no heirs at his death, then to her sisters and their children in case of the death of any of them; that the property is to a large extent unproductive, and the improvements not adapted to the neighborhood in which they are situated; that the annual rents received are some fifty-eight hundred dollars, and the repairs, insurance and general taxes reduce this amount to about three thousand dollars. The petition then shows that four of the streets upon which the property abuts have been, and are being, reconstructed by taking up the old pavement, renewing and readjusting the curbing, and paving the roadway with granite blocks laid on a concrete foundation; and that two other streets have been, and are being, reconstructed in like manner, save that the roadway is paved with asphalt on concrete foundation. For the work thus done tax bills are issued, which are a lien upon the property abutting upon the street. Plaintiff has paid the tax bills issued, amounting to thirty-seven hundred dollars, and others will be issued to the amount of thirty-five hundred dollars. It is alleged that the property is, and will be, greatly enhanced by the improvements. The plaintiff and his deceased wife, and all other persons having a contingent interest in the property are made

¹ In *Cochran v. Cochran*, 2 Desaussure's Eq. (S. C.) 521, a widow who was executrix charged to the estate the taxes on a house devised to her for life. On her accounting the chancellor decreed "that one-third of the taxes and repairs of the house the defendant [the widow] occupied, be paid by her, and the other two-thirds out of the estate." — ED.

defendants. The prayer of the petition is that a portion of the unproductive property be sold to pay the unpaid tax bills, and to refund to plaintiff the amount he has paid in excess of twenty-seven per centum.

The only question is, whether plaintiff, as owner of the life estate, should pay the whole of these taxes, or whether they should be apportioned between him and those entitled to the same in remainder.

The tenant for life is bound to pay the interest on incumbrances on the property out of the rents and profits; but if he pay off the incumbrances it is said that he is, *prima facie*, a creditor of the estate for the amount paid, deducting the interest he would have had to pay as life tenant during his life. 4 Kent, 74; 1 Wash. Real Prop. (3d ed.) 110. He must pay all ordinary taxes, certainly so, if the income is sufficient to enable him to pay them. *Johnson v. Smith*, 5 Bush. (Ky.) 102; *Cairnes v. Chabert*, 3 Edw. Ch. R. (N. Y.) 312; *Pike v. Wassel*, 94 U. S. 714; *Varney v. Stevens*, 22 Me. 334; *Prettyman v. Walston*, 34 Ill. 192. And generally he must also pay the expenses of managing the estate. *Pierce v. Borroughs*, 58 N. H. 302; *Perry on Trusts*, sec. 554. This author also says: "If, however, an assessment is made against the estate for something in the nature of a permanent improvement or betterment of the whole estate, the assessment may be ratably and equitably divided between the tenant for life and the remainderman," citing *Plympton v. Boston Dispensary*, 106 Mass. 546, which was a case of an assessment of benefits for opening a highway in the vicinity of the property. In the case of *Cairnes v. Chabert*, *supra*, it was intimated that this rule, requiring the life tenant to pay the taxes, ought not to apply to those extraordinary taxes levied for municipal improvements and permanently beneficial to the land, known as assessments; and accordingly it has been held in the various courts of the State of New York, that the remainderman must contribute to the payment of assessments for municipal improvement. *Gunning v. Carman*, 3 Redf. 69; *Fleet v. Dorland*, 11 How. Pr. 489; *In re Estate of Miller*, 1 Tuck. 346; *Stillwell v. Doughty*, 2 Brad. 311; *Peck v. Sherwood*, 56 N. Y. 615.

In some of these cases it does not appear what the improvements were. In one the assessment was for a sewer, in another for opening a street, but in the case last cited the assessment was for flagging a sidewalk. The rulings in those cases were probably not controlled by the statute cited in *Fleet v. Dorland*, *supra*, but it is quite likely the statute had an influence upon the result reached. The Supreme Court of Pennsylvania, in *Hitner v. Ege*, 23 Pa. St. 305, held that the costs of a brick sidewalk should be charged to the tenant for life, and not to the remainderman, and on the ground that it was not a

permanent improvement; and so a doweress must pay the cost of a foot pavement in front of a lot occupied by her as a residence.

Whyte v. Mayor, 2 Swan (Tenn.) 364.

In this case the question arises between the life tenant and remainderman, and we are considering it in no other aspect. It cannot be affirmed that contribution must be made in all local assessments. Many of them are of a temporary character, such as board and brick sidewalks. The rule, it is believed, to be extracted from the authorities, is, that contribution must be confined to cases of assessments for improvements, which, in their nature, are permanent, and do not require renewals from time to time. This rule will include benefits for opening and widening streets, and assessments for grading streets, and the construction of permanent sewers. But in the present case, the tax bills were, and will be, issued for improving the surface of the streets, that part of them which is subject to constant wear and tear, and in the nature of things the pavements must require repairs and renewals. Doubtless the granite pavement is more lasting than the asphalt, but we do not think either comes within the rule before stated. In this particular case it is conceded the plaintiff is only twenty-eight years of age, and, according to the tables adopted in the life insurance law of this State, his expectation of life is thirty-six years and over. It can hardly be hoped that these pavements will last that long without renewal. It is true the taxes are large; but we cannot make the amount of them the criterion.

The demurrer was properly sustained, and the judgment is affirmed.¹

(3.) ESTOVERS. EMBLEMENTS. IMPROVEMENTS AND FIXTURES. WASTE.²

e. Termination of Life-estates.

(1.) THE NATURAL TERMINATION.³

ROSEBOOM *v.* VAN VECHTEN.

5 DENIO (N. Y.), 414, 424. — 1848.

[Reported herein at p. 575.]

¹ Compare *Peck v. Sherwood*, 56 N. Y. 615; *Stevens v. Melcher*, 152 N. Y. 551 and *Chamberlain v. Gleason*, 163 N. Y. 214. — ED.

² See cases under these headings in Part III. — ED.

³ See note at p. 580, *supra*, on producing *cestui que vie*. — ED.

(2.) FORFEITURE. ✓

JACKSON EX DEM. MCCREA *v.* MANCIUS.

2 WENDELL (N. Y.), 357. — 1829.

EJECTMENT by the heir-at-law of Eve McCrea to recover certain lands of hers sold by her husband while tenant by the curtesy initiate. Verdict for plaintiff, subject to the opinion of this court.

By the Court, SAVAGE, C. J. — * * * The marriage of John McCrea with Eve, and the birth of a child, gave him an interest in the premises as tenant by the curtesy initiate. * * * The father being dead, and the mother also, the heir of the mother is entitled to recover, unless he is barred by the deed of his father, or by lapse of time.

What title passed by the deed of John McCrea? It is a general rule that no one can convey a better title than he has; and as it appears that he had an estate for his own life, the fair presumption would be that he intended to convey the estate which he had in the premises. * * *

Could not, then, a tenant by the curtesy convey in fee without having an estate in fee? The Parliament of Great Britain supposed that such an act might be done, and guarded against it by statute 32 Henry 8, ch. 28, which provision was re-enacted in this State at an early day (1 R. L. 181, 2, 3), by which it is enacted, that no fine, feoffment or other act of the husband in relation to the freehold or inheritance of his wife, shall prejudice such wife or her heirs. * * *

I conclude, therefore, that there is nothing in the fact of McCrea's conveying a fee, to show that he had the capacity to convey such an estate when it is shown that he had only an estate for life, and when, also, the form of conveyance used by him carried only such estate as the grantor had. If a greater estate is claimed under him, it should not be left to presumption so ill sustained, to prove that he had capacity to grant such estate.

Is the lessor barred by lapse of time? It is contended that the lessor's right of entry (if any) accrued in 1780, at the death of his mother, and as more than twenty years elapsed before suit brought, that therefore this action cannot be maintained. It is said that John McCrea, having only an estate for life, by attempting to convey a greater estate than he had, forfeited his estate, and that the heir of the wife might have entered upon her death. In this point there are two subjects of inquiry presented: 1. Did the tenant by the curtesy forfeit his estate by attempting to convey a fee? and, 2. If

he did, when did the heir's right of entry accrue? Was it on the death of his mother or his father?

1. Estates for life are considered at common law as strict feuds, and are forfeitable for certain causes. If tenant for life, including tenant by the curtesy, takes upon him to convey a greater estate than he has, in such a manner as to divest the estate in reversion or remainder, such conveyance will operate as a forfeiture of his estate for life, and the reason given (a very singular one in this country), is because it is a renunciation of the feudal connection between him and his lord. 1 Cruise, 122, § 36, and 173, § 31. Co. Litt. 252, a. Com. Dig. Forf. a. 1. The form of conveyance for this purpose must be such as to divest the estate of the reversioner or remainderman, and these were three: Feoffment with livery of seisin, fine, and common recovery; but a conveyance by lease and release, or bargain and sale, is no forfeiture.

If the conveyance in this case was by feoffment, the injury is one which is termed a discontinuance, the entry of the feoffee being lawful during the continuance of the particular estate, but by his continuance in possession after the death of the feoffor, the legal estate of the heir was gone, or at least suspended, and for a while discontinued. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be discontinued. By the common law, the alienation of a husband who was seized in right of his wife, worked a discontinuance of the wife's estate, till the statute 32 Hen. 8, ch. 28, provided that no act by the husband alone should work a discontinuance of, or prejudice the inheritance or freehold of the wife. Jacob's Law D. tit. Discontinuance.

In order to prove a forfeiture, therefore, in the conveyance by McCrea, it should have been shown to have been a feoffment with livery of seisin. As this mode of conveyance is nearly obsolete in England and very little used, and the more common species of assurance being lease and release and bargain and sale, we will not presume that a feoffment with livery was executed in this instance. It is equally probable that one of the other modes of conveyance was adopted, which, though in terms purporting to convey a fee, yet in reality transfer no more or greater estate than the grantor had. The fact, then, of a forfeiture is not satisfactorily shown. But suppose the conveyance to have been a feoffment, 2. Did a right of entry accrue? and was the heir bound to enter? Littleton says (§ 594), "If a man be seized of land as in right of his wife, and thereof enfeoff another and dieth, the wife may not enter, but is put to her action, the which is called *cui in vita*." But this is altered, says Coke, since our author wrote, by the statute 32 Henry 8, by the pro-

visions of which statute, the wife and her heirs, after the decease of her husband, may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

From what has already been said, and from the cases referred to, it would seem that the criterion of the forfeiture is the actually divesting of the estate of the remainderman or reversioner — the passing an estate which the grantor has no right to pass; and as the statute has interposed in this case to prevent such an effect from the feoffment of the husband, I think it follows that a feoffment in such case by the husband of his wife's estate does not work a forfeiture. It is, perhaps, not material to consider that question; but the more important inquiry will be, whether the heir is bound to enter during the life of the tenant for life, supposing he has a right so to do. The statute has been understood as refusing the right of entry till the husband's death: "And the heirs of the wife shall not be barred of their action after the death of their father and mother by the deed of their father, if they demand by action the inheritance of their mother which their father did alien in the lifetime of their mother." 1 R. L. 183, § 7. Lord Coke seems to understand the statute, that no right of entry exists till the death of the husband. He is so understood by Jacob in his dictionary, who says, "Though if the husband hath issue, and maketh a feoffment in fee of his wife's land, and his wife dieth, the heir of the wife shall not enter during the husband's life, neither by the common law, nor by the statute," citing 1 Inst. 326.

In the case of *The Earl of Pomfret v. Lord Windsor*, 2 Ves. Sen., 482, Lord Hardwicke expresses an opinion that in case of a fine by a tenant for life, which, as soon as levied, operates a forfeiture, the remainderman or reversioner may enter presently, but is not bound so to do; and therefore the law gives him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate. So Lord Ellenborough, in *Doe, ex dem. Cook v. Danvers*, 7 East, 321, says, that "If a forfeiture were committed, the party entitled to enter for it, was not bound to do so."

In the State of Massachusetts, this question has been twice decided, 9 Mass. Rep. 508, and 15 Mass. Rep. 472; the last of which cases was *Wallingford v. Hearl*, in which it appeared that the defendant's grandfather died seized in 1770, and the premises in question were assigned to the widow for her dower. She died in 1810, and the demandant entered in 1811. The tenant proved that he and those under whom he held had been in peaceable possession, claiming the premises, which were under improvement, for

thirty years and upwards. It was contended for the tenant, that as the right of entry was barred by twenty years' possession, and as the reversioner may enter on the disseisor during the continuance of the particular estate, and more than that time having elapsed, the action could not be maintained. But Parker, Ch. J., in delivering the opinion of the court, says, "The demandant's right of entry accrued on the death of the tenant for life; that if he might have entered in consequence of the disseisin of the tenant for life, he was not bound to do so. He might well suppose that the tenant had entered under a contract with her who was seised of the freehold."

So in this case, the lessor might well suppose that Vanderheyden had purchased only the life estate of John McCrea, and he was not bound to look after it till the natural termination of the life estate. I am of opinion, therefore, 1, that the lessor has shown a sufficient title to enable him to recover; 2, that there is no ground to presume a title in fee in John McCrea, but only a life estate as tenant by the curtesy; 3, that no forfeiture is shown of his life estate, because, 1, it does not appear that he conveyed by feoffment with livery of seisin, and 2d, if it did so appear, the statute prohibits the discontinuance which such a conveyance would produce at common law; and therefore, as the estate of the reversioner is not affected, there is no forfeiture. I am aware that the cause of forfeiture is said to be the disloyalty of the tenant for life to his lord; but I consider the true criterion of forfeiture, the passing an estate which he ought not to pass; 4, that if a forfeiture was shown, yet the reversioner is not bound to enter until the natural termination of the life estate, as the law does not require him to look after the estate, the presumption being that the tenant in possession holds by such a conveyance as the tenant for life had a right to give. I am therefore of opinion that the plaintiff is entitled to judgment in the two first causes. * * *

Judgment for the plaintiff.¹

(3.) MERGER.

BOYKIN *v.* ANCRUM. ✓

28 SOUTH CAROLINA, 486. — 1887.

EJECTMENT. — The will of William Ancrum gave the life use of certain real property to his widow with remainders as indicated in the opinion below. William A. Ancrum, having a life estate in

¹ Waste by the life tenant is, under special circumstances, another cause for forfeiture in many of the states. See N. Y. Code Civ. Pro., § 1655. — Ed.

remainder, purchased the interest of the widow (then Mrs. Julia Glass) and afterwards died while the widow was still alive. Further facts appear in the opinion.

MCGOWAN, J. * * * As to the construction of the devise. "To my second son, William Alexander Ancrum, for and during the term of his natural life, and from and after his decease to his lawful issue, absolutely and in fee simple. But if my said second son, William Alexander Ancrum, should die, leaving no lawful issue at the time of his decease, then, and in such case," over, etc. Without going again into the authorities upon the subject, we think this case is concluded by that of *McIntyre v. McIntyre*, 16 S. C. 294, where the authorities are cited and the conclusion satisfactorily stated by Mr. Justice McIver as follows: "We think the authorities in this State conclusively show that where the word 'issue' is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule (in *Shelley's Case*) does not apply." In that case, as in this, the antecedent estate was expressly "for life," and after the decease of the tenant for life, to the "issue." The superadded words there were, "and their heirs forever," while here they are "absolutely and in fee simple" — an equivalent phrase certainly quite as strong as the other. Besides, here there is still another limitation over to the third son, Thomas James Ancrum, "but if my said second son, William A. Ancrum, should die, leaving no lawful issue at the time of his decease," etc. We agree with the Master and Circuit Judge that William Alexander Ancrum took only a life estate in the premises described, and that there was a limitation over to his issue as purchasers.

Then, as to the plaintiff's exceptions. The first charges that it was error in the judge to hold "that when W. A. Ancrum purchased the life estate of Mrs. Julia Glass in the premises described, her life estate merged in the life estate of W. A. Ancrum." It was certainly just, when Chancellor Kent adopted the language of a great Master in the doctrine of merger, "that the learning under this head is involved in much intricacy and confusion." "Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged — that is, sunk or drowned in the greater." *Garland v. Paplin*, 32 Grat. 305; 2 Bl. Com. 177; 4 Kent, 100. Taking this definition, do the conditions exist here for a merger? Mrs. Glass had an estate for life, and (passing over the eldest son,

who had died early) the next vested estate was that of William Alexander Ancrum, which was also for life, without any estate intervening. These respective estates were to be enjoyed successively, and not concurrently — that of the mother, Julia, coming first in the order of succession. But in 1837 W. A. Ancrum purchased the life estate of Julia and held both, claiming the premises as his own absolutely until he sold and conveyed them to Doby in 1857. Did not this make the case referred to in the books “of the incompatibility of a person filling at the same time the characters of tenant and reversioner in one and the same estate?”

It is said, however, that both estates were for life, and therefore equal in degree and merger only takes place when a larger and smaller estate meet in the same person. The general rule is, that equal estates will not drown in each other, but there are well established exceptions. Were these estates equal in the sense of the rule? Looking at them from the point of view of W. A. Ancrum, one was an estate for the life of Mrs. Julia Glass, preceding his estate, and the other succeeding was for his own life. There seems to be something in the order in which the estates stand to each other in the matter of time. Chancellor Kent states the rule thus: “The merger is produced, either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. An estate for years may merge in an estate in fee or for life; and an estate *pur autre vie*, may merge in an estate for one's own life; and an estate for years may merge in another estate or term for years, in remainder or reversion. * * * To effect the operation of merger, the more remote estate must be the next vested estate in remainder or reversion, without any intervening estate, either vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate.”

It seems that even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder, being in this respect somewhat like a surrender, which is the relinquishment of a particular estate in favor of the tenant of the next vested estate in remainder or reversion. In the notes to the case of *James v. Morey*, 2 Cowen, 246, 14 A. D. 475; “Leading Cases in the American Law of Real Property,” lately published (1887) by Sharswood & Budd, vol. 3, 231, the rule is thus stated: “The estate in reversion or remainder must be as large as, or larger than, the estate to be merged. 3 Prest. Conv. 51. The expression, ‘as large, or larger,’ must be, of course, taken in the technical sense; thus an estate for life is larger than an estate for years, although

death may destroy the former estate long before the efflux of time has brought the latter to a conclusion. Thus, if a lease be made for years, with a remainder to the lessee for life, the estate for years will merge; but if there be an estate for life, with remainder to the life tenant for years, there will be no merger. Co. Litt. 54, b. In *Shehan v. Hamilton*, 4 Abb. App. 211, it is said that estates of equal degree do not merge; but whether this be strictly so or not, the effect of a merger will be produced by the unity of possession. An estate at will will merge in an estate for years. 3 Pres. Conv. 176. Estates for years may merge in each other or in estates for life. Estates for life will merge. Co. Litt. 338 b; *Cary v. Warner*, 63 Me. 571; *Allen v. Anderson*, 44 Ind. 395." We cannot say that the Circuit Judge committed error in holding that when W. A. Ancrum purchased the life estate of Mrs. Glass in the premises that estate merged in his estate.

Exceptions 2, 3, and 4 make the point, substantially, that the judge erred in holding that at the death of William A. Ancrum (1862) the rights of the issue in remainder attached, and from that time the possession of the parties was adverse, so as to put in motion the presumption of a grant from Mrs. Elizabeth B. Boykin, who reached her majority in 1864, two years after the death of her father, W. A. Ancrum, and more than twenty years before the commencement of the action. The life estate of Mrs. Glass was the first in the order of succession, and doubtless was expected to be the first to fall in; the fact, however, was otherwise, for she survived W. A. Ancrum for more than twenty years. It is true that, but for his purchase of her estate, W. A. Ancrum would never have reached the possession of his estate; and it is asked whether, under these circumstances, his right must be limited to his own life estate, which, though vested, he never enjoyed in possession, so as to make his death, and not hers, the time at which an action accrued to the remaindermen. At first view it is not obvious how an estate, which turned out to be the longest, could be drowned in one of shorter duration; but, according to the authorities, it seems that such was the necessary consequence of the merger. See *Mangum v. Piester*, 16 S. C. 330; 4 Kent, 99; 2 Pom. Eq. Jur., section 787, and notes, where it is said that: "An estate for years will merge in a reversionary term of years, even though the latter is of less duration," citing, among other authorities, *Welsh v. Phillips*, 54 Ala. 309. And Chancellor Kent says: "The estate in which the merger takes place is not enlarged by the accession of the preceding estate, and the greater or only subsisting estate continues after the merger precisely of the same quantity and extent of ownership as it was before the

accession of the estate which is merged, and the lesser estate is extinguished," etc.

We cannot doubt that the premises were held adversely to all the world. During his life William A. Ancrum held them as his own absolutely. Shortly before his death (in 1857) he conveyed them to Joseph W. Doby, with the usual warranty of title. We do not see how the relinquishment of some of the remaindermen could affect the character of the possession as to those who did not relinquish. We do not, however, think that the defendants should have interest on the value of their improvements while they have the possession and use of the same.

The judgment of this court is, that the judgment of the Circuit Court, with the slight modification as to interest on the value of the improvements, be affirmed.¹

2. CONVENTIONAL LIFE-ESTATES.

a. Created by act of parties.

(1.) BY DEED.

ADAMS *v.* ROSS.

30 NEW JERSEY LAW, 505. — 1860.

[*Reported herein at p. 483.*]

(2.) BY DEVISE.

MCCORMICK HARVESTING MACHINE CO. *v.* GATES.

75 IOWA, 343. — 1888.

[*Reported herein at p. 581.*]

(3.) NOT BY PAROL, OR BY WRITING LESS THAN DEED.

STEWART *v.* CLARK. ✓

13 METCALF (MASS.), 79. — 1847.

ACTION of waste. The declaration alleged that defendant Clark, was tenant for life and that plaintiff held the next immediate estate of inheritance in the premises, and that defendant had made waste.

¹ But a clear intention of the parties to that effect would prevent the merger of the estate *pur autre vie*. *Snow v. Boycott*, (1892) 3 Ch. Div. (Eng.) 110. Equity will often prevent a merger where otherwise serious wrong would be done. — ED.

As evidence of the existence of a life interest in defendant, plaintiff offered a paper purporting to create a life estate, but neither sealed nor acknowledged. Defendant objected to said paper as evidence of a freehold interest in him on the ground that it was not under seal, and to its reception because it was not acknowledged. The paper was rejected and plaintiff submitted to a nonsuit subject to the opinion of this court. Plaintiff claims that under § 28, ch. 59 of the Rev. Sts., "the paper in question may be operative, as a writing, against the grantor and his heirs to create a life estate."

DEWEY, J. — The objection taken to the instrument offered as a conveyance of a freehold interest to Lewis Clark is sound, and must prevail. The instrument is not under seal; is not a deed. As a valid conveyance of a life estate, it should be under seal. Rev. Sts. c. 59, § 1. The further provision of § 28 that, "no bargain and sale or other like conveyance of any estate in fee simple, fee tail, or for life, and no lease, for more than seven years from the making thereof, shall be valid and effectual against any other person than the grantor and his heirs, and devisees, and persons having actual notice thereof, unless it be made by a deed recorded," does not dispense with the necessity of passing such title by deed.

Nonsuit confirmed.

b. The words of limitation.

ADAMS *v.* ROSS.

30 NEW JERSEY LAW, 505. — 1860.

[Reported herein at p. 483.]¹

c. Created out of what.²

d. Successive life-estates.³

¹ See also cases pp. 489–520, *supra*. — ED.

² Life estates are usually created by the owner of a fee or of a life estate; but note that the *transfer* of a life estate gives the transferee an estate *pur autre vie*. See cases cited herein. In New York an estate for life may be created out of a term for years. § 40, N. Y. R. P. L. — ED.

³ Remainders for life. See N. Y. R. P. L., § 33, for a special limitation on their creation. — ED.

3. LEGAL LIFE ESTATES.

*a. Estate in tail after possibility of issue extinct.¹**b. Estates by the marital right.*BABB v. PERLEY.²

1 MAINE, 6. — 1820.

[Reported herein at p. 27.]

¹ Lit. § 32. "Tenant in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct."

Lit. § 33. "Also if tenements be given to a man and to his heirs which he shall beget on the body of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in special tail. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct."

Lit. § 34. "And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in special tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue which is heir to the donees in special tail, cannot be tenant in tail after possibility of issue extinct, for the reasons above said."

"And note, that tenant in tail after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him. 10 H. 6, 1. But he in the reversion may enter if he alien in fee. 45 E. 3, 22." — ED.

² See also *Houghton v. Hapgood*, *supra*, p. 24, and *Foster v. Marshall*, p. 622, *infra*.

For the interest of the husband in his wife's leaseholds, see *Riley's Administrator v. Riley*, *supra*, p. 26. For the wife's separate estate in equity, see *Jacques v. Trustees*, *supra*, p. 93, and *Pullen v. Rianhard*, *supra*, p. 95.

In most of the states the doctrine of the estate by the marital right has been abrogated; at first usually by the introduction of a statutory separate estate, later by more radical statutes which place the married woman as to her property rights on the same footing as a *feme sole*. For the course of legislation in New York on this subject, see Laws of 1848, ch. 200; 1849, ch. 375; 1860, ch. 90, and the Domestic Relations Law of 1896, §§ 20 and 21. See also statutes with regard to divorce, Code Civ. Proc., §§ 1759, 1760. — ED.

c. Estate by the curtesy.

(1.) NATURE OF CURTESY INITIATE AND CONSUMMATE.

FOSTER *v.* MARSHALL. ✓

22 NEW HAMPSHIRE, 491. — 1851.

WRIT of entry. The facts appear in the opinion.

BELL, J. — The principal question arising in this case, is as to the effect of the statute of limitations upon the demandant's right of action. It appeared that the demanded premises were set off by a committee of partition, appointed by the Court of Probate, to Mary Foster, formerly Mary Eastman, the mother of the demandant, as her share of the estate of her father, Samuel Eastman, deceased, on the 14th of May, 1814. Mary Foster was then the wife of Frederick Foster, by whom she then had one or more children. Frederick Foster died in 1834, and his wife in 1836. They had six children, whose rights are said to be now vested in the plaintiff.

The defendant proved, that in 1817, one Morrill was in possession, claiming to be the owner of the demanded premises. He conveyed the same by deed, dated July 3, 1817, to one Marshall, who entered and occupied, claiming title, till April 30, 1847, when he conveyed to the tenant, who has since remained in possession. The tenant claims that he has a perfect title by thirty years' undisturbed, and peaceable possession. The demandant alleges that his right is not barred, because at the time when the disseisin occurred, in 1817, Mrs. Foster was a *feme covert*, and up to 1834 her husband had an estate for life in the premises and she had no right of entry until his decease, and consequently no right of action till then, and that since that time twenty years have not elapsed.

Under the statute of limitations, which was in force in this State before the Revised Statutes, it must be considered settled, that the statute did not affect the right of a remainderman or reversioner, during the continuance of the particular estate; and that neither the acts nor the *laches* of the tenant of the particular estate could affect the party entitled in remainder. *Wells v. Prince*, 9 Mass. Rep. 508; *Wallingford v. Hearl*, 15 Mass. Rep. 471; *Tilson v. Thompson*, 10 Pick. Rep. 359.

No right of entry or action accrued to, or vested in the heirs of the wife during the continuance of an estate by the curtesy. *Jackson v. Schoonmaker*, 4 Johns. Rep. 390.

But the party entitled is not barred, until the usual period of limitation after the termination of the life estate. *Heath v. White*, 5 Conn. Rep. 228; *Witham v. Perkins*, 2 Greenl. Rep. 400.

If, then, the husband had, in this case, an estate by the curtesy, or any interest in the land which would entitle his wife, who survived, to be regarded as seised only in remainder or reversion, she and her heirs would have the full period of twenty years after the death of the husband, to commence their action.

To constitute a tenancy by the curtesy, the death of the wife is one of the four things required. The estate of the husband is initiate upon the birth of issue. It is consummate on the death of the wife. 4 Kent's Comm. 29; Co. Litt. 30 a.

By the intermarriage, the husband acquires a freehold interest, during the joint lives of himself and his wife, in all such freehold property of inheritance as she was seised of at the time of marriage, and a like interest vests in him in such as she may become seised of during the coverture. The husband acquires jointly with the wife, a seisin in fee of the wife's freehold estates of inheritance, the husband and wife being seised in fee in right of the wife. Gilb. Ten. 108; Co. Litt. 67 a.; *Palyblank v. Hawkins*, 1 Saund. Rep. 253 n.; S. C. Doug. 350.

This interest may be defeated by the act of the wife alone; as if, at common law, the wife is attained of felony, the lord by escheat could enter and eject the husband. 4 Hawk. P. C. 78; Co. Litt. 40 a.; Vin. Ab. Curtesy, A.; Co. Litt. 351 a.

After the birth of issue the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy initiate. Co. Litt. 351 a., 124 b.; *Schermerhorn v. Miller*, 2 Cowen's Rep. 439. He then becomes sole tenant to the lord, and is alone entitled to do homage for the land, and to receive homage from the tenants of it, which until issue born must be done by husband and wife. 2 Black. Comm. 126; Litt. § 90; Co. Litt. 67 a., 30 a.

Then he may forfeit his estate for life by a felony, which, until issue born, he could not do, because his wife was the tenant. 2 Black. Comm. 126; Roper, Hus. and Wife, 47.

If the husband, after the birth of issue, make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the husband's life; because by the birth of issue, he was entitled to curtesy, which beneficial interest passed by the feoffment. Co. Litt. 30 a.

If such feoffment is made before issue born, the husband's right to curtesy is gone, even though the feoffment be conditional and be afterwards avoided. And if in such case the husband and wife be divorced *a vinculo matrimonii*, the wife may enter immediately. *Guneley's Case*, 8 Co. Rep. 73.

The husband's estate, after issue born, will not be defeated by

the attainder of the wife, for his tenancy continues, he being sole tenant. 1 Hale, P. C. 359; Co. Litt. 351 a., 40 a.; Bro. Ab. Forf. 78.

The obvious conclusion from these views of the nature of the interest of a tenant by the curtesy initiate is, that such tenant is seised of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is that the wife cannot be prejudiced by any neglect of the husband, and, of course, she may bring her action, or one may be brought by her heirs, at any time within twenty years after the decease of the husband, when his estate by the curtesy, whether initiate or consummate, ceases, and her right of action, or that of her heirs, accrues. In this respect there is no distinction between curtesy initiate and curtesy consummate. *Melvin v. Locks & Canals*, 16 Pick. R. 140.

So far as we are aware, this principle has never been questioned, where the inheritance of the wife has been conveyed to a third person, either by the deed of the husband alone, or by a deed executed by husband and wife, which from some defect did not bind the interest of the wife. *Miller v. Shackleford*, 3 Dana Rep. 289; *Callier v. Metzger*, 13 Serg. & Rawle Rep. 356; *Fagan v. Walker*, 5 Iredell Rep. 634; *McCorry v. King*, 3 Humph. Rep. 267; *Mellus v. Snowman*, Shepley Rep. 201; *Meramon v. Caldwell*, 8 B. Mon. Rep. 32; *Gill v. Fauntleroy*, Ib. 177; *Melvin v. Locks and Canals*, 16 Pick. Rep. 140. But it has been held, *Melvin v. Locks and Canals*, 16 Pick. Rep. 161; *Kittridge v. Locks and Canals*, 17 Pick. Rep. 246, that where a disseisin has been committed upon the wife's estate, the disseisin is done alike to the husband and wife; that a joint right of entry and of action accrues to both for the recovery of it, and that if such remedy is not prosecuted within twenty years, it is barred.

This is true where the husband has acquired no estate by the curtesy, and is seised merely in the right of the wife of her estate. Such are the cases of *Guion v. Anderson*, 8 Humph. Rep. 298; *Mellus v. Snowman*, 8 Shep. Rep. 201.

And if the husband is tenant by curtesy, as he and his wife are seised of the fee in right of the wife, the action must be brought by husband and wife, and a joint seisin in fee alleged in them in her right. Anon. Buls. 21. Their joint right of action is barred by the lapse of twenty years after it accrues. But it by no means follows that the reversionary right of the wife, accruing in possession after the estate of her husband has ceased, is also barred. It is well settled, that the same party may have several and successive estates in the same property, and several rights of entry by virtue of those estates, and one of those rights may be barred without the others

being affected. *Hunt v. Burn*, 2 Salk. 422; *Wells v. Prince*, 9 Mass. Rep. 508; *Stevens v. Winship*, 1 Pick. Rep. 318; *Tilson v. Thompson*, 10 Pick. Rep. 359.

And every reason, which can exist in favor of the right of any reversioner, applies equally in this case, namely, that a reversioner has, as such, no right of entry and no right of action during the particular estate, and consequently is not barred until twenty years after his own right of entry accrued. 2 Sugd. V. & P. 353; 3 Steph. N. P. 2920, n. 10; 9 Mass. Rep. 508; 1 Pick. Rep. 318; 15 Mass. Rep. 471; 10 Pick. Rep. 359; 4 Johns. Rep. 390, before cited. Besides, the wife by reason of her disability can make no entry to revest her estate during the coverture. Litt. p. 403; Co. Litt. 246 a. Coke says, in express terms, "after coverture, she (the wife), cannot enter without her husband."

In *Jackson v. Johnson*, 5 Cow. Rep. 74, and *Heath v. White*, 5 Conn. Rep. 228, this question arose, and was decided in accordance with our views, and we think upon sounder principles than the cases in Massachusetts, to which we have referred.

We have compared the provisions of the Revised Statutes with the older statutes, and do not perceive, that there is, as to the point in question, any difference in their effect. Under neither would the plaintiff propose to claim any advantage from the proviso. His ground is not that the ancestor was a married woman, when her right accrued; but that her marriage and the birth of one or more children had vested a life estate in her husband, and that the disseisin was done to him, and that no right of action accrued to her in virtue of the reversionary interest, under which her heirs now claim, until she became a widow, and the husband's estate had terminated; and that the action is brought within twenty years after that event. This appears to us a correct view of the case, and of the law; and the verdict must, therefore, be set aside and a

New trial granted.¹

HATFIELD v. SNEDEN.²

54 NEW YORK, 280. — 1873.

[Reported herein at p. 641.]

¹ See *Wheeler v. Hotchkiss*, 10 Conn. 225, reported *infra*, p. 646. — ED.

² The last paragraph on p. 644 is all that need be read at this point. — ED.

WATSON *v.* WATSON.

13 CONNECTICUT, 83. — 1839.

EJECTMENT. Plaintiffs are the children and heirs-at-law of Ann Watson, deceased. Their father, John Watson, is still alive, but plaintiffs offered in evidence a writing under his hand and seal containing the following declaration and disclaimer: "I have not, at any time hitherto, and now do not claim, demand, possess or in any manner or to any extent whatever, have, or pretend to have, any right, title, or interest in [the premises in question], but do now fully, absolutely and without any reservation, disclaim and reject any and all right, title and interest in the same, which I might or could have had, by operation of law or otherwise, by reason of my surviving my said wife, or any title to said premises which she had during her life." The writing was rejected by the court. Verdict for defendant. Plaintiffs move for a new trial.

WAITE, J. — The object of a disclaimer is, to prevent an estate passing from the grantor to the grantee. It is a formal mode of expressing the grantee's dissent to the conveyance before the title has become vested in him. In some cases, it may be highly proper; as where a deed is made conveying an estate to one for life, with a remainder to another in fee. Here, in the absence of all evidence to the contrary, the law would presume the assent of the grantee in remainder, upon delivery of the deed to the grantee for life, for the benefit of both. But if the remainderman chooses not to take the estate, he may disclaim, and thereby remove all presumption of assent. So, where a deed is executed to several persons, and delivered to one for the benefit of all, if one dissents, he may disclaim, and furnish evidence that his share still remains in the grantor. *Treadwell et al. v. Buckley et al.*, 4 Day, 395.

But if the grantee once assents, and the title thereby becomes vested in him, he cannot, by any disclaimer, re-vest the estate in the grantor. For if he could, the disclaimer would have the effect of a deed, which it cannot have; the object of the latter being to transfer property, — of the former, to prevent a transfer.

But in a case of descent, the heir cannot, by any disclaimer, prevent the estate from passing to him. It vests in him immediately upon the death of the ancestor; and no act of his is required to perfect his title. He cannot, by any act, cause the estate to remain in the ancestor; for the latter is incapable of holding it after his death. Nor can he, by a disclaimer, transfer the estate to any other person, as the heir of the ancestor: for, as has already been

observed, the object of a disclaimer is not to convey, but to prevent a conveyance. He is, therefore, in the same situation, upon the death of the ancestor, as a purchaser who has assented to the conveyance. In both cases, a transfer can only be made by some instrument adapted to the conveyance of real estate.

A devisee, however, stands in the same situation as a purchaser. If he dissents, the estate passes to the heir in the same manner as if no will had been made. It is entirely optional with him to take or refuse the estate devised. *Townson v. Tickell et al.*, 3 Barn. & Ald. 31.

In the present case, the disclaimer was made by one who was entitled to the property as tenant by the curtesy. Is he, in this respect, like a grantee, or an heir? This species of estates has sometimes been classed with those acquired by purchase. But it is rather an estate thrown upon the tenant by operation of law. Co. Litt. 18 b. ¶ It partakes more of the character of an estate acquired by descent than by purchase. Immediately upon the death of the wife, the estate vests in him. Like the heir, he cannot, by refusing to take it, cause it to remain in the wife; nor can he, by a disclaimer, transfer it to others. The estate thus vested in him, becomes immediately liable for his debts; and he cannot, by any refusal to take the property, defeat the claims of his creditors.

The disclaimer offered in evidence could have no effect in showing a title in the plaintiffs; and was properly rejected by the court.

We are, therefore, satisfied that no new trial should be granted.¹

(2) THE ESSENTIALS FOR CURTESY.

(a.) *Lawful Marriage.*²

(b.) *Birth of issue.*³

THE CHANCELLOR IN MARSELLIS *v.* THALHEIMER.

2 PAIGE'S CH. (N. Y.), 35. — 1830.

IN THE analogous case of a tenancy by the curtesy it is well settled that the child must be born alive in the lifetime of the mother to entitle the father to the estate. And even the delivery of the child alive, by the cæsarian operation, after the death of the mother, is not sufficient.

¹ As to the nature of disclaimers in general, see *Jackson ex dem. Ten Eyck v. Richards*, 6 Cow. (N. Y.) 617. — ED.

² See cases under dower below. — ED.

³ A legislative act will not be unconstitutional because it defeats the expectation which the father of a living child had, previous to the act, of succeeding, as tenant by the curtesy, to any lands the wife might acquire subsequent to the act. *Thurber v. Townsend*, 22 N. Y. 517 (1860). — ED.

(c.) *Seisin of wife.*FERGUSON *v.* TWEEDY.

43 NEW YORK, 543. — 1871.

ACTION by Ferguson, claiming as tenant by the curtesy, to recover the possession and rents and profits of certain land. Plaintiff failed in the court below and takes this appeal.

Plaintiff's wife, prior to her marriage, was tenant in common with another of certain lands. Before her marriage deeds were interchanged between the co-tenants by which the lands were partitioned until either should die without issue and no longer. The wife died, **leaving issue the defendant.** The other co-tenant then died leaving no issue and this defendant acquired an interest in his share. Ferguson died after this action was begun and it is continued by his executrix.

FOLGER, J. — This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his lifetime an estate as tenant by the curtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seisin, during marriage, of the premises in question. There is no dispute but that all of these existed, save the last.

It is a general rule that to support a tenancy by the curtesy there must be an actual seisin of the wife. *Mercer's Lessee v. Selden*, 1 How. U. S. 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seisin, so as to entitle the husband to a life estate in the land as a tenant by the curtesy, though he has never received or demanded rent during the life of his wife. *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife. 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry. 8 Paige, *supra*. And it has been held that, where the wife takes under a deed, and there is no adverse holding at the time, that actual entry is not necessary. *Jackson v. Johnson*, 5 Cow. 74. But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife, she did convey by quit-claim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his

assign held the possession up to her death and afterward. It is true that this deed was one of two, interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed, as it was, by possession in severalty, was valid and sufficient to sever the possession for the lifetime of the testator's wife. *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 21. And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession, and right of such possession, for a term which ran for her life. There was, then, an outstanding estate for life in the premises, which, beginning before her coverture began, did not end until her coverture ended. And it is settled, that if there be an outstanding estate for life, the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during coverture. *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Cregier*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned justice before whom the action was tried, that the possession of the grantee in that deed, and of his assign, was actual and exclusive. It is found, also, that neither the wife of the testator, nor the testator himself, did at any time after the execution of that deed have actual possession of the premises, or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the curtesy in favor of the testator. This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the court below should be affirmed, with costs to the respondent.

LESSEE OF BORLAND *v.* MARSHALL.

2 OHIO STATE, 308. — 1853.

THURMAN, J. — The decision of this cause depends upon the answer that shall be given to the following question: Is a man entitled to curtesy in lands, the title to which descended to his wife

during coverture, but which were in the actual possession of an adverse claimant from the time her title accrued until her death. It is very clear that, by the strict rule of the common law, he is not; and for the reason that neither the wife, nor the husband in her right, was, at any time during coverture, actually seised of the premises. Four things, according to the common law, are necessary to create an estate by the curtesy, viz.: Marriage, seisin of the wife, issue, and death of the wife. Co. Lit. 30 a. And where the wife's title is derived by inheritance, or any other mode requiring an entry to perfect it, the seisin must be in deed, and not merely in law. Co. Lit. 29 a.; *Jackson v. Johnson*, 5 Cow. 98.

But it is contended, that in Ohio seisin is unnecessary; and this leads us to inquire: 1. What is the reason of the common-law rule requiring seisin? 2. Does the reason exist in this State? 3. If it does not, is the maxim applicable, "*Cessante ratione, cessat ipsa lex*," the reason ceasing, the law itself ceases?

The books generally, and with but few exceptions, give but one reason for the rule making seisin indispensable to curtesy, namely, that as, by the common law, livery of seisin was necessary to the transfer of a freehold estate by deed, and an entry necessary to perfect the title to such an estate, of an heir or devisee, it followed that unless the wife, or the husband in her right, was actually seised, her issue could never, as her heirs, inherit the lands; for owing to the want of actual seisin, she never acquired an inheritable estate. But unless she had an estate of inheritance there could be no curtesy, as it was indispensable to the existence of curtesy that the mother be seised of an estate which might descend to her heirs, and "the tenancy by curtesy is an excrescence out of the inheritance." 3 Bac. Abr. 11 (Bouvier's edition):

Thus, Littleton says (§ 52): "And memorandum that, in every case where a man taketh a wife seised of such an estate of tenements, etc., as the issue which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not."

Commenting on the above expression, "as heire to the wife," Coke says: "This doth implie a secret of law, for except the wife be actually seised, the heire shall not (as hath been said) make himself heire to the wife; and this is the reason that a man shall not be tenant by the curtesie of a seisin in law." Co. Lit. 40 a.

And, in illustration of the law that a wife must have an estate inheritable by her issue, the following case is put: "If lands be

given to a woman and to the heires males of her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibility could inherit the mother's estate in the land; and therefore where Littleton saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate." Co. Lit. 29 b.

Blackstone puts the same case, and adds: "And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised, because, in order to entitle himself to such an estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised." 2 Bla. Com. 128.

In a subsequent passage, he suggests an additional reason. It is as follows: "A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed." 2 Bla. Com. 132. The only authority referred to by Blackstone, in support of the above, is Co. Lit. 31, where the diversity between dower and curtesy is noticed, but no such reason as Blackstone gives for denying curtesy is stated, although it may be inferred.

What Coke says is as follows: "For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by the curtesy, which is worthy the observation."

As before observed, it is only by inference that this passage supports Blackstone's remark. It is to some extent fortified, however, by the following language in 7 Viner's Abr. 149, namely: "*Feme* shall be endowed of a seisin and possession in law, without seisin in deed, *quod nota*; for otherwise it is of tenant by the curtesy, and the reason seems to be, inasmuch as the baron may enter *in jure uxoris*, but the *feme* cannot compel her baron to enter into his own land."

On the other hand, the following extract from 3 Bac. Abr. 12, is certainly opposed to the existence of this reason, as the idea is

rejected that the allowing or disallowing curtesy is dependent on the ability or inability, industry or negligence, of the husband.

"But now of such inheritances, whereof there cannot possibly be a seisin in fact, a seisin in law is sufficient; and therefore if a man seised of an advowson or rent in fee, hath issue a daughter, who is married and hath issue, and he dieth seised, and the wife dieth likewise before the rent becomes due, or the church becomes void, this seisin in law in the wife shall be sufficient to entitle her husband to be tenant by the curtesy, because say the books, he could not possibly attain any other seisin, as indeed he could not; and then it would be unreasonable he should suffer for what no industry of his could prevent. But the true reason is, that the wife hath these inheritances which lie in grant, and not in livery, when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it."

In *Davis v. Mason*, 1 Pet. 507, the foundation of the rule is thus stated in the opinion of the court: "As it relates to the tenure by curtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made in order to vest a freehold (Co. Lit. 51,) and out of that member of the definition of the tenure by curtesy which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the heir made title direct from the grandfather, or other person last seised."

A careful examination of the authorities makes it quite apparent that this is a correct statement of the principal, if not the only, reason of the rule. No other reason is found in the books, except the suggestion before referred to, that curtesy is refused where there was no actual seisin, because the husband might, by diligence, have obtained such seisin. But this idea, as we have seen, is not universally admitted.

Our next inquiry is, do these reasons, or either of them, exist in Ohio?

That livery of seisin has never been essential, in Ohio, to the creation of a freehold estate, nor an entry necessary to perfect the title of an heir or devisee, is well known to every lawyer. The most common instrument of conveyance is a deed of bargain and sale, which, without the aid of a statute of uses, transfers both the legal and equitable estate. Nay, further, a mere deed of quitclaim, or release, is sufficient, even where the releasee has no prior interest in the land. But our departure from the English law does not stop here; for an adverse possession does not prevent the transfer of title, either by deed, descent, or devise. Whatever title is

held by the grantor, ancestor, or testator, may be thus transferred, notwithstanding the lands are adversely held by another. *Holt v. Hemphill*, 3 Ohio, 232; *Helpfenstine v. Garrard*, 7 Ohio (pt. 1), 272; *Hall v. Ashby*, 9 Ohio, 96. It might seem, from what was said in *Holt v. Hemphill*, that an adverse possession would be fatal to a deed; but that such possession in no wise affects it was expressly decided in *Hall v. Ashby*.

As, then, a freehold estate is created in Ohio without entry, it is manifest that the principal, if not the only reason, of the rule requiring actual seisin to give curtesy does not exist in this State.

But allowing that the minor reason before stated did exist in England, does it exist here? Ought a husband to be denied curtesy in Ohio upon the ground that he might have entered upon the land during coverture, and that if he did not, he was guilty of a fault that deservedly bars his right? There may have been much reason for saying so in England, when the rule requiring seisin was established; for, by the failure of the husband to enter, the wife and her issue might lose the estate, which it was plainly his duty to prevent, if possible. But in Ohio her title is as perfect before as after entry; and, in general, it would be nothing less than absurd to make a man's right depend upon whether he had gone for a moment upon the land and "broken a twig," or "turned a sod," or "read a deed." There is, however, one case, and perhaps but one, in which, if curtesy exists, the heirs of the wife might be prejudiced by a failure of the husband to obtain possession, namely, when by such failure the bar of the statute of limitations becomes perfect against them. But this would probably occur so rarely as to furnish but a slight foundation for the rule we are considering. Nor is it the only case in which a remainderman, or reversioner, may be powerless to preserve his estate. If A, the owner in fee of lands in the adverse possession of B, devise or convey them to C for life, with remainder to D, it is manifest that, as the statute of limitations began to run against A, and therefore continues to run against C and D, the latter may lose his estate through the neglect or failure of C to obtain possession. So, when the statute begins to run against a *feme sole*, and she afterward marry, she may lose her land by the neglect or inability of her husband to recover it.

These possible cases of hardship it is the province of legislation to guard against, and not of the courts. Were we to say that there shall be no curtesy where the possession was held adversely during the coverture, because to give it might by possibility result in the loss of the estate to the heir, it is very probable that, in guarding against hardships on the one side, we would open the door to quite as much,

or more, hardship on the other. For it is very far from being true that the failure to obtain possession during the coverture, is always attributable to the husband's neglect. He may have freely spent his time, labor, and money to recover the land, and yet, without any fault of his, be unable to succeed in the lifetime of the wife. Decide as we may, doubtless there will be room for cases of hardship to arise; but, as was truly said by Duncan, J., in *Stoolfoos v. Jenkins*, 8 S. & R. 173: "Courts cannot usurp legislative functions, or new-model the law according to their own ideas of natural justice, or redress hardships in each particular instance." And it is never to be forgotten that all wise laws are framed with a regard to what is likely to occur, rather than to that which is only possible.

On the whole, the conclusion to which we have arrived is, that neither of the reasons given for making actual seisin indispensable to curtesy, affords any sufficient foundation for the rule in Ohio.

It remains to be considered whether the reason of the rule having ceased, or rather never having existed in this State, the rule itself exists here. Tenancy by the curtesy has always been known to our law and is recognized by our statutes. We cannot deny its existence; but may we not deny the necessity of a requisite, that properly enough formed a place in the common law, but has no reason to support it in our jurisprudence? We are materially aided in this inquiry by the American decisions upon the subject of curtesy. These decisions may be reduced into three classes:

1. Those in which there being no adverse possession, the husband and wife were held to be constructively seised in deed, and such constructive seisin deemed sufficient.
2. Those in which there was an adverse possession; but a recovery in ejectment, on the demise of the husband and wife or the husband alone, took place during the coverture; and in which there was held to be curtesy, although no actual possession followed the recovery.
3. Those in which an adverse possession was decided to be no bar to curtesy.

Of the first class, *Jackson v. Sellick*, 8 Johns, 208, and *Davis v. Mason*, 1 Peters, 506, may properly, perhaps, be called the leading cases. Many others might be cited, for the general current of American authority certainly admits curtesy in this class of cases.

Of the second class, *Ellsworth v. Cook*, 8 Paige, 643, is the leading case.

To the third class belongs *Bush v. Bradley*, 4 Day, 298, approved in *Chew v. Comm'rs of Southwark*, 2 Rawle, 160, etc.

Now, a careful scrutiny of these cases will show that, in nearly all of them, the decisions were arrived at by an application of the maxim

"*cessante ratione, cessat ipsa lex.*" It was so expressly declared in *Davis v. Mason*. That case respected lands in Kentucky. After giving, in the passage hereinbefore quoted, the reason of the rule requiring seisin, the judge, who delivered the opinion of the court, went on to say: "But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery, or in any mode affecting the course of descent. If a right of entry therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin in law, 'he has the thing, if he has a right to have it.' Such was not the ancient law; but the reason of it has ceased. It has been shown, that in the most remote periods exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure."

So in *Jackson v. Sellick*, the court said: "We must take the rule (requiring seisin) with such a construction as the peculiar state of new lands in this country requires."

Both these cases seem to proceed on the ground that the wife, though not actually, was yet constructively seised in deed. Hence the allusion, in each case, to the fact that there was no adverse possession to rebut the presumption. The question whether an adverse possession would be fatal to the claim to curtesy was not presented. The cases in effect decide, not that seisin in deed is indispensable, but that, if there must be seisin, a constructive seisin is sufficient. But in *Bush v. Bradley*, the question was directly raised. The premises, during the whole period of the coverture, were adversely held by a third person. Yet the husband was adjudged to be tenant by the curtesy. The real estate law of Connecticut was, in all respects, material to the present inquiry, the same as that of Ohio; and the court held that, as the reason of the rule requiring seisin did not exist, seisin was unnecessary, and that the symmetry of the law required this decision. To the same effect is the following language of the court in *Stoolfoss v. Jenkins*, 8 S. & R. 175: "The actual seisin of the husband during coverture is necessary to entitle him, as tenant by the curtesy, by the common law; though such actual seisin by the husband is not necessary by our law, if there be a potential seisin, or right of seisin. This has been decided to be sufficient in this State." This ruling, as well as

the case of *Bush v. Bradley*, was approved in the case in 5 Rawle, 160, before cited, the court holding that it was sufficient to entitle the husband to curtesy that the wife owned the land and had a right "to demand and recover the immediate possession thereof."

In the light of these decisions, and the considerations upon which they rest, we can hardly err in holding that the reason, or reasons of the rule requiring seisin in deed, having no existence in Ohio, the rule itself does not exist. And, certainly, the symmetry of our law demands this. It would be strange indeed, and only lead to confusion and perplexity, if, while every other tenancy may be created in this State without entry, or regard to the fact of adverse possession, a tenancy by the curtesy could not. Nor does a rule strongly commend itself to the good sense of men that makes the existence of the estate depend upon an almost, or quite, imaginary distinction between seisin in law and constructive seisin in deed. The constructive seisin relied on in *Jackson v. Sellick*, *Davis v. Mason*, and *Ellsworth v. Cook*, was in substance nothing but a seisin in law. It is a mere fiction to say that a man is actually possessed of that which is in no one's possession, and it is plainly untrue to say so when the thing is in the possession of another. The reasoning of the courts in all these cases, if carried to its legitimate result, makes seisin in deed, either actual or constructive, wholly unnecessary; and this result is not in conflict with the principles of the common law. For even at common law, a seisin in law is sufficient to give curtesy in all inheritances created without entry. 3 Bac. Abr. 12; *Jackson v. Johnson*, 5 Cow. 98; *Ellsworth v. Cook*, 8 Paige, 643. It is therefore a mere application of a common-law principle to say that a seisin in law is sufficient in Ohio, where in no case is an entry necessary to create an inheritance. In the case before us, Mrs. Borland was seised in law, for "seisin in law is a right to lands and tenements, though the owner is by wrong disseised of them." 6 Jacob's Law Dic. 41. Her husband, there being issue born, became tenant by the curtesy, and as he was yet in life when the ejectment was brought by her heirs, the common pleas did right to nonsuit them.

The decision of this case also decides the case of *Doe ex dem. Hunter et al. v. Durrel*; the only difference in the cases being that there was an adverse possession in the one and not in the other.

(d.) *Death of wife.*

WHEELER *v.* HOTCHKISS.

10 CONNECTICUT, 225. — 1834.

[*Reported herein at p. 646.*]

WATSON *v.* WATSON.

13 CONNECTICUT, 83. — 1839.

[*Reported herein at p. 626.*]

(e.) *Need not all coincide in time.*

HUNTER *v.* WHITWORTH.

9 ALABAMA, 965. — 1846.

COLLIER, C. J. — It is laid down in general terms, by elementary authors, that where a man marries a woman seised of an estate of inheritance in lands, and has by her issue born alive, which was capable of inheriting her estate, he shall on the death of his wife, hold the lands for his life, as tenant by the curtesy. 2 Black. Com. 126; Steph. Com. 24; 1 Lomax, 65–6. Whether this estate is a consequence of feudal tenure, is a point perhaps upon which all are not agreed; it is, however, stated by all the text-writers, that the husband is the natural guardian of the child, and as such, is in reason entitled to the profits of the land, in order to maintain it. “As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant to the curtesy initiate; and this estate being once vested by the birth of a child, was not suffered to determine by the subsequent death or coming of age of the infant.” There are four requisites to constitute a tenancy by the curtesy, viz.: Marriage, seisin of the wife, issue born alive, and the death of the wife. See the citations above.

It has been held not necessary that there should be seisin and issue at the same time; and therefore if the wife become seised of lands during the coverture, be afterwards disseised and then have issue, the husband shall be tenant by the curtesy of those lands. So if the wife becomes seised after issue born, though the issue die before the seisure. *Jackson v. Johnson*, 5 Cow. Rep. 74; see also, 2 Conn. Rep. 565; 5 Id. 236. In *Heath v. White*, 5 Conn. Rep. 235, it was said, though the tenure by curtesy may have originated from

the husband's obligation to support his children, yet the extent of his interest is not measured by this reason for its introduction. He is entitled to hold for life, whether his children need his support or not, and whether they live an hour only or to old age. And it has been decided in this State that a decree of divorce, *a mensa et thoro*, pronounced against the husband, does not bar him of the right of curtesy. *Smoot v. Lecatt*, 1 Stew. Rep. 590.

Where B. devised the whole of his estate to his daughter, "to her, her heirs and assigns forever," but if she should die without issue, his whole estate was to be sold by his executors, and the money arising therefrom, after his widow's decease, to be equally divided among his brother's and sister's sons. The daughter married, and had issue which died during her life. Yet it was held that the husband was entitled to her estate, as tenant by the curtesy. *Buchanan v. Sheffer*, 2 Yeates' Rep. 374. We cite these cases to show the favor with which the law regards this description of estate, with what liberality it extends it, even beyond the object for which its introduction was mainly intended to provide; that it is protected, although the wife is absolved from the obligation of living with her husband, in consequence of some fault of his; and that even the express terms of a devise shall be so construed as not to divest a tenancy by the curtesy, if the husband's right once attached. Having said thus much in respect to the estate in general, we now proceed to consider it in reference to the statutes, which it is insisted for the plaintiff in error, are decisive of the case at bar. By the act of 1806, for the regulation of descents, and the distribution of estates, among other things, it is enacted, "Where a man having by a woman a child, or children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." Clay's Dig. 168, § 3. The act of 1811, "concerning bastardy," provides, that if the mother of a bastard child and the imputed father shall, at any time after its birth, intermarry, the child shall in all respects be deemed and held legitimate, conformably to the maxim of the civil law. Clay's Dig. 134, § 6; see also Croke on Illegitimacy, 95.

By legitimating a bastard, we are to understand that he is placed in the same state as if he were born in wedlock, that is in a lawful manner. Marriage is considered by all civilized nations as the source of legitimacy; the qualities of husband and wife must be possessed by the parents in order to make the offspring legitimate, where the municipal law does not otherwise provide. See the Civil Code of Lou. Arts. 203 to 216. In the same work it is declared that children born out of marriage, except the fruit of an incestuous or

adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever they have legally acknowledged them as their children. And children legitimated by a subsequent marriage have the same rights as if they were born during marriage. *Id.* Arts. 217, 219.

Marriage then is regarded as the primary essential to legitimacy, and the produce of an illicit connection are, in a legal sense, expurgated when the parents form such a union. The law regards such a child for all purposes as if born in wedlock — the duties and obligations which such a child and its parents respectively owe to each other, are precisely the same as if marriage had preceded its birth. It can inherit and transmit the inheritance in consequence of its paternity, to and from the relatives of the father. No matter from what source the tenancy by the curtesy takes its origin or upon what reasoning it originally rested, the rights and duties of the father in respect to such a child are the same in all respects as if he had been legitimate from his birth.

If what we have said be well founded, the father is under a legal as well as moral obligation to provide for his legitimated offspring, above what the law requires him to do for a bastard child. To enable him to perform the duty of maintenance, we think he clearly must, at common law, be entitled to the lands of which the wife was seised during coverture. That this much favored estate by the curtesy may be upheld and secured, the husband may, by a kind of legal fiction, *pro re nata*, be presumed to have married previous to the birth of the child. This presumption could do harm to no one, as it would not, of course, be carried so far as to divest interests which the wife had passed from herself between the birth of the child and the marriage.

Having attained a conclusion favorable to the plaintiff in error upon the first point, we need not consider the second. Let the judgment be reversed and the cause remanded.¹

(3.) TO WHAT ESTATES CURTESY IS AN INCIDENT.

(a.) *In general.*

HOUGHTON *v.* HAPGOOD.

13 PICKERING (MASS.), 154. — 1832.

[*Reported herein at p. 24.*]

¹ In this case all of the children were born before the marriage of their parents. In New York "An Act to legitimize children whose parents have intermarried after the birth of such children" was passed in 1895, ch. 531, and is now § 18 of the Domestic Relations Law. — Ed.

FERGUSON *v.* TWEEDY.

43 NEW YORK, 543. — 1871.

[*Reported herein at p. 628.*]HOWARD, J., IN WASS *v.* BUCKNAM.

38 MAINE, 356. — 1854.

“PETITION for partition.” The entry of one tenant in common into the common estate, and his subsequent possession is presumed to be the entry and possession of all the co-tenants, unless otherwise explained and controlled. Each has a right to the possession of the whole estate; and such is the character of their estate that such possession is necessary for the full enjoyment of their legal rights respectively. So if one occupy the whole estate, it is not necessarily nor by presumption of law, adverse to his co-tenants; but is in accordance with his title, and consistent with his rights, and in support of their common title. He is presumed to be in of right, and not for the purpose of excluding his co-tenants, or with the intention of effecting an ouster or disseisin.

There is no satisfactory evidence that the respondents, and those under whom they claim, ever asserted an exclusive right, or manifested an intention to hold the estate adversely to their co-tenants. The evidence of the character of their occupation and improvement, is consistent with the legal rights and interests of all concerned. Whether there were any surplus rents and profits, or in what manner the rents received were disposed of, does not appear.

Anna, the mother of the petitioners, was seised in her own right, of her interest in the premises, in common with the co-tenant, under whom the respondents claim, his seisin as co-tenant being as well for her as himself; and upon her death, her husband became tenant by the curtesy, and her children were entitled to the remainder, and to her interest upon the termination of the particular estate of the husband by his death. *Jackson v. Sellick*, 8 Johns, 202, 207; *Davis v. Nason*, 1 Peters, 507, 508; 4 Kent's Com. 29, 30, where it is shown that the rigid doctrine of the English law, requiring the wife to be seized in fact and in deed, in order to entitle the husband to his curtesy, has been modified and relaxed in favor of his right.

If, during the life of the husband, there was an adverse possession of the estate for more than forty years, as claimed by the respondents, it would not defeat the petitioners. So long as they were out of possession, and without the right or power to acquire it, as was

the case during the tenancy of the husband, no possession of another could be adverse to them, and no law of limitation could affect them. The law will not suffer a party to be so far circumvented as to be deprived of his interests under its sanctions, and for the imputed laches of others, while it renders him incompetent to assert his rights. 2 Salk. 423; *Dow v. Danvers*, 7 East, 321; *Jackson v. Schoonmaker*, 4 Johns, 401; *Whitam v. Perkins*, 2 Maine, 400.

(b.) *Fees subject to executory limitation.*

HATFIELD v. SNEDEN.

54 NEW YORK, 280. — 1873.

EJECTMENT by an executory devisee against the husband of the (deceased) owner of the estate which was subject to the executory devise. Plaintiff succeeded below and defendant appeals to this court.

JOHNSON, C. — Upon the true construction of the will of Mary Wood, the estate of her daughter was a fee determinable upon the happening of the events on which the devise to the plaintiff was to take effect. The language of the primary devise is to the daughter and her heirs forever. Then followed a clause which, in the event of the return to the county of the son of the testatrix (the son was supposed lost at sea), gave them the estate in equal shares. The testatrix further directed that if the daughter should never have any children, or a child living at her decease, if her son should not return then the devised estate was to go to the plaintiff in fee.

In the first place it is to be observed that the earlier part of the phrase in respect to the daughter's issue is inoperative and meaningless, taken in connection with the latter part of the same clause. If the daughter had no child living at her decease, it was of no consequence how many she might have had at an earlier period. If she had a child living at her decease, then, of course, it could not be true that she never had any children. The substance of the whole clause is the same as if the testatrix had said, if my daughter, at her decease, leaves no child living, and if my son does not return, then the estate is to go to the plaintiff in fee. The concurrence of both these events was necessary to carry the estate to the plaintiff. If the son returned, Hatfield took nothing irrespective of the question of the daughter leaving a child living. If the daughter left a child living, and the son did not return, Hatfield took nothing, and her issue living at her death would not have taken under the testatrix's

will, but by descent from their mother, out of the fee devised to her, which had not been defeated by the prescribed events.

The return of the son, and the death of the daughter, without leaving a child surviving her, were events, which, from their nature, would be determined within their two lives, and there is no objection on the ground of remoteness to the executory devise in favor of the plaintiff. Nor is there any question that both events on which the executory devise over to him was to take effect have been determined in his favor. The son, who had been absent three years in October, 1851, when Mary Wood made her will, had not returned or been heard of in March, 1861, when the daughter died without a surviving child. There is, therefore, such a presumption of his death that his return may be taken to have become impossible before the death of the daughter.

Nothing then stands in the way of the plaintiff's recovery, unless the defendant has an estate as tenant by the curtesy by reason of his marriage to the daughter and the birth of their living child during the marriage, who might, if she had outlived the mother, have inherited the whole estate in question. The defendant was, therefore, entitled to curtesy if the estate of his wife was such that curtesy could be had of it. The point thus presented has been the subject of elaborate discussion in the text-books, and of criticism upon the case of *Buckworth v. Thirkell*, decided by Lord Mansfield, and reported in 4 Doug., 323, Collect. Jur. 332; 3 B. & P. 652 n., and upon that of *Moody v. King*, 2 Bing. 447, which fully upholds it after it had been spoken of with disapprobation by Lord Alvanley in *Doe v. Hutton*, 3 B. & P. 643, 651. The discussion has been so full and complete that it seems impossible to throw any additional light upon the views and various arguments which have been adduced upon it. The most accurate and comprehensive discussion which I have found upon the subject is in Washburn's Law of Real Property, vol. 1, §§ 11 to 21, of ch. 6, of book 1, pp. 131-135, and §§ 31 to 33, of ch. 7, of the same book, pp. 212-217, in which the cases in England and in the United States are stated and examined with ability. There results a division of opinion in the courts which is irreconcilable, and in respect to which, additional discussion is not likely to afford advantage. To restate and reconsider this full discussion could only serve to incumber, by a useless parade of cases, the already too voluminous reports. The conclusion which is stated in the work cited (p. 135, § 21) is:

"If the estate of the wife be an estate of inheritance, determinable by a limitation which operates to defeat her estate at common law the right of curtesy is gone. But, if the limitation over be by

way of springing use, or executory devise, which takes effect at her decease, thereby defeating or determining her original estate, before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seisin and estate which she had of the fee simple or tail will give the husband curtesy." It may properly be added that the strong objection proposed to this doctrine by its critics, is to the consequence which they deem unreasonable, that an estate determined according to the terms of its creation should by the incident of curtesy or dower be prolonged. To this, it seems to me a fair and complete answer to say, as Lord Coke says in *Paine's Case*, 4 Coke R., part VIII., Frazer's ed., p. 212, marg. 36 a, in answer to a similar difficulty as to curtesy after an estate tail determined by the death of the wife, tenant in tail, and of her issue, "the husband's estate shall continue, for it is not derived merely out of the estate of the wife, but is created by law," "by the privilege and benefit of the law *tacite* annexed to the gift." This possible continuance of dower or curtesy as an incident of the estate created may well be deemed to have been in the contemplation of the testatrix, and is not an unreasonable or unnatural provision for the possible husband or wife of one clothed with a fee simple not defeasible, except upon death without children living. The only authority in this State in conflict with this conclusion is a decision at Special Term in *Weller v. Weller*, 28 Barb. 588, in a case of dower, which was put upon the ground of the criticism in Park on Dower, upon Lord Mansfield's decision. The decision at General Term in the present case seems to have gone upon the ground that the interest given by the will of Mary Wood to her daughter was a life estate only, with remainder to her issue, if any, as purchasers. This construction we have seen could not have been maintained, *Hatfield v. Sneden*, 42 Barb. 615. There is another aspect of this case which, from the record, appears to have existed, or been in the highest degree probable, viz., that the daughter was, at her mother's death, her only heir-at-law. In that case she would have been in by descent in fee, and the only effect of the devise would be to create an executory limitation to Hatfield in case of the concurrence of the two events on which the estate is given over. That she would have been in by descent the preferable title, and not by the devise, is obvious. *Doe v. Timins*, 1 B. & Ald. 530. In that case it would be difficult to take from the estate in fee any of the incidents which the law has attached to such an estate, and impossible to deny that her husband was entitled to curtesy according to every definition given in the books of such an estate. In this aspect we may take it that the will is silent about the absent son and his possible return,

and silent about the daughter, except as both are mentioned in limiting the executory devise. That no estate is devised either to son or daughter, but that the only provision of the will is, if my son shall not return, and my daughter shall die, leaving no child living, then I devise to Hatfield. Under such a will the daughter would take just what the will in question gave her, and for exactly the same estate. Being thus in by descent, there is in the books not only no warrant of authority, but not even a suggestion that the estate in fee by descent can be deprived of any of the lawful incidents belonging to estates in fee. It is not until those are exhausted that the executory devise to Hatfield can take effect in possession.

It may be regarded in another aspect, equally pointing to the same result. If the devise had created an estate tail (supposing such an estate could at that date have been created in this State), and it had been limited in tail general to the daughter, with remainder in fee simple to the plaintiff, that estate in the event which has happened would have had the same duration as the fee given to her in this case. It would have terminated with her life, the issue in whom alone it could have continued having died before her. Yet, in that case, the husband's right to curtesy would have been clear beyond all question. It would seem not a little singular that the greater estate, the fee simple which this daughter took, either by descent or devise, should not avail to give her husband that which he unquestionably would have taken had her estate been of an inferior quality and less than a fee simple.

Again, leaving out of view all technical aspects of the case, and looking only to the general intention of the testatrix, it is obvious that she did not mean the plaintiff to take anything unless her two children should be dead, and should have left no children living. She knew that the son had no children, and was probably dead, but if he came back he and the daughter were each to have a half. If he did not return, the daughter was to have the whole, but if she died leaving no child, then, her descendants being extinct, the estate was to go to plaintiff. Her purpose was not to lower the quality of her daughter's estate or to deprive it of the ordinary incidents of estates in fee, but only to give it over when there should remain no longer any one to hold it representing her daughter.

The only remaining question is as to the effect of the married woman's acts of 1848 and 1849 upon the law in respect to curtesy. After sundry conflicting decisions, the law has become substantially settled, that while those acts excluded the husband during life from control of, or interference with, his wife's separate real and personal estate, and gave to her alone the power of disposition by deed or

will, yet they left the husband the right of curtesy in her real property and of administration for his own benefit of her personalty, in so much as remained at her death undisposed of and unbequeathed *Matter of Winne*, 2 Lansing, 21; *Ransom v. Nichols*, 22 N. Y. 110; and *Barnes v. Underwood*, 47 Id. 351.

The judgment should be reversed, and judgment rendered for defendant on the verdict, with costs.

(4.) HOW CURTESY MAY BE DEFEATED.

(a.) *Alienage of husband.*

PUTMAN, J., IN *FOSS v. CRISP*.

20 PICKERING (MASS.), 121, 124. — 1838.

It is found in the case, that Sarah, after the death of her husband Varney, married Antonio Crisp, the tenant, by whom she had one child, Antonio Crisp, Junior, now living: and that Antonio Crisp was an alien, a native of Spain, and that he made his primary declaration of an intent to become a citizen of the United States, in the lifetime of Sarah, his wife, and was in fact naturalized after her death.

And the question made for him is, whether or not he is entitled to hold the premises as a tenant thereof by the curtesy.

In the case of *Wilbur v. Tobey*, 16 Pick. 179, the Chief Justice, for the whole court, stated the law to be without doubt, "that an alien can take real estate, by deed or devise, or other act of purchase, but cannot hold against the commonwealth; he, therefore, takes a defeasible estate, good against all except the commonwealth, and good against them, until they institute proceedings, and obtain a judgment by inquest of office. But an alien cannot take by act of law, as descent, because the law will be deemed to do nothing in vain, and, therefore, it will not cast the descent upon one who cannot by law hold the estate."

The doctrine laid down by the Chief Justice is maintained by all the books which treat of the subject. Indeed the counsel for the tenant does not deny the general doctrine of the common law touching alienage, but courageously contends that it has been repealed by our own statutes, and that the tenant is entitled to take and hold the premises demanded, as a tenant by the curtesy.

He contends that by the Revised Stat., c. 60, § 17, the tenant is clearly entitled. * * *

The answer is very apparent. The statutes of the commonwealth touching the descent of real estate, were intended to apply to citizens, and not to aliens, unless they were particularly named.

(b.) *Forfeiture for alienation of fee.*

JACKSON EX DEM. MCCREA *v.* MANCIUS.

2 WENDELL (N. Y.), 357. — 1829.

[*Reported herein at p. 612.*]

(c.) *Annulment of marriage. Absolute divorce.*

WHEELER *v.* HOTCHKISS.

10 CONNECTICUT, 225. — 1834.

DAGGETT, Ch. J. * * * Has the plaintiff a title to the land on which the supposed trespass was committed? It was conveyed to her, in 1808, while she was the lawful wife of William Wheeler, by whom she had issue, born alive, before and since the conveyance. His interest in this land by virtue of the coverture, was taken by execution, in favor of one Judah Ransom, who entered into possession and occupied until the 15th of June, 1832; when he sold it to the defendant, who has possessed it ever since. Subsequent to all these events, in August, 1832, she obtained, by a decree of the Superior Court, a divorce *a vinculo matrimonii* from her husband, William Wheeler. What is the operation of this decree of divorce upon the rights of the wife, and of the defendant, who holds by purchase from the execution creditors?

It was decided, by the unanimous opinion of this court, in *Starr v. Pease et al.*, 8 Conn. Rep. 541, that the right of the husband in the land of his wife, being an estate during coverture, is terminated by a divorce *a vinculo matrimonii*; and that the rights of creditors to the land dependent on coverture, were thereby affected and destroyed. On further reflection, I am satisfied with that decision. It must, then, control this case, unless a distinction can be sustained. The counsel for the plaintiff insist on this fact, that in the case of *Starr v. Pease et al.*, it appeared, that Lewis, the husband, had no issue by the wife; and in this case, Wheeler, the husband, had issue, born alive, before and after she became seised of the land; and hence, they say, that he was tenant by the curtesy initiate. It has its origin, they insist, not simply in the marriage, but in the birth of

issue. He may then charge the estate; make a feoffment; hold against the heir of the wife, after her death; against the remaindermen or reversioner; and even against the king, in the case of attainder. And again, his estate is not terminated, by abandoning the wife and living with another woman. For these several positions they cite Co. Litt. 30; 2 Black. Com. 127; 1 Rep. on H. and W. 15, 45, 48; 1 Swift's Dig. 84; *Sidney v. Sidney*, 3 P. Wms. 276, 7.

Be it so, that by these authorities, these positions are sustained; still all the authorities concur, that until the death of the wife, he is only tenant by the curtesy initiate, and not consummate. The death of the wife is one of the four essential requisites to constitute a tenancy by the curtesy.

Now, the wife, Mary Wheeler, is still living, and the foundation of the husband's estate is removed, by the dissolution of the marriage. The coverture is dissolved by the wrong act of the husband. By the authority of adjudged cases, as well as for the soundest reasons, his estate could continue only during the coverture. 8 Conn. Rep. 545. I am, therefore, satisfied, that the right of the wife, which was suspended during the marriage, is restored by the divorce; and of course, the title to the land is now vested in her. * * *

Judgment for defendant.¹

(d.) *Wife's conveyance.*

VANN, J., IN ALBANY CO. SAVINGS BANK *v.* McCARTY.

149 NEW YORK, 71 (85). — 1896.

It is difficult to see how McCarty's signature to the mortgage added anything to its effect, as, since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to lands acquired since the passage of those acts, consists simply of a status, which is never a vested right and is not separately alienable during coverture, but may be modified or annulled at any time before it becomes consummate by the death of the wife. *Thurber v. Townsend*, 22 N. Y. 517; *Staples v. Brown*, 95 Mass. 64; *Williams v. Baker*, 71 Pa. St. 476; 1 Kerr on Real Property, §§ 780, 831; Gerard's Titles to Real Estate, 4th ed. 79, 159. While merely initiate it is not an estate, but a simple possibility or expectancy like that of an heir apparent. Either may be destroyed at will by the owner of the fee. As it is not coupled with

¹ *Contra*, *Gillespie v. Worford*, 2 Coldwell (Tenn.), 632, (1865.) — Ed.

an interest in the property, it cannot be made the subject of a mortgage or transfer. "It is common learning in the law that a man cannot grant or charge that which he hath not." Perkins, tit. Grant, § 65. Like "the next cast of a fisherman's net," it involves a possibility but no actual or potential interest. 1 Thomas on Mortgages, § 136. While equity may enforce a contract expressly intended by the parties to apply to after-acquired property, that principle does not apply to a husband, who simply unites with his wife, the owner of the fee, in a deed of mortgage. We think, therefore, that Mr. McCarty was not disqualified as a witness because he was tenant by the curtesy.¹

(c.) *Disclaimer.*

WATSON *v.* WATSON.

13 CONNECTICUT, 83. — 1839.

[*Reported herein at p. 626.*]

d. Dower.

(1.) NATURE OF DOWER.

(a.) *Dower inchoate.*

HINCHCLIFFE *v.* SHEA.

103 NEW YORK, 153. — 1886.

ACTION against Margaret Shea to foreclose a mortgage executed in 1878 by Martin Shea, and Margaret, his wife, upon lands of the husband. Mrs. Shea had no interest in the lands, at that time, other than her inchoate right of dower. In 1880 the premises were sold under an execution upon a judgment recovered in 1874 against Martin Shea. The judgment had been duly docketed. Martin died in 1882, and shortly thereafter the purchaser conveyed the premises to his widow. The trial court and the General Term held the dower interest of the widow, subject to the mortgage. Defendant appeals.

¹ Where the wife can convey lands subject to the curtesy, but not free from it the husband by joining in her deed would bar his curtesy. In some States curtesy is abolished, in some it is made analogous to dower, in some the husband takes an absolute interest in a portion of his wife's lands on her death. 1 Stim. Am. Stat. Law, Art. 330. — Ed.

ANDREWS, J. — The joinder by a married woman with her husband in a deed or mortgage of his lands, does not operate as to her by way of passing an estate, but inures simply as a release to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterward claiming dower in the premises as against the grantee or mortgagee, so long as there remains a subsisting title or interest, created by his conveyance. But it is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. *Robinson v. Bates*, 3 Metc. 40; *Malloney v. Horan*, 49 N. Y. 111; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Littlefield v. Crocker*, 30 Me. 192.

In short the law regards the act of the wife in joining in the deed or mortgage, not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee of her husband, so far as respects the title or interest created by his conveyance. It follows, therefore, that her act in joining in the conveyance, becomes a nullity whenever the title or interest to which the renunciation is incident, is itself defeated. *Scribner on Dower*, chap. 12, § 49. The wife's deed or mortgage of her husband's lands cannot stand independently of the deed of her husband when not executed in aid thereof, nor can she by joining with her husband in a deed of lands to a stranger, in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right. *Marvin v. Smith*, 46 N. Y. 571. These principles are, we think, decisive of this case. The plaintiff's mortgage has been defeated by the paramount title, derived under the execution sale. It was the husband's mortgage and not the mortgage of the wife, except for the limited and special purpose indicated. {The lien of the mortgage, as a charge on the lands of the husband, has by the execution sale, been subverted and destroyed.} Nor can the security be converted into a mortgage of the widow's dower, now consummate by the death of her husband. This would be a perversion of its original purpose. {Her act in signing the mortgage became a nullity on the extinguishment of the lien on the husband's lands.} If on the execution sale there had been a surplus applicable to the mortgage, it might very well be held that the

widow could not be endowed therein, except after the mortgage had been satisfied.

The surplus would represent in part the mortgaged premises. See *Elmendorf v. Lockwood*, 57 N. Y. 322.

We think the authorities require a reversal of the judgment.¹

(b.) *Dower consummate, — before "assignment."*

PAYNE v. BECKER.

87 NEW YORK, 153. — 1881.

ACTION by a receiver in proceedings supplementary to execution to procure (among other things) the admeasurement of the dower of a widow (the judgment debtor) in lands of which her husband died seised.

DANFORTH, J. — The appellant now argues that the action is in the nature of a creditor's suit. If we yielded to this view it would lead to a dismissal of the appeal, for in such an action the judgment measures the matter in controversy. It is less than \$500, and the appeal has been taken as of right and not by allowance of the Supreme Court. Code, § 191, sub. 3. It is, however, clearly a case seeking admeasurement of the widow's dower and partition of the lands described; thus affecting the title to real property or an interest therein, and, therefore, not within the provisions of the code referred to. [The court below held that plaintiff's position did not enable him to maintain an action for partition, and this is now conceded by the appellant's counsel.] One other ground of action remains, and we are of opinion that the complaint does contain facts sufficient for the admeasurement of the dower of the defendant. The common law secured to the widow dower for her sustenance and the sustenance and education of her children. Co. Litt. 30 b. But,

¹ See also *Marvin v. Smith*, 46 N. Y. 571, and *Wheeler v. Kirtland*, 27 N. J. Eq. 534, reported *infra*, p. 698. In *Moore v. City of New York*, 8 N. Y. 110, it is held that a fee taken by right of eminent domain is vested in the city free and clear of the inchoate right of dower. Gardiner, J., says: "Such a possibility [an inchoate right of dower] may be released, but it is not, it is believed, the subject of grant or assignment, nor is it in any sense an interest in real estate." So, in *Barbour v. Barbour*, 46 Me. 9, it is held that an inchoate right of dower is subject to be modified, charged, or even abolished by legislative enactment. The case of *Moore v. New York*, *supra*, has been distinguished and limited in subsequent New York cases. See, in particular, *Simar v. Canaday*, 53 N. Y. 298, and *M. L. I. Co. v. Shipman*, 119 N. Y. 324, but an inchoate right of dower is nowhere held to be an estate in the land. — Ed.

although in modern times the right has been enlarged, and is confirmed by statute, the humane object of its allowance may be defeated by her improvidence, and the right itself subjected to the claims of creditors. This was held in *Tompkins v. Fonda*, 4 Paige, 448, where the only question presented was whether a widow's right of dower which had never been demanded or assigned could be reached by the aid of a court of equity after the return of an execution unsatisfied.

In that case the court required the defendant to assign to the receiver, for the purpose of the suit, her right of dower in certain premises, and he was authorized to proceed in her name for the recovery and assignment of it. After that, the receiver was, by the terms of the decree, to be let into possession of the lands assigned, and to receive the rents and profits until the further order of the court. This case was carefully considered and although frequently cited, *Elmendorf v. Lockwood*, 57 N. Y. 322; *Marvin v. Smith*, 46 Id. 574; *Stewart v. McMartin*, 5 Barb. 438; *Moak v. Coates*, 33 Id. 498; *The Chautauqua County Bank v. White*, 6 Id. 596, has met with no disapproval. In *Stewart v. McMartin*, *supra*, a similar decree was made, and while it was denied in *Moak v. Coates*, *supra*, it was upon the ground that no assignment of the widow's interest had been made to the receiver. Whether that was well put, needs no consideration, because in the case before us the widow, by direction of the judge, conveyed her right to the plaintiff. The other cases sustained the general doctrine, and it must now be deemed settled, that, upon the death of her husband, a widow has an absolute right to dower in the lands of which he had been seised, and that this right or interest, although resting in action, is liable in equity for her debts. In the cases above cited, *Tompkins v. Fonda*, and *Stewart v. McMartin*, the action for its admeasurement was required to be brought in the widow's name, but since the code, that cannot be necessary. The plaintiff takes as the assignee of a chose in action, *Tompkins v. Fonda*, *ante*, and must sue therefore in his own name, § 111, Old Code; § 449, New Code. This was so held in Indiana under a code of practice similar to our own, *Strong v. Clem*, 12 Ind. 37; *Jackson v. Aspell*, 20 Johns. 410, and other like cases cited by the respondent show, not that the assignment by the widow of her right of dower is inalienable, but only that it could not be so aliened as to enable the grantee to bring an action in his own name.

This was no doubt the rule at common law, but the code changed it. In *Strong v. Clem*, *supra*, the court held, first that the dower interest accruing to the widow in the real estate of her deceased husband was, although unmeasured, assignable as a right in action; and, second, that under the code of practice in that State, it might be

enforced in the name of the assignee. Such is the rule in equity, as applied to all rights in action, 2 Story's Eq. Jur. §§ 1040-1055; and that a claim for dower is within that rule is shown by the case of *Potter v. Everitt*, 7 Ir. Eq. Cas. 152. The action was by the purchaser of a widow's right of dower before assignment, against the widow and the deceased husband's heirs-at-law, to compel them to allot the dower and afterwards convey the land so allotted. The plaintiff obtained the relief sought. Both upon principle and authority, therefore, [we must hold that the widow's right or claim of dower is property; that, like every other species of property it may be reached and applied to the payment of her debts; and this principle once established, the power of the Supreme Court to carry it into effect cannot be doubted. Whatever interest or right the defendant had, accrued prior to the recovery of judgment, and she was at that time, and at the time of the appointment of the plaintiff as receiver, entitled to have dower assigned to her. The plaintiff not only complied with the conditions made necessary by statute, New Code, § 2468, before the property of the judgment debtor should vest in him; but he took, by order of the judge, an assignment of it from the plaintiff. Thus, by compliance with statutory provisions and by the act of the defendant in pursuance of a judicial mandate, he became entitled to all her property, whether real estate or rights in action.] But this avails nothing unless he can make his title effectual and reduce the property to possession for the purpose of his appointment. Upon the facts stated in the complaint, and conceded to be true, we think he is entitled to reach that now in question, and for that purpose may have the dower admeasured and applied according to the prayer of the complaint.

The order and judgment appealed from should, therefore, be reversed with costs, the demurrer overruled, and leave given to the defendant to answer, upon payment of costs, within twenty days after notice of the order to be entered upon the remittitur herein.

Judgment reversed.¹

¹ See *Mut. Life Ins. Co. v. Shipman*, 119 N. Y. 324, in which RUGER, CH. J., says: "Although this right [that of a widow to her dower], while unassigned, did not give her a legal estate in the lands, it is now well settled that it was a legal interest and constituted property which was capable in equity of being sold, transferred and mortgaged by the dowress, and liable to be reached by creditors in payment of her debts." *Contra*, at C. L., *Harper v. Clayton*, 84 M.J. 346, distinguishing the New York cases as decided under a statute which allows things in action to be reached in equity by creditors. — Ed.

(c.) *Dower consummate, — after "assignment."*

LAWRENCE v. MILLER.

2 NEW YORK, 245. — 1849.

ACTION for rent. Defendant had been a tenant of plaintiff's husband, and the premises having been set off to plaintiff as her dower he had attorned to her. Later the husband's administrator, under an order from the surrogate, had sold these premises for decedent's debts, including plaintiff's interest therein. The purchaser leased them to defendant, who now refuses to pay rent to plaintiff. Judgment for defendant. Plaintiff appeals.

GARDINER, J. — At the time of the proceedings before the surrogate, the plaintiff had a vested legal estate in the premises assigned to her, under the decree in chancery, absolute for her life unless her right and title was subject to and qualified by the 31st section of the act 2 R. S. 99. Com. Dig. tit. Dower, ch. 4, § 1; 1 R. S. 740, § 16; 4 Kent's Com. 69. This section provides that the conveyances executed to purchasers upon a sale by order of the surrogate, "shall be deemed to convey all the estate, right and interest in the premises of the testator or intestate at the time of his death, free and discharged from all claim for dower of the widow of said testator or intestate."

(Before assignment the widow has no estate in the lands of her husband; her right is a mere chose in action which cannot be sold upon execution at law. Until that time it is strictly a claim.) Greenleaf's Cruise, vol. I., tit. Dower, ch. 3, and note. The ordinary signification of claim, is that of a right or title, actual or supposed, to a debt, privilege or other thing in the possession of another. Most persons distinguish readily enough between a claim for dower and the estate itself in the actual possession of the person entitled thereto. No one thinks of confounding a claim for possession, with possession in fact. Writers speak of possession, of the right of possession, and the mere right. Each has its distinct and appropriate meaning; they may exist in different individuals, although their union in the same person is necessary to a perfect title. A claim is the means by or through which the claimant obtains the possession or enjoyment of the thing sought. It is the means to an end, and not the end itself. It is true, that the word may sometimes stand for the subject claimed. And so may cause for effect. The distinction between the two is somewhat important, notwithstanding.

It may be granted that if Mrs. Lawrence, after assignment, had conveyed all her claim for dower to the premises in her possession, she would have transferred all her interest to the purchaser. And the same might be said of a person who owned his farm in fee simple. But in those cases, courts would seek for the intent of the parties in their situation and the state of the property, and modify the primary and popular signification of the term used by them, so as to give effect to the conveyance. Neither the parties nor their legal advisers would, I apprehend, speak of selling a claim, when they intended to dispose of a freehold estate in possession. The Legislature must be presumed to have used the word in question, in its ordinary and popular sense, unless there is something in the subject to which it is applied, or in other provisions of the act to indicate a different design. And first as to the subject. Dower is perhaps, of all others, the estate most favored in law and equity. 3 Brown's Ch. 264. It is distinctly recognized and protected in our statute, and a presumption of a change in the law to the prejudice of the widow is not to be indulged. Again, by the common law, although the title of the widow is consummate upon the death of the husband, she is not seised, but the heir; and she consequently claims through his seisin. Cruise's Dig. tit. Dower, ch. 3, § 1. But by assignment of dower, the seisin of the heir is defeated *ab initio* (Id. ch. 3, § 24) and the dowress is in of the seisin of her husband, as of the time when that seisin was first acquired. It is upon this principle that the widow can elect under which seisin she will hold, where lands have been sold after marriage and repurchased by the husband.) Co. Litt. 588, 33, a., and note. For the same reason, she holds the lands discharged of all incumbrances created subsequent to the marriage, if the husband was then seised, because in the language of Cruise, "her title has relation to the time of the marriage, and to the seisin which her husband then had." Cruise's Dig. tit. Dower, tit. 6, ch. 2, § 34. Her estate is a continuation of the husband's, commencing at the time of the purchase, if the lands were acquired after marriage. Id. tit. 6, ch. 2, § 17; Co. Litt. *supra*.

By the 3rd section above quoted, the surrogate's deed conveyed all the estate, right and interest of the husband at the time of his death. That interest was a fee in possession, subject to all incumbrances, the widow's claim for dower included. This estate descended to the heir, and he also could transfer a fee in possession before assignment to a purchaser. The object of the statute was to extinguish the claim for dower, while the heir was seised of the same estate, both in quantity and quality, that was in the ancestor at the time of his death. It gives to the purchaser, under the surrogate's

order, just what the intestate had at his death and no more, with the exception of the discharge of dower.

But by the assignment of dower, the widow took a freehold estate, the right to which accrued in 1825, when the land in question was purchased by her husband, and her title by relation commenced at that time. Viner's Abr. tit. Relation; 3 Cowen's R. 75; Cruise's Dower, tit. 6, ch. 2, § 34. It displaced the seisin of the heir, and that of the husband which was in him at the time of his death, and from that period, turned the estate of the former into a reversion, expectant upon the determination of her estate. When proceedings for the sale were commenced before the surrogate, there were two estates, one for life, and a reversion expectant upon its determination. They originated at different times, and under a different seisin; that of the heir at the death of the intestate, that of the widow when the land was acquired. Together they would not make the same estate of which the husband died seised. That was subject to the claims of his creditors, and to a general claim for dower extending to all the lands of which he was seised during the marriage. After assignment, the estate of the widow overreached the former and extinguished the latter. The difference in interest is still more striking in those cases where the estate is largely encumbered. The widow's estate might be valuable, while the whole fee of which the ancestor and the heir were seised, might not be worth the expense of a sale.

According to the views of the defendant, the 31st section annuls the estate of the widow which she held as purchaser under a title reaching back to 1825, in favor of debts subsequently contracted, and revives her general claim against all the lands of the testator, which the statute of dower declares shall be forever barred by the assignment. 1 R. S. 742, § 23. This claim, extending to all the lands of the intestate, was the evil which the Legislature intended to suppress, because it would probably always depreciate the value of the whole real estate beyond the value of the widow's interest. This would occasion loss to the estate and to creditors without a corresponding benefit to any one. The 31st section, therefore, very properly afforded a remedy by substituting a pecuniary recompense for a claim thus indefinite. But when dower is assigned, the reason for the provisions cease. The purchaser knows what he is buying, and the law in directing compensation, assumes that the value of the widow's claim can be accurately calculated.

Again, by section 5, the order to show cause must be directed to all persons interested in the estate. Prior to the assignment, the widow's claim is upon all the real estate of the intestate; she is then

interested in the estate, and entitled to the notice provided by the 6th and 7th sections. After assignment her interest ceases, and she is then remitted to her dower which she holds by title paramount to the heirs and the creditors of her husband. By the 10th section, the heir or devisee of the decedent, or any person claiming under them, may contest the facts alleged by the executor or administrator, etc. The widow, before assignment, claims under and through the seisin of the heir, and may litigate; after assignment, she is in of the estate and seisin of the husband, and cannot. If she is not entitled to notice, nor the right to litigate, she cannot be bound by the decree of the surrogate. Without adverting to other parts of the act, it is sufficient to say, that they do not conflict with the construction given to the 31st section.

I think the authority of the surrogate to direct a sale, "free from all claim of dower," must be limited to cases where the heir upon whom the law casts the estate of the intestate could convey a fee in possession. In other words, it must be exercised, if at all, before the assignment of dower. Upon this construction, full effect can be given to the whole section; no estate is displaced; the tenants of the dowress are protected; she may bequeath the crops on the land holden by her. 1 R. S. 744, § 25. The provisions of this act harmonize with those of the statute concerning dower, and the only change is, that a claim, a chose in action, is made the subject of pecuniary compensation out of the proceeds of the land to which it relates.

The judgment should be reversed.

(2.) ESSENTIALS FOR DOWER.

(a.) *Lawful marriage.*

BENNETT, J., IN JONES v. JONES.

28 ARKANSAS, 19. — 1872.

WAS Delilah Jones the widow of Elbert Jones? This inquiry is an important one, as she is asking the court to award her dower, and marriage is an essential prerequisite to the right of dower. In order to entitle a woman to this provision, she must answer the description of a lawful wife. 1 Scribner on Dower, ch. 3, sec. 1. Marriage, under our statute, is considered in law a civil contract, to which the consent of the parties, capable in law of contracting, is necessary. Marriage has been regulated by legislative enactments, by defining the character and relations of parties who may marry, so as to pre-

vent a conflict of duties and to preserve the purity of families; by prescribing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise and seduction; by annexing civil rights to the parties and their issue, to encourage marriage and to discountenance wanton and lascivious cohabitation; by declaring the causes and the judicature for rescinding the contract, when the conduct of either party and the interest of the State authorize dissolution. A lawful marriage may be defined to be a contract made by parties authorized by law to contract, and solemnized in the manner prescribed by law. To constitute a lawful wife, there must have been a lawful marriage. It is generally considered in the absence of any positive statute declaring that all marriages, not celebrated in the prescribed manner, shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulation, would still be a valid marriage. 2 Greenleaf, Ev. 417; 2 Kent Com. 90, 91; Reeve's Dom. Rel. 196, 200, 290; *Parton v. Harvey*, 1 Gray, 119; *Londonderry v. Chester*, 2 N. H. 268; *Chiseldine v. Brewer*, 1 Har. & McH. 152; *Hantz v. Sealey*, 6 Binn. 405.

A marriage celebrated in any country, according to its own laws, is recognized and valid in any country whose laws or policy it may not contravene.

The proof of marriage, as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances from which its existence may be inferred.

SMITH *v.* SMITH.

5 OHIO STATE, 32. — 1855.

PETITION for dower. Ruth Atherton married one Dennis in 1817 or 1818. They soon thereafter separated and each remarried, — Ruth marrying one David Smith. Smith, during the coverture, was seised of certain lands which he conveyed to the defendant, Chester Smith, Ruth not joining in the conveyance. David is now dead and Ruth asks to have dower set off to her. Case reserved.

SWAN, J. — It seems to be conceded by the counsel for the complainant, Ruth Smith, that if her marriage to Smith was absolutely void, she is not entitled to dower in his estate. Such is undoubtedly the law; and it is equally well settled, that a second marriage, as in this case, while the first husband was living, is absolutely void,

unless the legislation of this State has rendered such second marriage voidable only.

It is said that the statute which authorizes proceedings to obtain a divorce, "where either of the parties had a former husband or wife living at the time of solemnizing the second marriage, Swan's Stat. 325, § 1, does, constructively, render such second marriage voidable only. The fact of a prior marriage may be one of doubt; and hence this provision permits parties to have the subject judicially investigated and determined. Another object of this provision was, probably, to give alimony to the second wife of a man who had a former wife living. Besides, to render such second marriage valid, or voidable only, until decree of divorce, would require distinct and positive legislation.

No presumptive proof of divorce between Dennis and his wife exists. Indeed, a divorce being a judicial proceeding of record, we do not see how such a presumption could arise without some proof. There is none.

The petition must be dismissed.

(b.) *Seisin of husband during coverture.*

DURANDO *v.* DURANDO.

23 NEW YORK, 331. — 1861.

TESTATOR devised his lands to his widow for life, remainder to his children of whom petitioner's husband was one. During the continuance of the life estate part of the lands were taken under the exercise of the right of eminent domain and the moneys received therefor were paid into court. Petitioner's husband died in 1853, the life tenant in 1860. Petitioner asks a share of the money in court. Petition denied and she appeals.

SELDEN, J. — To entitle a widow to dower, the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee, or a vested remainder expectant upon an estate for life, his widow cannot be endowed. As in such a case the husband has never had either possession or any present right of possession, he cannot be said to have had a seisin of any sort, either actual or legal. It is conceded by the counsel for the appellant, that this rule applies where lands descend to the husband, subject to the right of dower of the widow of the ancestor; as if a father die intestate, leav-

ing a widow and a son, and the widow is endowed, it is not claimed that the widow of the son, in case of his death, in the lifetime of his father's widow, could ever be endowed of the lands which had been assigned for the dower of the latter. But it is insisted, that where the estate comes to the husband, not by inheritance but by purchase, the widow may be endowed, notwithstanding her husband has had only a remainder in the land.

The distinction, or rather the idea, that it applies to this case, is evidently founded upon a misapprehension. It is true, that where a father conveys lands to a son, subject to the contingent right of the wife of the father to dower, if the father dies, and his widow is endowed, and before her death the son dies leaving a widow, the latter, if she survive the widow of the father, is entitled to dower in the lands of which such widow had previously been endowed. But the reason is, not because there is any distinction between a vested remainder, which comes by descent, and one created by deed, but because in the case supposed, the son becomes actually seised of the estate in the lifetime of the father; and this seisin is sufficient to entitle his widow to dower, although his estate is contingent, and is defeated by the death of the father leaving a widow.

I can discover no other foundation for the position assumed by the appellant's counsel, than the inapt use by Coke of a single word in a passage which I will quote. In speaking on this subject he says: "For example, if there be grandfather, father and son, and the grandfather is seised of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated; and now upon the matter the father had but a reversion, expectant upon a freehold, and, in that case, *dos de dote peti non debet*; although the wife of the grandfather dieth, leaving the father's wife. And here note a diversity between a descent and a purchase. For in the case aforesaid, if the grandfather had enfeoffed the father, or made a gift in tail unto him, then in the case above said, the wife of the father, after the decease of the grandfather's wife, should have endowed of that part assigned to the grandmother; and the reason of this diversity is, for that the seisin that descended after the decease of the grandfather to the father is avoided by the endowment of the grandmother, whose title was consummate by the death of the

grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *dos de dote*." Coke, Litt. 31 a, b.

The word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage quoted shows that the effect attributed to a purchase follows only when the land is conveyed by deed. The sole reason given for the distinction is, that a purchase takes effect in the lifetime of the vendor, and the purchaser becomes at once seised of a defeasible estate; while in case of a descent, the heir is never seised of the lands assigned for dower during the life of the widow, as her title relates back in all cases to the death of the husband. Now, in this respect, there is not the slightest difference between a descent subject to dower, and a devise subject either to dower or any other life-estate. In either case the freehold passes directly to the tenant of the life estate, upon the death of the ancestor or deviser, and neither the heir nor the devisee of the remainder can have any seisin until the death of such tenant.

The distinction is stated in terms perfectly accurate and precise by the Chancellor in the case of *Dunham v. Osborn*, 7 Paige, 634; but in the subsequent case of *Cregier*, 1 Barb. Ch. 598, he uses the word purchase as it is used by Lord Coke, and states the distinction as being between estates which came to the husband by descent, and those which came by purchase, subject to dower. This inaccuracy in the use of the word purchase, by both Lord Coke and Chancellor Walworth, is perfectly palpable; but as it has led to the bringing of so clear a case as the present to this court, it may be well to advert to and explain it. That it is this which has misled the counsel for the appellant is obvious, as he commences his citations in support of his doctrine with the Year Book (5 Edw. III., title Voucher, 249), which appears to be the very authority upon which Lord Coke based his distinction. None of the other authorities cited by the counsel have any tendency to support his position, and it is very clear that it is untenable. The precise question was decided by the Supreme Court of Massachusetts in the case of *Eldridge v. Forrestal*, 7 Mass. 253, and in *Beekman v. Hudson*, 20 Wend. 53, it was assumed as perfectly clear, that in such a case the widow was not entitled to dower.

There can be no pretense that the widow is entitled to the fund in question as personal estate, under the statute of distributions. The money is the product of the land taken, and must belong to the per-

sons entitled to the land which it represents, and out of which it arose. Besides, the title had already vested in the heirs when the proceedings for extending the street were commenced, and if the widow had then no right to dower in the premises, she of course can have no right to the money even if it is to be considered as personal estate.

The judgment of the Supreme Court must be affirmed.

PHELPS v. PHELPS.

143 NEW YORK, 197.—1894.

GRAY, J. — This is an action, in equity, brought by a wife to establish and protect an inchoate right of dower in certain lands now held by, and in the name of, a third person; but which were paid for by the plaintiff's husband, and, also, to establish her dower right in the proceeds of the sale of certain other lands similarly purchased and held. Her complaint having been demurred to for insufficiency to state a cause of action, we must assume all its averments of material facts to be true. After alleging a marriage and the birth of children, she sets forth a separation between herself and her husband, caused by his neglect, wrong conduct and desertion. She alleges that since his desertion of her, with the intent and purpose of defrauding her of her dower rights in his real estate, her husband had purchased various pieces of land, and caused the title to be taken in the name of one Lewis, as a dummy in the transaction, under an agreement and arrangement with the said Lewis that the said defendant (meaning her husband), "should receive all the benefit of and have full control over said property, which agreement was in writing."

She alleges that her husband "retained and exercises full possession and control over the same," and that when he desired to dispose of any of the property, he would "under the agreement and arrangement with said Lewis present the deeds and papers to him, which said Lewis, under his agreement, was bound to execute;" that all of the property, with the exception of one piece, was thus disposed of by her husband "to *bona fide* purchasers, without notice of the dower interest of this plaintiff," and that her husband "received the full amount of the purchase money paid for the same, for his own use and benefit." She then proceeds to describe the piece remaining unsold, which she alleges to have been conveyed by Lewis, at the request of her husband, without consideration, to the defendant Goodwin, a partner of her husband, "who was to hold

the same under the same agreement that said Lewis had with her husband," and as to this property the plaintiff charges her husband to be the real owner. She prays for a decree, which will adjudge, because of these transactions and their fraudulent purpose, that the proceeds received by her husband upon the sale of any of this property "are still real property and that this plaintiff has an inchoate right of dower in the same;" that her husband be ordered to pay one-third of these proceeds into court, there to be held and invested, etc., etc., and that as to the land held by Goodwin, it be adjudged to be subject to her inchoate right of dower, etc., etc.

With this as a sufficient summary of the material facts of her complaint, we are confronted with the pretended cause of action, for which I am unable to find any sufficient basis in our Revised Statutes; to which we must look for the authority for the claim of a wife to be entitled to dower in lands. To entitle the wife to dower the husband must be seised, either in fact or in law, of a present freehold in the premises, as well as of an estate of inheritance. That proposition follows from the language of the section in the Revised Statutes, that "a widow shall be endowed of the third part of all the lands, whereof her husband was seised of an estate of inheritance at any time during marriage."

How can seisin be predicated of the plaintiff's husband with respect to the lands purchased through the use of his moneys, but never conveyed, nor agreed to be conveyed, to him? The plaintiff, certainly, had no control over the use which her husband chose to make of his personal estate. That was his absolutely and she had no interest in it which she could assert; beyond a claim upon him for the support of herself and their children. He might have chosen to use it in the acquisition of any of the many kinds of personal property, without any right on the part of his wife to complain of, or to interfere in, his acts. Instead of confining his use of his moneys to purchases of personal property, or instead of putting them into land and of taking title to himself, he has adopted methods set forth in this complaint for its use, and they were effectual to prevent the vesting in him of any legal estate in the realty, although paid for with his moneys. He, undoubtedly, intended to prevent his wife from acquiring any dower right in the real property, in the purchase and sale of which he was dealing through his friend; but, unless he was actually seised, or unless he had such a seisin at law as would entitle him to its possession, it is difficult to see how his wife could claim that she ever gained any dower interest. Her complaint seems to concede that her husband acquired no legal title, unless through the agreement alleged to have existed between him

and Lewis. But that agreement is not one which could operate to vest in her husband any right to the actual possession of the property conveyed to Lewis. The agreement is purely executory in its nature and, if not complied with by Lewis, would only have given to Phelps a cause of action in damages for its breach. Taken at its strongest meaning, it cannot be said to import any grant by Lewis of any interest in the property to be acquired by him, through which a legal estate would arise in favor of Phelps. It does not rise beyond the promise of Lewis that Phelps should have the full control and enjoyment of whatever real property he might become vested with the title to, under their arrangement. Phelps' rights rested in the mere promise of Lewis. It is manifest, from the statute, that notwithstanding the consideration for the grant of the real property to Lewis was paid by Phelps, the title vested in the grantee, free of all claims, except the claim which creditors might have to assert that the transaction was fraudulent as to them. See §§ 51 and 52 of the article on Uses and Trusts.¹ It is needless to argue that wives cannot come under that classification.

The position of a wife, with respect to her husband's property, is limited by the Revised Statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it. Concededly, in this case, the husband was never seised of the property in question and the agreement set forth, and which is claimed to confer upon him its real ownership, could create no interest, or right to possession. If it were possible to assume a right in Phelps, based upon the agreement, to maintain an action for the reconveyance by Lewis to himself of the lands, such an assumption clearly negatives any idea of the existence of a legal estate in Phelps. We may assume, as it is alleged, that he was to receive the benefits arising from the lands; but if there was a beneficial use, it must be united with a right to the possession (a right which is not alleged here), before we can perceive the existence of any estate, upon which a claim of dower may be impressed.

It is not pretended that any precedent exists in the decisions of the courts of this State for the maintenance of this action.

So far as my examination has gone, I am unable to find in the adjudged cases any support for the proposition that a right to dower can be asserted, except with respect to real property of which the husband was actually seised during his lifetime, or to the actual seisin of which he had a legal right. The cases referred to by the respondent's counsel in the reports of the courts of other States are

¹ See § 74 of the New York "Real Property Law." — Ed.

inapplicable in the construction of the statutes of our own State. They may, or may not, turn upon the wording of particular statutes; however it may be they cannot control when our own statutes are in question.

It results from my consideration of the case, that the order and judgment below should be reversed and that an order should be entered dismissing the complaint, with costs in all the courts to these appellants.

FONTAINE *v.* BOATMEN'S SAVINGS INSTITUTION.

57 MISSOURI, 552. — 1874.

SUIT for the assignment of dower.

Plaintiff was the wife of Felix Fontaine, who died in 1849. During the coverture one Louis Provenchere, and his wife, conveyed the premises in question, in fee, to Fontaine, who at once conveyed the same to one Derouin, in trust for Provenchere's wife. Plaintiff did not join in the last conveyance. The title has passed to defendant by several intermediate conveyances. Judgment below for defendant. Plaintiff brings error.

WAGNER, J. * * * The case was tried before the court sitting as a jury; and at the close of the testimony plaintiff requested the court to declare the law to be, that on the evidence and admission in the cause plaintiff was entitled to dower in the land described in the petition. This was refused, and on the application of defendant the court gave the converse of the proposition, and instructed that under the evidence in the case the plaintiff was not entitled to recover. * * * The question in the case, therefore, is whether the seisin of Fontaine, the plaintiff's husband, in the estate was of such a beneficial interest as would entitle her to dower, or whether it was merely transitory? Perhaps no principle of the law is more firmly or thoroughly established than that where the seisin of the husband is for a transitory instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower passes. 1 Scrib. Dow. 259. To this principle may also be referred the well settled doctrine that where a deed for lands is executed, and simultaneously therewith the purchaser gives back a mortgage upon the same lands to secure any portion of the purchase money, he acquires, as against the holder of the mortgage, no such seisin as will entitle his wife to dower. The deed and mortgage, although in themselves separate and distinct instruments, neverthe-

less, under the circumstances are regarded as parts of the same contract. They take effect at the same time, and the giving of the deed upon the one part, and of the mortgage upon the other, is held to constitute but a single act, and to result in clothing the purchaser with seisin for a transitory instant only. *Id.* 261 and note 2.

It is not even essential to the application of this rule that the two instruments should correspond in date, provided they are delivered at the same time, as they take effect from the time of delivery only. And it is competent to show by parol at what time the delivery was actually made. *Mayberry v. Brien*, 15 Pet. 21; *Reed v. Morrison*, 12 S. & R. 18; 1 Washb. Real Prop. 178. But wherever there is a beneficial seisin in the husband, no matter how short the time, it will be sufficient to clothe the wife with the right of dower. In *Grant v. Dodge*, 43 Me. 489, the above rules were recognized, but it was said that if the tenant would defeat the demandant's claim of dower, the burden would be upon him to prove that the deed and mortgage relied on constituted one transaction. But in a subsequent case, in the same court, *Moore v. Rollins*, 45 Me. 493, it was held that where one has received a deed of an estate and given back a mortgage of the same to secure the purchase money, if the deeds are of the same date, have the same attesting witnesses, and are acknowledged before the same magistrate, and the notes secured are of the same date with the mortgage, in the absence of all proof to the contrary, the deeds will be regarded as one and the same transaction. [*The case of McGowan v. Smith*, 44 Barb. 233, is also cited and construed.] * * *

KITTLE v. VAN DYCK.

I SANDFORD'S CHANCERY (N. Y.), 76. — 1843.

THE ASSISTANT VICE-CHANCELLOR.—* * * Before disposing of the case on this point, I will examine another question which was fully discussed, and the determination of which may be a guide to both parties in the further progress of the suit: viz., the extent of the right of dower of Magdalen Van Dyck in the premises, and depending upon that, her interest in the event of the suit and her standing as a witness.

The bond and mortgage were executed on the same day, and no doubt at the same time, that the deed was given and the money paid to Crandell. In *Gilliam v. Moore*, 4 Leigh's R. 30, where the verdict found that the deed and mortgage were executed on the same day, the court say they are bound to infer that they were given at the

same time, and were parts of one and the same transaction. The complainant insists that the bond and mortgage were given for the purchase money of the farm, and that, therefore, Magdalen Van Dyck's dower therein is subject to the mortgage; that she is dowerable of the equity of redemption only, while she claims dower in the whole, and denies that the mortgage was given for the purchase money within the meaning of the equitable principle on that subject which is now embodied in our statute.

1 Rev. Stat. 740, 1, § 5, enacts, that "where a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons."¹

As this provision was prospective, it does not affect the purchase and mortgage in question, which were made and given before the adoption of the Revised Statutes. The Legislature in this section, it is supposed, intended to enact the existing rule of law. This appears from the report of the revisers accompanying the section.

Chancellor Kent, in his commentaries, says that the transitory seisin for an instant, "when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor or to a third person, to secure the purchase money in whole or in part," is not sufficient to give the wife dower. 4 Kent's Com. 38, 39, 2d ed.

No reported adjudication that I have met with in the courts of this State, goes as far as the learned commentator has declared the principle to extend. The leading case is *Stow v. Tift*, 15 Johns. R. 462. In that case, as well as the subsequent one of *Jackson d. Bruyn v. De Witt*, 6 Cowen, 316, the mortgage for the purchase money was given to the grantor. This was the fact also in the following cases in other States where the same decision was made: *Boyce v. Rutledge*, 1 Bay's R. 312; *Trustees of Frazier v. Center*, 1 McCord's Ch. R. 270, 279; *Gilliam v. Moore*, 4 Leigh, *ubi supra*. And *Holbrook v. Finney*, 4 Mass 566.

The principle on which the doctrine rests, clearly extends to the case of mortgages to third persons. In the judgment of the court, as pronounced by Judge Spencer in *Stow v. Tift*, it is placed on the ground that the *seisin* of the husband is an instantaneous *seisin* only; that the estate passes in to him and is drawn out of him, *quasi uno flatu*, and by one and the same act. Or as expressed by Mr. Park in his Treatise on the Law of Dower, page 43, "The *seisin* of the

¹ See § 173, N. Y. R. P. L. — ED.

husband is for a transitory instant; that is to say, where the same act which gives him the estate, conveys it out of him again." Chief Justice Parsons in *Holbrook v. Finney*, takes the same ground. It can make no possible difference in the duration or the transit of this seisin, whether the mortgage be given to the grantor or to a third person. In either event, he gains the estate in the same instant, and by the same act, which conveys it out of him.

Now, in this case, the substance of the transaction was this: We will suppose the three parties, Crandell and Maria and Henry P. Van Dyck together; and if they were not all present, some one must have acted for the absentee. Crandell delivered his deed to Henry. Maria Van Dyck paid the \$2,000 to Crandell, and Henry delivered his bond and mortgage to her for the \$2,000. Each of these events was in consideration of the other. They were inseparably connected by the previous contract between the parties, and in contemplation of law, were all accomplished at the same moment of time. The seisin of Henry was but for an instant. He received it by means of the money of his mother, paid to Crandell, and it passed out of him in the same instant, by the mortgage to secure that money.

If Henry had executed the mortgage to Crandell, and he at the same time assigned it to Maria V. D., and received the \$2,000 from her, or from Henry, he having borrowed it of her, no question would have been made. Wherein does the transaction before me differ from that mode, in any matter of substance?

If in fact the money were paid by Maria to Henry, and by Henry to Crandell, it would make no difference in the result. It was all done in pursuance of the previous agreement. The loan and purchase were parts of the same transaction. Without the one, the other would not have been made, and they were consummated together.

The cases already cited show the uniform application of the principle of American law, which excludes dower, as against a mortgage given for the purchase money, to the vendor. The two following go the whole length of the case under consideration.

In *Clark v. Munroe*, 14 Mass. 351, one Andrews conveyed the premises to W. Clark, who at the same time mortgaged them to one Winthrop. The consideration of the deed from Andrews to W. Clark was the property of Winthrop, and the mortgage was given to him in pursuance of a previous agreement between the parties. The court held that the wife of W. Clark was not entitled to dower, and that the case was no different from what it would have been had the mortgage been made to Andrews instead of Winthrop.

In *M'Cauley v. Grimes*, 2 Gill & Johns. 318, Charles M'Cauley

held a large tract of land derived from his father, considerably beyond his just share of his father's estate. In arranging and dividing the estate, it was agreed by all the parties, that Charles should convey the land to his brother Hugh, and Hugh, in consideration thereof, should pay to his brothers and sisters certain stipulated sums, and to secure the payment should execute a mortgage of the land to them, when he received it from Charles. Those sums, it was agreed, should be received as their respective portions of their father's estate. Charles accordingly executed the deed to Hugh, and at the same time Hugh executed the mortgage and his bonds to the other brothers and sisters. The Court of Appeals, in an opinion reviewing the American cases, decided that Hugh's widow was not entitled to dower against the mortgage.

I am entirely satisfied that by the law as established in this State, a widow is not entitled to dower in land conveyed to her husband during coverture, which he mortgaged to secure the purchase money, whether the mortgage were given to the grantor of the land or to a third person; and that in such case she is only dowable of the equity of redemption. Here the mortgage in question was given for the purchase money, at the same time that the land was conveyed to the husband, in pursuance of a previous arrangement. The widow, Magdalen Van Dyck, therefore takes her dower in the farm subject to the mortgage. See *Card v. Bird*, 10 Paige, 426, decided November 21, 1843. It follows that she was an interested witness, and her testimony, as it is now presented in the cause, would be excluded, if the cause were to be determined upon the merits.¹

(c.) *Death of husband*,²

¹ See also *Smith v. McCarty*, 119 Mass. 519. See also N. Y. R. P. L., § 173. For a case involving a vendor's lien see *Boies v. Benham*, 127 N. Y. 620. — ED.

² For a resumé of legislation and judicial decisions in this State and in Eng. land upon the subject of property rights, as affected by civil death, see *Avery v. Everett*, 110 N. Y. 317. In some States divorce makes dower consummate. For this and some other peculiarities, see Stimson's Am. Stat. Law, §§ 6251 A., 3204. — ED.

(3.) IN WHAT ESTATES AND LANDS A WIDOW MAY HAVE DOWER.

(a.) *In general—in estates of inheritance.*¹GOODWIN *v.* GOODWIN.

33 CONNECTICUT, 314. — 1866.

[*Reported herein at p. 8.*]²JOHNS *v.* JOHNS.

1 OHIO STATE, 350. — 1853.

[*Reported herein at p. 14.*](b.) *As to estates of inheritance in expectancy.*DURANDO *v.* DURANDO.

23 NEW YORK, 331. — 1861.

[*Reported herein at p. 658.*](c.) *In the case of determinable estates.*EVANS *v.* EVANS.

9 PENNSYLVANIA STATE, 190. — 1848.

DEVISE by Sarah Evans to her two sons, George and Oliver, “and to their heirs and assigns, share and share alike; but should either of my sons die without leaving lawful issue, living at the time of his death, then the estate of such son, so dying without issue, shall vest in the surviving brother and his heirs forever.” Oliver died without issue and the widow brings suit for dower in the lands owned by him in his lifetime. She succeeded in the court below.

GIBSON, C. J. — Notwithstanding what the conveyancers and text-writers have said about the difficulty presented to us, not one of them has hinted at the true solution of it, except Mr. Preston. All agree that where the husband’s fee is determined by recovery, condition, or collateral limitation, the wife’s dower determines with it.

¹ See N. Y. R. P. L. §§ 170-175. For “widows quarantine,” see § 184 N. Y. R. P. L. Dower has been modified or abolished in many States. In some dower can be had only in lands of which the husband died seised. — ED.

² See however ch. 121, §§ 1 and 2 Mass. Pub. Stat. 1882-1887, transcribed *infra*, p. 713, under “Leaseholds.” — ED.

But why a collateral limitation, rather than by any other limitation of the estate, which extinguishes the husband's fee, of which the dower is but an appendage? I have a deferential respect for the opinions of Mr. Butler, who was, perhaps, the best conveyancer of his day; but I cannot apprehend the reason of his distinction in the note to Co. Litt. 241 a, between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and devise of a fee simple, or a fee tail absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which, curtesy or dower will also cease. In *Doe v. Hutton*, Lord Alvanly spoke doubtingly of it, and, without absolutely dissenting from it, refused to give it his approbation. The system of estates at the common law is a complicated and an artificial one; but still it is a system complete in all its parts, and consistent with technical reason. But how to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him to show; and he has not done it. He drew his instances from statutory estates, whose limitations have been moulded more benignly; and though he affirms that a wife might have been endowed of an extinct conditional fee before the statute *de donis*, he gives no precedent for it. The case of a tenant in tail, says Mr. Preston in his abstracts of Title, vol. 3, 372, "is an exception arising from an equitable construction of the statute *de donis*; and the cases of dower of estates determinable by executory devise and springing use, owe their existence to the circumstance that these limitations are not governed by common-law principles." The mounting of a fee on a fee by executory devise, is proof of that. This very satisfactory solution of the doubt was glanced at, but not developed, in *Buckworth v. Thirkell*. Before the statute of wills, there was no executory devise; and before the statute of uses, there was no springing use. Like estates tail, which were created by the statute *de donis*, and of which there is constantly dower, though tenant in tail claims *per formam doni*, it was the benign temper of the judges who moulded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law; and among other things, to preserve curtesy and dower from being barred by determinations of the original estate, which could not be prevented. *Sammes and Payne's Case*, 1 Leo, 167, is an example of this temper, in the case of a springing use. A mother covenanted to stand seised to the use of her elder daughter, on condition that she would pay £100 to her other daughter, within a year after she should attain the age of eighteen; and if the elder should

fail in payment, or die without issue before the day of payment, then to the use of the other daughter in tail. The mother died; the elder took husband, had issue, and died without issue before the day of payment; and it was adjudged that the husband should be tenant by the curtesy. *Flavell v. Ventrice*, 1 Roll. Abr. 676, was also the case of a springing use; in which, however, the court was divided. That two of the judges had not embraced the new faith at that day, is not surprising; but that Lord Eldon should have inclined to think as he did, in *Maundrell v. Maundrell*, 10 Ves. 263, that a husband might bar his wife's dower by executing a power of appointment, is more remarkable. He was still groping after a fancied distinction between a collateral limitation and a limitation of the estate which, if it exists, has nothing to do with an estate conveyed to uses. It may be safely said, that *Buckworth v. Thirkell*, *Goodenough v. Goodenough*, and *Moody v. King*, had a solid foundation in the interpretation of the statutes which sustained the estate from which the curtesy or dower was derived. Lord Alvanly is reported to have said, in *Doe v. Hutton*, 3 B. & P. 653, that *Buckworth v. Thirkell* made a good deal of noise in the profession at the time it was decided — a remark which was properly disposed of by Chief Justice Best, in *Moody v. King*. "Whatever conveyancers might have thought of the case," said he, "when it was first decided, they have since considered it as having settled the law; and it would be productive of much confusion if we were to unsettle it again." Including the decision then made, we have three cases in point, without an antagonistic case in all the books; and if to overturn them for the sake of a technical principle would have bred much confusion then, it would breed more confusion now. The English courts have gone upon a liberal principle, and we are bound to follow them.

Judgment affirmed.

EDWARDS v. BIBB.

54 ALABAMA, 475. — 1875.

STONE, J. — * * * Under this will thus construed, Thomas Bibb, Jr., either took a fee simple, having another fee engrafted upon it by way of executory devise, to come into being on the happening of an event therein provided for as a conditional limitation, or he took only a life estate, and at his death, his lawful male issue, if he had left such, would have taken as purchasers. If the latter be the true construction of the devise, no one will contend that Thomas Bibb's widow would be dowable of the lands. Supposing,

then, that the estate of Thomas Bibb was a defeasible fee, the question comes up, is his widow entitled to dower, the estate of her husband having expired with his life?

Few questions of the law have been discussed, or have given rise to more perplexing distinctions than that of the widow's right to dower in lands, the title to which passed out of her husband contemporaneously with his death, by force of some limitation, reversion or remainder. The case in hand is one of remainder, which has taken effect. The question is thus stated by a very accurate writer: "Is the widow entitled to dower after the estate of her husband has determined, before its natural expiration, by the happening of an event particularly mentioned in the instrument creating it, but without disturbing or overreaching his prior seisin?"

The case of *Buckworth v. Thirkell*, is one of the first cases on this question. 3 Bos. & Pul. 652, note. That case came before Lord Mansfield, one of England's greatest jurists, and it was determined that the husband was entitled to curtesy. The rule in regard to dower is the same on this question as that in regard to curtesy.

The case of *Buckworth v. Thirkell* has not had the good fortune of commanding universal assent. Mr. Butler, in his note to Coke upon Littleton, page 141, while conceding that upon the termination of an estate tail by the failure of issue, the right of curtesy or dower will attach as a prolongation of the estate, yet contended that when a fee simple is determined by a valid executory devise, neither curtesy nor dower ensues. Other writers contend for the same distinction. See very full discussions of this question in Park on Dower, page 157 *et seq.*; 1 Scrib. on Dower, 284 *et seq.* To follow them through the shadowy mazes of their disquisitions would tend rather to bewilder than instruct. The human mind is not wont to rest satisfied with distinctions when it can find no substantial differences to rest them on.

Speaking of dower, as affected by conditional limitations, Chancellor Kent says: "The estate of the husband is, in a more emphatical degree, overreached and defeated by the taking effect of the limitation over, than in the case of collateral limitation;" and, he adds, "the ablest writers on property law are evidently against the authority of *Buckworth v. Thirkell*, and against the right of the doweress when the fee of the husband is determined by executory devise, or shifting use." 4 Kent's Com. 50.

Mr. Jacob, in his learned note published in the appendix to 2 Bright on H. & W., p. 468, says: "Upon the introduction of conditional limitations by way of use and executory devises, it became a question whether dower or curtesy should cease when the estate

was determined by either of these modes. Upon principle, it would seem that the decision of this question ought to be guided by analogy to the general rule of the common law, and not by analogy to the excepted case of an estate tail. . . . The conditional limitation destroying the estate, defeats the whole of that which is expressly granted. It would be singular, if that which is included in the grant by implication only, could be preserved." He adds, "The supposed rule (speaking of Mr. Preston's attempt to justify the rule laid down in *Buckworth v. Thirkell*) rests on very doubtful grounds."

In New York, it was decided by Chancellor Walworth that where an estate in fee was terminated by the happening of a conditional limitation, and the executory devisees took as purchasers, the widow of the first devisee could not have dower. See *Adams v. Beckman*, 1 Paige, 631.

In the case of *Weller v. Weller*, 28 Barbour, 588, the same question arose as in *Adams v. Beckman*, *supra*. The court said, "The widow takes her estate through the husband and not from him like one who inherits; for he can do no act which will divest her right. And when the estate of the husband is determined by the happening of an event which defeats its further continuance, the estate in dower must be determined with it. It is a part of the same estate of freehold and inheritance of which the husband was seized, and, to the extent of it, so much abstracted from what would otherwise descend to the heirs at law. . . . The wife's right to dower ceased with the estate out of which it could only proceed. This conclusion conflicts with Lord Mansfield's judgment in *Buckworth v. Thirkell*. It is the rule, however, given by Mr. Cruise in his treatise on the law of real property, and is the rule now sustained by Mr. Park with singular ability in his work on the law of dower."

Washburn, in his work on real property, vol. 1, p. 212, says: "There is a class of cases where, what at first sight might seem to be an inconsistent doctrine is applied. Thus, in the familiar case of tenant in tail dying without issue, although the estate, as one of inheritance, is determined, and the remainder over upon such a contingency takes effect, yet, it having been an estate of inheritance in the tenant, his widow, if he dies, will be entitled to dower, it being by implication of law annexed to such an estate as an incidental part of it; a portion of the quantity of enjoyment designated by the terms of limitation itself. And the doctrine is broadly laid down by writers upon the subject, that wherever the husband is seized during coverture of such an estate as is in its nature subject to the attachment of dower, the right of dower will not be defeated by the determination of that estate by its regular and natural limitation." He

adds: "This class of cases has given rise to much ingenious speculation and grave diversity of opinion, where the estate of the husband is one of inheritance, but ceases at his death by what is called a conditional limitation."

The case of *Buckworth v. Thirkell* was followed in *Moody and Wife v. King*, 2 Bing. 447; and in this country, in the cases of *Milledge v. Lamar*, 4 De Saussure (So. Car.), 617; *Evans v. Evans*, 9 Barr. (Pa.) 190, and *Northcut v. Whipp*, 12 B. Monroe (Ky.), 65. In a later case in South Carolina, *Wright v. Herron*, 6 Rich. Eq., the court of errors was equally divided, and no decision was pronounced. This case presented the same question as the one presented in *Buckworth v. Thirkell*.

In the case of *Evans v. Evans*, *supra*, the opinion of the Supreme Court of Pennsylvania was pronounced by Chief Justice Gibson — one of the ablest jurists that ever sat on that bench. It will be seen that he was laboring to break down the imaginary distinction attempted to be drawn by Mr. Butler and others between the cases of remainder over, made and provided to take effect after the termination of an estate tail by failure of issue, and the termination of an estate in fee simple by failure of heirs, with a valid limitation over by way of executory demise. He says: "I cannot apprehend the reason of his (Mr. Butler's) distinction between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and the devise of a fee simple, or a fee tail, absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which curtesy or dower will also cease." He propounds, and in effect answers, the following pertinent inquiry, "How to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him (Mr. Butler) to show; and he has not done it."

Any attempt to maintain a distinction between the claim of dower or curtesy, when the inheritance in an estate tail has failed, and a limitation over has taken effect, *per formam doni*, and the same result when an estate in fee has been determined by the happening of the event upon which a conditional limitation over was made to take effect, by the terms of the instrument creating the title, is too artificial and technical to command our assent. Dower is a derivative estate; it is derived from the estate of the husband. It is the creature of the law, not of contract. While the husband lives, there is no estate in dower. It is an interest, carved out of, or abstracted from the inheritance; or out of the estate of the husband's alienee, if the widow survives, and has not relinquished her dower. The hus-

band, by any conveyance made, or recovery suffered by him, cannot bar, or impair her right.

When, however, by the very terms of the conveyance or devise, legal in form and purpose, the estate of the husband expires with him, cutting off *per formam doni*, the heritable quality of his estate, and the title passes to another as purchaser by a valid limitation over, the primitive estate is gone, and there is nothing left from which dower can be derived. We do not declare what would be the result, if the case were one of mere reversion to the demisor or grantor. It will be time enough to consider that question when it arises.

Decree affirmed.

(d.) *Dower in equitable estates of inheritance.*

HOPKINSON v. DUMAS.

42 NEW HAMPSHIRE, 296. — 1861.

SUIT for dower in certain premises. It is admitted that plaintiff is entitled to dower in one-fifth of the premises, but she claims dower in all.

Hopkinson, plaintiff's husband, and four others agreed to unite in the purchase of the premises in question, each to take a fifth. The deed was made to Hopkinson and he gave his notes (the other four joining as sureties) for part of the purchase price. One thousand dollars was paid down, each contributing his share, and Hopkinson gave a receipt for the same, acknowledging the trust.

Later on Hopkinson made an arrangement for the purchase of the interests of the other four, giving a mortgage for the purchase price. This mortgage has been foreclosed and defendant makes title under the foreclosure. Mrs. Hopkinson has never released her interest in the land. The questions of law were reserved for this court.

SARGENT, J. — * * * We see no objection on this proof, to holding that there was, in this case, prior to the giving of the receipt by Hopkinson, and that there would have been, without any such receipt, a resulting trust to each of those who signed the notes as sureties. Our statute provides that "no trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument signed by the party creating the same, or by his attorney." Rev. Stat. ch. 130, § 13; Comp. Laws, 290.

But although a trust cannot be created or declared by parol evidence yet a resulting trust may be shown by that kind of proof; it may be proved, rebutted, or discharged by parol evi-

dence. *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397; *Page v. Page*, 8 N. H. 187; *Brooks v. Fowle*, 14 N. H. 248; *Pembroke v. Allenstown*, 21 N. H. 107; *Gove v. Lawrence*, 26 N. H. 484; *Tebbetts v. Felton*, 31 N. H. 273. Parol evidence is admissible to show a resulting trust, but not to show any other. *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 382.

So that if there were no trust declared in the case in writing, there would seem to be no difficulty in holding that a trust upon the facts stated, resulted, by operation of law. But we think that this is not perhaps the more correct view to take of the case. Here is a trust declared in writing, which, although dated after the date of the deed, evidently contains the agreement and understanding of the parties, not only at the time of its date, but also at the date of the deed, and we think this written declaration of the trust should be and must be considered as part of the original transaction, and that the giving of the deed, the agreements and the giving of this writing should be considered together, as one transaction, as the different parts of the same contract and agreement.

The trust declared in the writing is evidently the same that had existed prior to its date, and includes evidently the full agreement that was made originally, that all the time continued to exist between the parties until the new arrangement by which Hopkinson bought the others out and gave back a mortgage of the premises to them as their security. Taking the deed to Hopkinson and the money paid, the notes given and the writing given back to them declaring the trust, as parts of the same transaction and as containing the whole of the arrangement between them, from the beginning, we are left in no doubt about the rights of the parties so far. And the only remaining question is, the one arising out of the sale to Hopkinson, and the mortgage back of the same premises, on the 13th day of May, 1857.

We do not understand that there is any question made but what the arrangement then made was such that whatever interest was conveyed to Hopkinson by the others, was at the same time reconveyed by him to them in mortgage. His seizin of such interest as they conveyed was but instantaneous. To be sure they gave him no deed of any right, nor did they need to do so. He had the legal title before. Theirs was the equitable, the trust estate, which did not appear of record, and which would have been unavailable to them as against a creditor of or a purchaser from said Hopkinson, without notice of the existence of such estate.

It is claimed that this written agreement does not create a trust estate in the lands; that it gives only certain equitable rights, but

no present estate, so that a court of equity, upon an application of the *cestuis que trust*, could not have decreed a conveyance of the legal title, except upon the performance of certain conditions precedent, to be performed by themselves. But without considering or discussing that point, and without stopping here to inquire what difference there would be, if any, between the trust here created and a trust estate created by deed and appearing of record, let us, for the purposes of this case, assume that Coffin and the others had a present equitable estate in the premises, just the same as though the deed which conveyed the premises to Hopkinson had declared the trust and given to Coffin and others an equitable estate which appeared of record, and that the equitable estate had been conveyed to Hopkinson by deed at the time when the mortgage was given back by him.

Upon this supposition, the question that arises is, where the legal and equitable estates meet in the same person, but by different conveyances, at different times, and he thereby becomes seized in fee of the whole estate, which estate merges in the other, and which draws the other after it? Does the equitable estate merge in the legal and the title in fee to the whole relate back to and date from the commencement of the legal estate? If this be so, then the plaintiff takes dower in the whole premises. But, if the opposite doctrine be true, that the legal title merges in the equitable, on becoming united in the same person, and his title in fee relates back only to and dates from the commencement of his equitable interest, then this plaintiff does not take dower in any but her husband's one-fifth part of the premises, because his seizin upon the hypothesis was only instantaneous. It becomes necessary to ascertain which of these estates is to control the other, when they become united, in order to see which of them dower shall follow; because, at common law, which is the law of this State in this particular, dower could not be taken in either estate alone.

A widow of a trustee shall not have dower. *Robinson v. Codman*, 1 Sum. 121; *Germond v. Jones*, 2 Hill, 569; *Cooper v. Whitney*, 3 Hill, 101; *Coster v. Lorillard*, 14 Wend. 314. In England there is at law no dower in a trust estate, whether the husband have himself parted with the legal title before marriage, reserving only a trust, or whether a trust estate has been directly limited to him by a third person. And the same rule applies where the husband purchases an estate in the name of a trustee who acknowledges the trust after his death. *Ray v. Pung*, 5 B. & Ald. 561; 2 Bl. Com. 337; 1 Hill on Real Prop. 323. So that, so long as the legal and equitable estates remained

separate, no dower could be claimed, and no inchoate right of dower could be acquired on either side.

But where both estates are united in one person, one must merge in the other, because a man cannot be trustee for himself. In *Good right v. Wells*, Douglass, 741, the question arose as to whether, in a case of this kind, "the equity should follow the law or draw the law after it." It was a case in which an only child inherited the legal estate in lands from his mother, and the equitable estate from his father; and, dying without issue, the estate was claimed on the one side by his legal heirs *ex parte materna*, and on the other side by those *ex parte paterna*; and it was held that the equitable estate should merge in the legal and that both should follow the line through which the legal estate descended; the whole property in that case going to the heirs on the part of the mother.

It was there learnedly argued that, before the statute of uses the use was considered, in most respects, as the complete ownership of the land, that the estate of the feoffee was subservient to the *cestui que use*, and that the former could do nothing to defeat the interest of the latter, unless by alienation for a valuable consideration without notice; that the statute of uses completed this subserviency by consolidating the legal estate with the use, or by merging the legal estate in the equitable; and that by analogy to uses thus considered, trust estates had been and should be held to be the solid and substantial ownership of the land, and the trustee the mere instrument of conveyance; that where a party holds by two titles, the law considers him as taking by the best; that the trust estate, being the best, must control the legal estate.

But the court held otherwise, deciding that the legal estate was the better title, and that the equitable title was merged the moment the two became united in the same person; that the legal drew after it the equitable estate, and that the latter was lost in the former; so that, upon the death of the son, the person in whom both estates had been united, the estate did not again open, and that the trust could not again be revived.

Lord Mansfield, in delivering his opinion in the case, says: "For the moment both [estates] meet in one person, there is an end of the trust. He has the legal estate, and all the profits, by his best title. A man cannot be a trustee for himself. Why should the estates open upon his death? What equity has one set of heirs more than another? He may dispose of the whole as he pleases, and if he does not, there is no room for chancery to interpose, and the rule of law must prevail." And he seems to conclude

that the weight of opinion and argument is, that the legal estate must draw the trust after it.

In the same case, Ashurst, J., says that "where the trust and legal estates join, they shall both go according to the legal estate." Buller, J., also says, that, "in a court of equity it has never been determined that an heir of one sort can hold as trustee for an heir of another sort. And if the question be tried in a court of law, the principle that, where two titles unite, the party shall be in of the best, prevails, and the clear fee simple estate, the legal interest, which descends from the mother is the better title. The trust, in this case, was merged and gone." The same principle was sustained in *Doe v. Patt*, Douglass, 684, and afterwards by Lord Thurlow, in *Wade v. Paget*, 1 Brown, C. C. 364; *Phillips v. Bridges*, 3 Ves. 126; *Selby v. Alston*, 3 Ves. 339; *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Gardner v. Astor*, 3 Johns. Ch. 53; Hill on Real Prop. ch. 24, § 27.

Upon the principle deduced from these authorities, it would seem evident that, when the two estates were united in the plaintiff's husband, the trust estate became at once merged and lost. It was consolidated into, overshadowed by, and swallowed up in the legal estate. The law of the legal estate regulates and governs its descent and distribution, and dower must be taken by the same law.

We have considered the question as though here had been originally a trust estate, created by deed and appearing of record; and coming to the conclusion we have upon that supposition, it becomes unnecessary to inquire farther into the defendant's case, because the facts assumed by us above are at least as favorable to the defendant as any that can be made out of the agreed case, and might be found to be much more so upon investigation, though on that subject we express no opinion. And the above authorities would seem to be decisive, also, of the defendant's rights — in fact, of the rights of both parties — not only at law, but also in equity. We are therefore of opinion that the plaintiff must prevail in her claim for dower in the whole of the premises described in her declaration; and judgment must be rendered for the plaintiff accordingly, and for damages for detention, to be fixed according to the provisions of the case.

(c.) *Dower in wild lands.*SCHNEBLY *v.* SCHNEBLY.

26 ILLINOIS, 116. — 1861.

PETITION by the heirs-at-law of Henry Schnebly to have his widow's dower assigned to her. There were ten separate parcels of land of all which the widow was entitled to be endowed. This is a writ of error by the petitioners to review a judgment approving the report of the commissioners.

WALKER, J. — The commissioners appointed by, and acting under the decree of the court, assigned to the widow as her dower in the various tracts embraced in the decree, the E. 1-2 N. W. 27, 9 N. 8 E., and 88 acres on the west side, part of the northeast quarter of the same section. These premises included the residence and homestead of the husband in his lifetime. They also report that premises thus allotted are one-third in value of all the lands with perfect title, having reference to the quantity and quality. It is urged by plaintiffs in error, as one of the grounds of reversal, that wild, unimproved and unproductive lands are not, under our statute, subject to dower. The first section of the dower act provides that "a widow shall be endowed of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form."

By this provision it is the character of the title, or rather the nature of the estate held in the land, which determines the right. It is not the accidental condition of the property which controls, but the interest or extent of the title. The Legislature has not declared that the widow shall be endowed of all improved or productive real estate of which the husband was seized during the marriage, but it is of all the lands of which he was seized of an estate of inheritance. And in making this provision, the general assembly have no more than declared the common law. It is true that in giving dower in equitable estates and in land purchased by the husband in his lifetime, and not paid for until after his death, the right has been enlarged; but as such estates are not involved in this case, there is no occasion for their discussion.

There seem to be obvious reasons for the enactment. After the assignment of dower, the widow may undeniably use and enjoy the portion allotted to her in any mode she may choose, provided she shall not commit waste. She may reclaim lands that have been once cultivated and abandoned; she may reduce prairie land to cultivation, and may pasture timber land. And no one will deny that by

that means she may derive profit without committing waste. These are doubtless sufficient considerations for the enactment. But be that as it may, we have no hesitation in saying that the Legislature designed to give, and has given the widow dower in unimproved as well as in improved lands, of which the husband was seized of an estate of inheritance during the marriage.

It is likewise urged, that the statute has not authorized the court through commissioners to assign dower in a portion of lands in lieu of dower in the whole. As in declaring the right, our statute has only enacted the common law, we must look to it for the rules regulating its assignment, unless it is otherwise provided for by the act. Park, in his treatise on Dower, p. 255, says that, "In the simple state of property in former times, it is probable that the only provision that was made for the security of the dowress was, by requiring that the sheriff should assign to her a third part of each existing denomination of property. Thus he was bound to assign her a third part of each manor, if there were several; or a third part of the arable, a third part of the meadow, and a third part of the pasture." And it is said in Bac. Abr. 374, letter D; "If a woman be dowable in three manors, and accept of the heir one of these manors in lieu of dower in all of the rest, this is good, though against common right, which gives her but the third part of each manor." And Roll's Abridgment, 683, is referred to in support of the doctrine. We thus see that the common law, or common right, as it is sometimes called by the ancient writers, gave to the widow one-third part of each particular tract. While this is true, it also permitted the heir and the widow, by mutual consent, to allot a specific tract in lieu of dower in several parcels, and when so assigned, the law upholds and enforces it between the parties. But its validity depended alone upon the agreement, as neither could be compelled by the law to make such an assignment.

And in this country, the courts, so far as we have found, have adopted the same rule. *Scott v. Scott*, 1 Bay, 504; *Coulter v. Holland*, 2 Harring, 330; *Sip v. Lamback*, 2 Har. N. J. 442. But it may be that cases are to be found which announce a different rule, although we have not been referred to them, if they exist. It however seems to us, that when considered upon principle, that it is more reasonable, just and convenient, that each tract should bear the burden of the widow's dower, annexed to and growing out of it. If the dower in all of several tracts may be imposed upon one or more, to the relief of others, it might be made to operate with great injustice to purchasers or heirs. In case of purchasers of several tracts without any relinquishment by the widow, it would be highly

unjust to endow her out of the portion purchased by one, and to exempt the other. It would be equally wrong to impose the whole of the widow's dower in the estate upon the portion of one heir, and exempt the others. If this might be done, purchasers would be disinclined to pay the value of real estate at sales by executors and administrators, of real estate subject to the widow's dower. And yet they have no power to compel its assignment.

Again, under our statute this widow's dower is an incident to the land held by a particular description of title. It attaches to all of the lands alike held by that description of title, and not to a portion of them. By the marriage the right attaches to the lands then held, and as others are subsequently acquired, it attaches to them. And by the husband's death the right becomes consummate, as it originally attached to each separate parcel, and we are aware of no statute or rule of the common law that will permit the court or the commissioners without the consent of the parties, to release one portion from the burden and impose it upon another. If the parties choose to do so, they have the unquestioned right, or if the commissioners were to so assign it, and it were approved by the court without objection, where the parties were not under disability, or if by their report it appeared that the parties in interest consented, and it were not disproved, such an assignment would be good. But without such agreement by parties capable of assenting, when objected to, the court should set aside the report and refer it back to the same or other commissioners.

In assigning the widow's dower, the commissioners should so allot it, having reference to quantity and quality, that her portion shall be equal in its yearly value or income to one-third of the yearly value of the tract from which it is taken. They should not consider the intrinsic or cash value, but the yearly income, but its capacity at the time for production, and assign to her such a portion as will produce one-third of that value. If after such an assignment the profits are increased by her expenditure of money or labor, it is her compensation for the expenditure.

That this is the true rule seems to be manifest from the provisions of the 28th section of the dower act. It provides that in case the property is not susceptible of a division, and the commissioners shall so report, the court, shall impanel a jury and ascertain its yearly value, and render judgment that the widow shall be paid on a day named, one-third of the amount annually, during her natural life. This provision proceeds upon the principle that it is one-third of the yearly value and not one-third of the number of acres or the cash value of the land of which she is to be endowed.

For the reason that the assignment of dower in this case was not of the one-third part of such tract, and was a part of two tracts only, the decree of the court below affirming the report of the commissioners must be reversed, and the cause remanded, with instructions to refer it back to the same or other commissioners.

Decree reversed.

CONNER *v.* SHEPHERD. ✓

15 MASSACHUSETTS, 164. — 1818.

WRIT of dower. Demandant's husband was seized during coverture of the lands in question and conveyed them to defendants. The lands when conveyed were, and still are, uncultivated and covered with wood and timber.

PARKER, C. J. — Upon this question we have had considerable difficulty. By the common law, the widow is dowable of all the real estate of which her husband was seized during the coverture, with the exception only of a castle erected for public defense, of a common in gross, and some other kinds of estate not known in this country. The question whether forest, parks, and other property of a similar nature, are also exceptions, seems never to have occurred; probably because there is no instance, in Great Britain, of any such property held separately and distinct from improved and cultivated estates.

In this country, on the contrary, there are many large tracts of uncultivated territory owned by individuals who have no intention of reducing them to a state of improvement, but consider them rather as subjects of speculation and sale, or as a future fund for their posterity, increasing in value with the population and improvement of the country. If dower could be assigned in estates of this nature the views of those who purchase such property would be obstructed; and an impediment to their transfer would be created, and in many instances the inheritance would be prejudiced, without any actual advantage to the widow to whom the dower might be assigned. For, according to the principles of the common law, her estate would be forfeited if she were to cut down any of the trees valuable as timber. It would seem, too, that the mere change of the property from wilderness to arable or pasture land, by cutting down the wood and clearing up the land, might be considered as waste; for the alteration of the property, even if it became thereby more valuable, would subject the estate in dower to forfeiture — the heir having a right to the inheritance in the same character as it was left by the ancestor.

It is not an extravagant supposition that lands actually in a state of nature may, in a country fast increasing in its population, be more valuable than the same land would be with that sort of cultivation which a tenant for life would be likely to bestow upon it; and that the very clearing of the land, for the purpose of getting the greatest crops with the least labor, which is all that could be expected from a tenant in dower, would be actually, as well as technically, waste of the inheritance.

There would seem, then, to be no reason for allowing dower to the widow in property of this kind. If she did not improve the land, the dower would be wholly useless; if she did improve it, she would be exposed to dispute with the heir, and to the forfeiture of her estate, after having expended her substance upon it.

But this is not all. It is well understood; by the common law, and the principle has been repeatedly settled in this court, that the dower of the widow is not to be assigned, so as to give her one-third of the land in quantity, but so that she may enjoy one-third of the rents and profits, or income, of the estate. Now, of a lot of wild land, not connected with a cultivated farm, there are no rents and profits. On the contrary, it is an expense to the owner, by reason of the taxes. The rule, therefore, by which dower is to be assigned cannot be applied to such property.

It is observable also that, at common law, the right of damages for detention is incident to the right of dower; from which it may be inferred that there can be no dower in land, the detention of which can be no injury. Now, the detention of wild land from the widow can form no subject of damages. Our statute has adopted the same principle, and has also expressly prohibited strip or waste by the tenant in dower; and has expressly required that she keep the fences, buildings, etc., in good repair, and shall so leave the same. This is all predicated upon the supposition that the estate of which a widow is dowable, may be retained by the heir to her prejudice, has fences and buildings upon it, and is in fact, in a state of actual cultivation and improvement.

Upon the whole, seeing no possible benefit to the widow from an assignment of dower in such property; and, on the contrary, believing that it would operate as a clog upon estates designed to be the subject of transfer; and finding that the principles upon which the estate in dower rests at common law are not applicable to a case of the kind before us, — we feel constrained to say that the demandant cannot maintain her present action.

This case seems never to have been expressly decided before; and yet there is a prevalent opinion among lawyers against the claim of

dower in such property. Possibly the point may have been decided before the publication of the decisions of this court commenced.

The case of *Sargent et al. v. Towne*, and several decisions of the court, respecting the manner in which widows shall be endowed, when land has been alienated by the husband, have a bearing towards the decision we have adopted.¹

(f.) *Estates in joint tenancy and in partnership.*

BABBITT *v.* DAY. ✓

41 NEW JERSEY EQUITY, 392. — 1886.

THE CHANCELLOR. — This is a suit for specific performance of a contract for sale of real estate by the complainants to the defendant. The objection made to the title is that the wives of the complainants' grantors, who held the title as joint tenants in fee, did not join in the conveyance to the complainants, and it is urged that the wives, who are living, may have a right of dower in the property. By the common law, no title of dower attaches where the husband is seized of the land jointly with another or others. This is owing to the nature of the estate of joint tenants. The possibility, so long as the joint ownership subsists, that the estate of each tenant may be wholly defeated by his dying in the lifetime of the other or others, prevents the attaching of the right of dower in the wives of any of the tenants, except the survivor. The estate which the husband must have to entitle his wife to dower is one in severalty or in common. The unity of interest in joint tenancies, each tenant is seized *per my et per tout*, prevents the admission of a right of dower of curtesy, except as to the estate of the survivor. On the decease of one joint tenant the survivor holds the whole property under and by virtue of the original grant, and holds no part of it in anywise under the descent. 2 Cruise's Dig. 444.

We have not, in this State, changed the law in respect to dower in such estates either by statute or legal adjudication. The statute, it is true, provides that the wife shall have dower in all the real estate of which her husband or any other to his use, was seized of an estate of inheritance at any time during the coverture, to which she shall

¹ See *Webb v. Townsend*, 1 Pick. (Mass.) 20, *infra*, p. 709. Also *White v. Cutler*, p. 447, *supra*. This is often called the "New England Rule." It is now the statutory rule in Mass. and N. H. But there may be dower in wild lands used in connection with improved lands for purposes of estovers, pasture, etc. *Stevens v. Owen*, 25 Me. 94. — ED.

not have relinquished her right of dower by deed duly executed and acknowledged (Rev. p. 320), and an estate in joint tenancy is, in terms, an estate of inheritance, but the right of survivorship in such estates has not been abolished. Such estates are recognized by statute (Rev. p. 167, § 78), and they retain their common law characteristics. By the term "estate of inheritance" in the statute is meant an estate of inheritance in severalty or in common. Estates in joint tenancy are not included. The demurrer will be overruled.

BOPP v. FOX.

63 ILLINOIS, 540.—1872.

SHELDON, J.—This was a petition in equity, on the part of Catherine Bopp, for the assignment of dower in the real estate of her deceased husband, Louis Bopp.

The claim of dower is in the one undivided one-fourth part of certain premises, by virtue of a conveyance thereof to Frederick Weaver, John Schuchman, Henry Burmeister and Louis Bopp, on the 8th day of March, 1865.

The defendants set up in resistance to the claim that they were purchasers of the whole of the premises at a receiver's sale thereof, made on the 13th of August, 1870, under an order of court in a certain suit for the dissolution of a copartnership between the said Weaver, Schuchman, Burmeister and Bopp, in which suit the said Weaver and Burmeister were complainants, and said Schuchman and Bopp were defendants; and that the said premises were bought with partnership funds for partnership purposes.

The only questions made on the record are, whether the premises were so purchased with partnership funds for partnership purposes, and if so, whether they were subject to the claim of dower. * * *

We consider this was essentially a purchase with partnership funds for partnership purposes. The property was required for the payment of partnership debts, and was duly appropriated to that purpose.

Under such circumstances, does a right of dower attach in favor of the widow of one of the copartners, in whose individual name stood the legal title, to the undivided one-fourth part of the land?

It is a well known rule, governing the relation of partnership, that partnership property must first be applied to the payment of partnership debts, and that the true and actual interest of each partner in the partnership stock is the balance found due to him after the payment of all the partnership debts and the adjustment of the partner

ship account between himself and his copartners. And in equity real estate forms no exception, but stands on the same footing, in this respect, with personal property, no matter in whom the legal title may be vested.

Although Louis Bopp took the legal title to one-fourth of this land, in the view of a court of equity he never had any beneficial interest in it distinct from the partnership purposes, but he took it clothed with an implied trust that it should be applied to the payment of the partnership debts if necessary, and his widow was not entitled to her dower until this trust was fully executed and fulfilled.

These views and principles we regard as just, and as amply sustained by the great weight of authority.

For a full consideration of the subject and authorities bearing upon it, we refer to *Buchan v. Sumner*, 2 Barb. Ch. R. 165; *Dyer v. Clark*, 5 Metc. 562; *Howard v. Priest*, Id. 582; Collyer on Part., Perkins' Ed. 123 *et seq.*, and notes.

It was supposed in the argument to make a difference that there were no partnership debts existing at the time the land was purchased, but we find no such limitation of the rule. The title was taken by Bopp chargeable not only for the payment of the partnership debts existing at the time of the purchase, but for the payment of any partnership liability that might be found to exist at the time of winding up the partnership concerns.

The interest of Louis Bopp in the land having been applied to the purpose of the implied trust upon which it was taken — the payment of the partnership debts if necessary for that purpose — his widow is not entitled to dower.

The court below should have dismissed the petition, instead of allowing dower, as it did, in the land, exclusive of the mill improvements.

Decree reversed.

(4.) BARRING DOWER.¹

(a.) *Conveyance of, or charge on, land by intended husband before the marriage.*

TRUSTEES OF THE POOR v. PRATT. ✓

10 MARYLAND, 5. — 1856.

MASON, J., * * * delivered the opinion of the court.

This is an action at law, for dower, instituted by the appellee.

The prominent and controlling question of the case is, whether a sale of real estate, under an execution upon a judgment rendered

¹ Under this head are considered the classes of cases in which dower never attaches; under (5) below those cases in which dower is defeated after it has once attached. — ED.

against a party prior to his marriage, would defeat the claim of his widow to dower?

This question is conclusively settled, upon authority, in the affirmative. Kent, in his Commentaries, 4th vol., page 50, thus states the law: "As a general principle, it may be observed that the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin."

The same doctrine is more broadly affirmed in the case of *Greene v. Greene*, 1 Ohio Rep. 542. In speaking of the widow's right to dower, Judge Sherman says: "Her estate is but part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband."

The same doctrine is announced in the case of *Scott v. Howard*, 3 Barb. Rep. 319, and also in our own chancery court, in the case of *Mantz v. Buchanan*, 1 Md. Ch. Dec. 202, as well as a number of other well adjudged cases.

But the soundness of this doctrine seems not to be denied by the appellee's counsel, but it is contended, that such a defense cannot be resorted to in action at law, but is only availing in equity, if it can be relied on at all.

We think the contrary is settled by the General Court of this State, in the case of *Lane v. Gover*, 3 Har. & McH. 394. That was a case, like the present, at law, and the court permitted a sale under a lien subsisting prior to marriage, to defeat the claim of the widow to dower, and the mere circumstance that the lien bound the land in the lifetime of the husband's ancestor, does not affect the principle, as the appellee's counsel supposes, that such a defense would be availing at law.¹

CAMPBELL, J., IN *BROWN v. BRONSON*. ✓

35 MICHIGAN, 415. — 1887.

THE bill in this case was filed by the widow of Henry B. Brown, deceased, to recover her dower of certain property in Big Rapids, Mecosta county, which Brown was claimed to have conveyed to the defendants, who were his children, and would have been his heirs-at-law of any property which he owned at his death. This deed purported to have been made September 26th, 1871, two days before Brown's marriage with complainant. The bill claimed that if the

¹ See N. Y. R. P. L. § 172. — ED.

deed was genuine it was in fraud of complainant, but disputed its genuineness and delivery.

Both parties to the marriage were beyond middle life, and had grown-up children at the time. The defendants were children of Brown by a former wife. They claimed that the deed was delivered and intended to operate at once, and that it was made in fulfilment of a trust in their favor, the land being asserted to have been purchased with the proceeds of property held in trust for them from their mother's estate. * * *

We are satisfied that if the deed had been executed and delivered at the time of its date, it would have been a legal fraud on complainant, under the rule in *Cranston v. Cranston*, 4 Mich. R. 230. And assuming all that is claimed for defendants on the facts, the land was then owned by Henry B. Brown in his own right, and free from any trust whatever. * * *

In bringing about the marriage, Brown had, and was evidently intended to have, credit for owning the premises in controversy. The deed was not made public, and was unquestionably intended to prevent the dower interest of complainant from attaching, — if the deed itself was really made operative. This was a legal fraud, and could not lose that character by reason of any desire to carry out a previous purpose, concealed from complainant and the public, and continuing concealed during the remainder of Brown's life.

(b.) *Ante-nuptial settlements or agreements intended to bar dower.*¹

VINCENT v. SPOONER. ✓

2 CUSHING (MASS.), 467. — 1848.

FLETCHER, J. — This was a suit by the demandant, as the widow of Isaac Vincent, to recover dower in a certain messuage, of which the tenant, as the executor of Vincent, is in possession. It is admitted that the demandant was the lawful wife of Vincent; that during the coverture he was lawfully seized of the premises described in the writ, and died seized thereof, and that the demandant's demand to have dower assigned to her therein was duly made before the commencement of this suit. The tenants contend that this suit cannot be maintained, for the reason that, prior to the demandant's intermarriage with Isaac Vincent, she duly executed an ante-nuptial contract with him and one Valentine Bradford, as trustee, by the terms of which she accepted a certain pecuniary provision therein

¹ Sec N. Y. R. P. L. §§ 177-179, 182. — Ed.

made for her out of the estate of her intended husband in lieu of dower.

It appeared that previous to the marriage, an indenture between Isaac Vincent, of the first part; Valentine Bradford, of the second part, and the demandant, by her then name of Sarah T. Cushman, of the third part, was executed, by which Vincent covenanted with Bradford, that if the marriage took place, and the plaintiff survived him, he would cause to be paid and secured to Bradford, by his last will or otherwise, the sum of one thousand dollars, to be paid within ten months after his decease, and would also cause to be paid or secured to Bradford the further sum of five hundred and fifty dollars, to be paid to him yearly, during the widowhood of the demandant, to be paid over to her instead and in satisfaction of dower, and of all distributive share in his personal estate. Bradford covenanted faithfully to execute the trusts, and the demandant covenanted and agreed, that the sum of one thousand dollars being provided to be paid and actually paid, and an annual sum of five hundred and fifty dollars being secured and provided to be paid, should be in full satisfaction and bar of her dower in his estate, and should also be a bar to her claiming or having any part of his personal estate.

Isaac Vincent deceased, having made his last will and testament, of which the tenant was duly appointed executor. Upon the tenant's assuming the trust of executor, he duly notified the demandant and Bradford, the trustee, of his readiness to perform all the stipulations of the ante-nuptial contract. Within ten months after the decease of Vincent, the tenant paid Bradford, the trustee, the sum of one thousand dollars, which was accepted by him and tendered to the demandant.

Within the ten months also, the tenant executed and delivered to Bradford a bond, with sufficient sureties, for the faithful and prompt payment of the annuity of five hundred and fifty dollars during the widowhood of the demandant, which bond was also fully secured by mortgage; and the bond and mortgage were accepted by Bradford, as such trustee, as sufficient security for the payment of the annuity.

Within one year from the decease of Vincent, the tenant paid the trustee the sum of five hundred and fifty dollars, pursuant to the ante-nuptial contract, which was also accepted by the trustee and tendered to the demandant. Both sums, so tendered to the demandant, and not accepted by her, have been specially deposited in bank.

No reference was particularly made in the will of Isaac Vincent to the ante-nuptial settlement, but a general direction was therein given for the payment of debts and the performance of obligations.

At common law, a jointure made to a wife before or after marriage was not bar to her dower. By the statute of 27 Henry 8, c. 10, § 6, which had always been in force here, before our revised statutes, no jointure is a bar of dower, unless it be a freehold estate in lands, tenements, or hereditaments, for the life of the wife at least, and which is to commence and take effect, in possession or profit, immediately on the husband's death. The demandant's action, therefore, would not be barred by the marriage settlement, either at common law, or by the statute of 27 Henry 8, c. 10. The defense to the action, therefore, rests wholly on the Revised Statutes, c. 60, §§ 8, 9. The eighth section of that chapter is taken mostly from the statute of 27 Henry 8, c. 10. The provision as to the assent of the wife, and the mode of signifying her assent when she is under age, is adopted from the revised code of New York. The ninth section is also adopted from the New York Code. By this latter section it is provided, that any pecuniary provision that may be made for the benefit of the intended wife, and in bar of her dower, shall, if assented to by her, as provided in the preceding section, bar her right of dower in all the lands of her husband. In regard to this section, the commissioners for revising the statutes say: "The ancient distinction between real and personal estates is not much regarded by our present laws and usages as it will often be found more convenient, and probably quite as secure for the widow, to have her income payable out of public stocks, or other personal estate, as to have it depend on the rents of real estate." The only question in the present case, therefore, is whether by the ante-nuptial contract any pecuniary provision was made for the benefit of the demandant, the intended wife, in lieu of dower, and assented to by her in the manner provided by the statute. If such provision was made and assented to then, by force of the statute, it bars her right of dower, and she cannot maintain this action. If no such provision was made and accepted, then, of course, she is entitled to her dower, and this action is well brought.

On the part of the demandant, it is maintained, that no such provision was in fact made; that by the marriage contract it was optional, on the part of the husband whether he would pay or secure to the demandant the sums of money mentioned; that he was under no absolute obligation to do so, and in fact did not cause the sum of money mentioned to be paid or secured by his last will or otherwise, according to the provisions of the marriage settlement; and, therefore, that the demandant is not barred of her dower, which could only be effected by actually paying and securing the money, as provided in the marriage contract.

These positions, on the part of the demandant, if well sustained in fact, would no doubt establish her claim. But the facts by no means warrant or sustain these positions. By the marriage settlement, the husband had no option or election, whether he would or would not pay and secure the sums stipulated. He absolutely and unconditionally covenanted with the trustee, that he would by his last will or otherwise cause to be paid and secured, for the intended wife, the sums stipulated. The demandant expressly assented, that such sums being paid and secured, should be in bar of her dower. The husband covenanted, that he would by his last will or otherwise cause the money to be paid and secured. He made no express or particular provision by his will. But it was not necessary that provision should be made by will. Any other mode was just as effectual. All that this marriage contract required, and all that the statute requires, is, that the pecuniary provision, which the intended wife assents to instead of dower, should be actually and effectually secured to her. In the present instance, the indenture, constituting the marriage contract, was of itself a complete provision within the statute, and clearly fulfilled and accomplished the covenants on the part of the husband. This indenture absolutely bound the husband and his estate, and could be fully enforced against the latter in the hands of his executor. As there was ample estate, the husband did, therefore, in fulfillment of his covenant to cause the money to be paid and secured by his will or otherwise, cause it actually to be done by this indenture itself. In fact, the executor, admitting his liability, has fulfilled the covenant of the husband, to the letter, by paying and securing to the trustee, for the benefit of the wife, the sums which she assented to take in lieu of dower. The case, therefore, is clearly within the statute and the demandant's claim of dower is barred by the pecuniary provision made for her benefit, and assented to by her; and, consequently, according to the agreement of the parties, a nonsuit must be entered.¹

(c.) *Alienage of wife.*

THE CHANCELLOR IN PRIEST *v.* CUMMINGS.

20 WENDELL (N. Y.), 338. — 1838.

I have no doubt upon the question, as to the regularity and validity of the naturalization of the defendant in error in 1829. The fact that she was then a *feme covert* was no objection, as

¹ See §§ 179-182 N. Y. R. P. L. — ED.

neither married women or infants are excluded from the benefit of the acts of Congress on this subject. The fact that the statute makes the naturalization of the father, in certain cases, enure to the benefit of his infant children, does not preclude infants themselves from applying whenever it may be necessary; and as the general language of the naturalization acts includes all free white persons, *femes covert* and infants, if they have sufficient capacity to understand their rights and the nature and obligation of an oath, may be naturalized.

I cannot admit, however, that the effect of naturalization under the general acts of Congress, which have not declared what shall be the effect of such naturalization, can retroact so as to divest rights which have been acquired by others previous to such naturalization. (It is said by Coke, and other elementary writers, that if a man take an alien to wife, and afterwards aliens his land, and then the wife is made a denizen, and the husband afterwards dies, she shall not be endowed, because her capacity and possibility to be endowed came subsequent to the marriage by the act of denization; but that it is otherwise where she is naturalized by act of Parliament, Co. Litt. 33, b.; Clancy, 202; and it is supposed that the effect of a naturalization under an act of Congress must necessarily have the same effect as naturalization by act of Parliament. That a naturalization here has the effect to give to the naturalized citizen inheritable blood, so as to enable him to take by descent from another citizen, as well as to acquire lands by purchase, I have no doubt. It probably would also have the effect to give to the naturalized wife a capacity to take an inchoate right of dower in lands, of which the husband was seised in fee at the time of her naturalization, so as to give her the right of dower therein at his death. To that extent the husband takes his land, subject to the right of his wife to acquire a title to dower therein, by a subsequent naturalization under a law which was in existence at the time of his purchase, or marriage; and as the wife after her naturalization has an inchoate right of dower in such lands, of which she cannot be deprived except by her own consent, a subsequent purchaser from the husband who neglects to procure her release, takes the land subject to such right. But where the husband had parted with all his interest in the land before his wife had the capacity to take even an inchoate interest therein, which could by any possibility be released while the wife was an alien, it would be contrary to every principle of justice and common sense to give her the right to divest or impair the title of the purchaser, by her subsequent act of naturalization. The same objections would also exist to the retroactive operation of

a naturalization, where the person thus naturalized had previously been passed over in the descent of real estate, in favor of a more remote lineal or collateral heir who was not an alien. In such cases, if the principle of retroaction contended for here, should be adopted and established, the estate would to a certain extent be rendered inalienable in the hands of the owner thereof. In the first case, the possible right of the alien wife could not be extinguished by any release or common law conveyance; and in the last case, no one could safely purchase from the more remote heir, upon whom the inheritance had descended, until all the intermediate alien heirs and their descendants, who were in existence at the time of the descent cast, were dead, as it could not until then be known to the purchaser whether any, and if any, which of them would become naturalized.

The effect of a statutory naturalization in England, in overreaching previous vested rights, depends upon the omnipotence which has been ascribed to an act of Parliament; in which at some of the earlier periods of English history, a due regard was not always paid to the rights of third persons who had not petitioned for the passing of the act. * * *

I conclude, therefore, that the naturalization of the defendant in error had the same effect as to the rights of property, as letters, of denization had by the common law, and the same effect as to all other rights as an act of Parliament giving her all the rights of a natural born subject, and without any special provisions to give it a retrospective operation. She, therefore, had from that time the capacity to take an estate in dower, of and in any lands of which the husband was then seised of an inheritable estate; to take lands by devise or descent from any person capable of conveying or transmitting lands in that manner to her; and to take any other interest in real estate by gift or otherwise to herself, and to sell, alienate, or bequeath the same, or transmit the same to such of her heirs as were capable of taking by descent, as fully as a natural born citizen might do, but not otherwise. Her naturalization, however, did not retrospect so as to deprive the mortgagees of her husband, or those claiming under them, of any right or interest in his lands which they had acquired previous to her naturalization.¹

¹ See *Burton v. Burton*, 1 Abb. Ct. App. Dec. 271 for construction of certain statutes, and see subject of "aliens" in Part V, *infra*. — ED.

(5.) DEFEATING DOWER.

(a.) *Elopement and adultery. Divorce.*REYNOLDS *v.* REYNOLDS.

24 WENDELL (N. Y.), 193. — 1840.

By the Court, BRONSON, J. — Adultery in the wife was, at the common law, no bar to her claim for dower, not even where a divorce followed, unless it was a divorce *a vinculo*. 2 Inst. 436; Co. Litt. 32, a., and note 194; 2 Black. Conn. 130; 4 Kent's Comm. 52, note c., 54. But by the statute Westm. second, 13 Ed. 1, ch. 34, it was enacted, that "if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case, she shall be restored to her action." 2 Inst. 433. This statute was, in substance, re-enacted in this State in 1787, 1 Greenl. 294, § 7; and it remained in force down to the revision of the laws in 1830. 1 R. L. of 1802, p. 53, and 1 R. L. 58. Under this statute, there can be little doubt that the plaintiff forfeited her claim to dower by living in adultery with Haskins, without being afterwards reconciled to her husband.

The provocation which she had to depart will not aid her. The words of the statute Westm. 2, are, "if a wife willingly leave her husband, and go away, and continue," etc. Lord Coke, in his commentary, says: "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, but after consent, and remain with the adulterer without being reconciled, etc., she shall lose her dower; for the cause of the bar of her dower is, not the manner of her going away, but the remaining with the adulterer in avowtry, without reconciliation;" and so if she go away with her husband's consent and agreement with another man, and afterwards commit adultery, she shall be barred. And Coke cites what he calls "a rare and strange case," from the Parliament roll, 30 Ed. 1, which was only seventeen years after the statute was passed. In that case, John de Camoys, by deed, delivered and committed his wife Margaret to the Lord William Paynel, and did grant and confirm that the said Margaret should be and remain with said Lord William according to his will. After the death of her husband, the wife demanded her dower, but it was adjudged against her, on the ground of the adultery with Paynel. 2 Inst. 435; Dyer, 107 a., note; Bacon's Abr. Dower F. In *Coot*

v. Berty, 12 Mod. 232, in dower, the defendant pleaded the elopement of the wife; she replied that the husband had bargained and sold her to the adulterer; but the replication was held bad. In the recent case of *Hethrington v. Graham*, 6 Bing. 135, it was held that adultery was a bar, although committed after the husband and wife had separated by mutual consent. Tindal, Ch. J., concludes a review of the authorities, by saying that they "place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances of the elopement." I do not find that this doctrine has been departed from.

Although the plaintiff had good cause for leaving her husband, yet the subsequent adultery, had the husband died while the act of 1787 remained in force, would clearly have barred this action for dower. The effect of the present statute upon her claim remains to be considered.

In 1830, the act of 1787 was repealed and after declaring that a widow shall be entitled to dower, a new provision was made in the following words: "In case of divorce dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed." 1 R. S. 741, § 8.¹ Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This has brought us back to the common law, as it stood before the statute of 13 Ed. I., for we have already seen, adultery did not work a forfeiture at the common law. And as to a divorce *a vinculo*, that always put an end to the claim of dower; for although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. Co. Litt. 32, a.; 2 Bl. Comm. 130; 2 Kent's Comm. 52, c., p. 54. The statute bar for the mere act of adultery, which had existed for more than five centuries and a half, was blotted out by the repeal of the act of 1787 — the British statutes not being in force in this State; and the 8th section of the act of 1830 has added nothing to the law as it would have stood had the Legislature stopped with a simple repeal of the act of 1787.

How, then, stands this case? Prior to 1830, the plaintiff was under a statute disability, and had her husband died at that time she could not have taken her dower. But seven years before the death of her husband, the disability was removed by the repeal of the statute — there was no longer any bar, and I am unable to discover any valid objection to her claim. She is able to establish all the elements of a perfect title to dower, to wit, a lawful marriage, and the seisin and

¹ 1. N. Y. R. P. L., §§ 176 and 186; and see § 1760 Code Civ. Pro. — Ed.

death of the husband. The objection urged against her is, there was a time when if your husband had died, you would not have been entitled to dower. To this she may well answer, true it is, there was such a time, but it has gone by and when my husband died, there was no legal bar in my way. The law says, a widow shall be endowed, unless there has been a divorce for her misconduct; there has been no such divorce in my case, and I am a widow and claim my right. Her arguments rest, I think, on a solid foundation.

It is not very important whether we regard the late revision of the statutes as working a simple repeal of the act of 1787, and thus reviving the ancient common law; or whether we regard it as a repeal, accompanied by a new provision; for in either case, the mere fact of living in adultery ceased to be a bar to dower in 1830, and the husband did not die until 1837. There had been no divorce, and there was at that time no obstacle in the way of the plaintiff's claim.

The defendant's answer to this view of the case is, that the plaintiff had a right, interest or estate in the land in the lifetime of the husband, which was forfeited by the adultery prior to 1830; and we are referred to the saving clauses in the repealing statute. 2 R. S. 779, §§ 5, 6. The argument assumes what cannot be maintained. While the husband lives, the wife has no right, interest or estate in the land. She has nothing but a mere capacity to take, in the event of her surviving her husband — she is dowable. It is not until she becomes a widow, that she is entitled to dower. It was the widow, not the wife, who was provided for by *magna charta*. 9 Hen. III., ch. 7; 2 Inst. 16. And so it has always been in our statutes concerning dower. 1 R. L. 56, ch. 4; 1 R. S. 740. The legal assurance that the wife shall have dower if she becomes a widow, is sometimes spoken of, through the imperfection of language, as though it were a present estate or interest in the land; but, in truth, it is not so; she has no right, until after the death of her husband. In *Lampet's Case*, 10 Co. 49, Lord Coke, although he was endeavoring to prove that the wife might be barred by a fine, was forced to admit that, "notwithstanding her husband is seised in fee, and the marriage is lawful yet she has but a possibility of dower till the death of her husband." * * *

It is undoubtedly true, as a general rule, that a statute shall not have a retrospect beyond the time of its commencement, or be so construed as to take away a vested right of property, or defeat a right of action already accrued. *Sayer v. Wisner*, 8 Wendell, 661; *Varick v. Briggs*, 6 Paige, 332. But that doctrine can have no bearing upon this case. While her husband lived the plaintiff had no interest in the land; no right of action which could be forfeited.

Her misconduct vested no new interest or title in any third person, and consequently none was taken away by the act of 1830.

I cannot think it a sufficient objection to the plaintiff's claim, that there was a time, when, if her husband had died, she would have been barred. Though she was disabled by the adultery, and her dowerable capacity was gone for a time, it was restored before the right accrued — the obstacle in the way of her taking was removed by the repeal of the act of 1787. * * *

New trial granted.

(b.) *Loss of husband's estate.*

WHEELER v. KIRTLAND.

27 NEW JERSEY EQUITY, 534. — 1875.

REED, J. — * * * The wife, by her bill, now claims to have an interest in the award, by reason of her inchoate dower in the land so condemned.

Two questions are presented: First. Has the wife an interest in this award? Second. If so, what interest?

The character of inchoate dower has been the subject of much contrariety of opinion. It is said not to be an estate. It is not the subject of grant. It cannot be taken upon execution. Equity will not apply it to the satisfaction of the debts of the wife. As dower was a humane provision for the sustenance of the widow and younger children, some limit was imposed on the power to defeat its consummation. Yet, while not technically an estate, it cannot, at this day, be denied that inchoate dower is a valuable interest in land. It is an interest which the courts have repeatedly recognized. Its presence works a breach of the covenants against incumbrances. *Carter v. Denman*, 3 Zab. 260. Its relinquishment is a valuable consideration to support a conveyance by her husband to her against his creditors. *Wright v. Stanard*, 2 Brock. 311; or a promissory note given by a purchaser. *Nims v. Bigelow*, 45 N. H. 343.

A conveyance by the husband on the eve of marriage, to defeat dower of the wife, will be set aside during the life of the husband. *Smith v. Smith*, 2 Halst. 515. And when, by judicial proceedings, land is converted into money, the wife's interest is still recognized and protected. The character of land is impressed upon the fund, and courts of equity will secure that portion of the money which represents her inchoate interest. *Matthews v. Duryea*, 45 Barb. 69; *Malloney v. Horan*, 49 N. Y. 116; *Vartie v. Underwood*, 18 Barb. 561. This principle has been recognized in this State, in the case

of *Hays v. Whitall*, 2 Beas. 241. It seems, therefore, clear that the wife had a valuable interest in the strip of land condemned. It is equally clear that if the amount awarded represents the interest of both husband and wife, she has an interest in the award, which, upon general principles, equity is bound to protect. It is insisted, however, that no portion of this award represents the inchoate dower of the wife in the lands. It is said that when lands are taken for public use, the mere exercise of the right of eminent domain in a proceeding against the interest of the husband, extinguishes this right of the wife, without notice or compensation to her. This is the doctrine undoubtedly enunciated by the text-writers. Dillon on Mun. Cor., §§ 459-496; Scribner on Dower, vol. II., p. 551. The two cases upon which these writers rely are *Gwynne v. Cincinnati*, 3 Ohio, 24, and *Moore v. City of New York*, 8 N. Y. 110. The first was an application of the rule to dedicated lands, and the latter to lands taken by condemnation.

While the conclusion is in conformity with the settled law in England and this country, the conclusion is reached in the case of *Moore v. The City of New York*, by a general assertion that the inchoate interest of the wife was without value. Gardner, Judge, says: "The wife had no interest in the land, and the possibility she did possess was incapable of being estimated with any degree of accuracy." This was said in the face of the fact that, years before Chancellor Walworth had propounded and acted upon a rule for the computation of the value of this very interest. *Jackson v. Edwards*, 7 Paige, 408; *Bartlette v. Vanzandt*, 4 Sandf. Ch. 396. The broad statement in *Moore v. The City of New York*, is not only opposed to the weight of authority elsewhere, but has been repudiated or modified in later cases in that State. *In the Matter of Central Park Extension*, 16 Abb. Prac. R. 68; *Simar v. Canaday*, 53 N. Y. 298, etc.

The extinguishment of dower by condemnation means no more than this, that, as against the State, no widow can claim dower in lands devoted to public use. It has its origin at a time when the sovereign power in the State could assume its right to the use of the property of the subject without compensation. The right was exercised by the removal from possession, of all parties whose occupancy was inconsistent with the object of the public use. No one thereafter could claim a possession inconsistent with such user. The widow was merely in the same position as any other person claiming an interest in the land. The rights of all parties were subject to this dominion of the State, and were in abeyance while the State chose to exercise its privilege. Thus it was said by Coke, "Of a castle that is maintained for the necessary defence of the realm, a

woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private." "Here," says Scribner, "we see shadowed forth the principle upon which the courts at a later day have proceeded, in holding the inchoate dower of the wife extinguished in lands appropriated, according to the forms of law, to the uses of the public." Scribner on Dower, vol. I., p. 550. It is apparent that the doctrine arose, not because the inchoate dower was valueless, but because it, like all other interests, was servient to the power which inheres in every government, and is here styled eminent domain. As the interest is valuable, she is, under our law, entitled to compensation where those lands are taken for public use.

This conclusion does not conflict with the doctrine that where lands are condemned by proceedings to which the husband only is a party, that the wife cannot thereafter assert a right in the land against the public. I think, for the purposes of condemnation and compensation, this interest of the wife's, not rising to the dignity of an estate, is represented in the fee of the husband. We know that in making compensation, the right taken is considered a perpetual easement, equivalent to the fee, and that damages are assessed for the value of the entire interest in the land.

It has never been hinted that a deduction for the wife's inchoate dower should be made. The value of her interest, therefore, passes into the award. In this view, the condemnation of the land, by notice to the husband, condemns and extinguishes the inchoate interest of the wife. The land is transmitted into money. It assumes a shape where she can claim her right without interfering with the public. Equity will secure to her that portion of the award which represents her inchoate dower.

While this doctrine is expressly held in no preceding case, the court, in the *Matter of the Central Park Extension*, 16 Abb. Prac. R. 69, speaking of the case of *Moore v. The City of New York*, says: "It might have been added to that case, that the right was transferred from the land to the money received from the land by the husband, if the wife survived him." Mr. Scribner, vol. II., p. 21, says: "It may be that after the value of the entire estate is ascertained, and the amount paid over to the proper legal authorities, particularly if she be a party to the proceedings, her right is transferred from the land to the money representing the land."

I think that by the practice in this State, of compensating for the entire value of the land, upon notice to the husband, the wife is represented by her husband, and is always a party to the proceedings, for the purpose of enabling her to assert her right to her inter-

est in the award. Upon the first question, I think the conclusion of the vice-chancellor was correct. This being so, the parties desire a sum in gross, in preference to the securing of one-third of the principal, to await the event of her surviving her husband. In what portion of the award is the wife entitled to inchoate dower? The entire amount of damages awarded was the sum of \$15,000. The benefits were \$1,500. The benefits were properly deducted, leaving the balance \$13,500. Of this sum, it is claimed that only \$4,800 were for the value of land taken, the remaining portion being for damages to the adjacent land of the husband. It is claimed that the wife has no interest in the damages.

It is true, generally, that the wife has no interest in damages resulting from injury to land. I think, however, in this instance, that the computation of the vice-chancellor upon the entire amount of \$13,500, was correct. It represented the depreciation of the entire tract. Although she has still her right of dower in the remaining portion, yet by the sale under the Wheeler and Green judgment, before, any improvements were made, her right is limited to recover a third of the land at the time of the sale. *Vandorn v. Vandorn*, Penn. 513. She gets, therefore, what she would have recovered had the land not been taken.

I think the decree of the chancellor should be affirmed, with costs.

TRUSTEES OF THE POOR *v.* PRATT.

10 MARYLAND, 5. — 1856.

[*Reported herein at p. 687.*]

(c.) *Husband's conveyance during coverture.*¹

DICK *v.* DOUGHTEN.

1 DELAWARE CHANCERY, 320. — 1827.

BILL in equity for the assignment of dower. The case made by this bill was as follows:

James Dick, deceased, the husband of the complainant, was in his lifetime seised in fee simple of a certain tract of land, situate in New Castle county. About the 21st of April, 1803, he sold and conveyed the same to David L. Reece, the complainant being before and at the time of the sale and conveyance the lawful wife of the

¹ See N. Y. R. P. L. § 183. — Ed.

grantor, the said James Dick. The bill alleged that the complainant had not at any time released her dower in said land or barred herself thereof by any act or deed whatever. The title to the land was traced down by the bill, from David L. Reece to William Doughten, the present tenant and the defendant in this suit. James Dick, the husband, died on the 26th of December, 1803, leaving to survive him his widow, the complainant, and one daughter. William Doughten, the defendant, was in possession of the lands at the filing of this bill, and had been since the 21st of March, 1814. The prayer was that dower be assigned to the complainant out of the said tract of land, and that the defendants account with her for the rents and profits which may have accrued therefrom since the date of the death of the said James Dick. * * *

RIDGELY, CHANCELLOR. — It is now for the first time objected in argument for the defendants, that William Doughten was a purchaser without notice, for a valuable consideration. * * *

I might here close this part of the case; but two other points were made in the argument. First, on the part of the complainant, it was objected that the defendant could not make the defense, by answer, of his being a purchaser for a valuable consideration, without notice. The second point was, whether the defendant can avail himself, by plea or answer, of his being a purchaser for a valuable consideration without notice, as against a claim of dower in the complainant.

First, I think a defendant may avail himself of this defense by answer as well as plea. The following authorities support this opinion: 1 Harrison's Ch. Pr. 244; *Harris v. Ingleton*, 3 P. Wms. 91, 95; 2 Ves. Sr. 492. Lord Hardwicke says, in *Chapman v. Turner*, 1 Atk. 54, "The defense proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and is to save the parties the expense of an examination; and it is not every good defense in equity that is good in a plea, for where the defense consists of a variety of circumstances, there is no use of a plea; the examination must still be at large, and the effect of allowing such a plea will be that the court will give their judgment on the circumstances of the case before they are made out by the proof." In addition, Lord Redesdale's Treatise on Pleadings, 246, may be consulted on this subject. The defense in this case might, possibly, have been better made by a plea and by answer in support of the plea; but I will not enlarge on this subject.

The second might have been much the most important point; but from the failure of proof in the defendant, it is not of the first consideration in the cause. However, I shall not pass it by without

notice. In *Williams v. Lambe*, 3 Bro. Ch. Rep. 264, which was a bill for dower, and in which the defendant pleaded to the discovery and relief that he was a purchaser for a valuable consideration, without notice of the vendor being married, Lord Thurlow said, "the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim." He therefore overruled the plea. Mr. Park, in his Treatise on Dower, 328, says the case of *Williams v. Lambe* may be supported on its particular circumstances, on the ground that the plea covered too much, being to the relief as well as to the discovery. The dowress had a right to recover against the purchaser at law, and if it be established that a court of equity has a concurrent jurisdiction to assign dower, such a plea to the relief would appear to be inexplicable; although it might be good to the discovery, since the relief prayed is not the assistance of the court to enable the dowress to make good her title at law, but merely to give her the effect of a recovery at law. It is, indeed, noticeable that the observations of Lord Thurlow seem distinctly addressed to the plea, as a plea to the relief, and his omitting to intimate that such a plea might be good as to the discovery, may possibly be accounted for by the consideration that in a case so circumstanced, a plea to the discovery would almost unavoidably be overruled by the answer. Now, in the case of *Williams v. Lambe*, I do not perceive the ground for Mr. Park's distinction; for as the case is reported by Brown, although Lord Thurlow's remarks were addressed to the plea, yet they distinctly state that the plea did not apply as a bar to a legal claim; that dower was a legal claim, and therefore the plea was overruled. But suppose Mr. Park's distinction to be correct, this answer does not object to making the discovery; and it does state the several deeds of conveyance, and makes a full discovery as to the title; and then as I clearly understand it, the fact that the purchase for a full, fair and just price, without any notice, knowledge or belief that there existed any defect in the title, or that the said tract of land was liable to any claim or demand of dower by the said Martha Dick is opposed as a defense to the relief. This is a legal, not an equitable title, and I should decree in favor of the complainant, had the defendants supported their answer by proof, unless the admission of the sufficiency of the answer by not excepting to it might have interposed a difficulty. * * *

d. Wife's release of dower.

HARRIMAN v. GRAY.

49 MAINE, 537. — 1860.

APPLETON, J. — On the 23d of October, 1823, the plaintiff's husband conveyed the premises in which dower is demanded, to Joab Harriman, by a deed to which she was not a party.

On the 19th January, 1827, Joab Harriman quitclaimed the same to James Harriman by deed having no covenants and closing in these words: "So that neither I, the said Joab Harriman, nor my heirs, nor any other person or persons claiming from, or under me or them or in the name, right or stead of me or them, shall or will, by any way or means, have, claim or demand any right or title to the afore-said premises, or their appurtenances, or any part or parcel thereof forever."

From James Harriman the title passed through various mesne conveyances to the tenant.

Upon the case as thus presented, the plaintiff's right to dower would seem to be unquestioned. The tenant claims to bar the plaintiff's right to dower by reason of her release of the same to Joab Harriman, by deed dated April 2, 1838. But, long before this, the title to the premises in question had been conveyed to those under whom the tenants claim. The releasee had ceased to have any interest therein. A release of dower to a stranger constitutes no defense. *Pixley v. Bennett*, 11 Mass. 298. "In dower, the tenant pleads a release from the demandant to such an one, tenant *in possessione tenementor prædict existent*, and because not said he was *tenens liberi tenementi*, it was holden no plea; and adjudged for the demandant; for a release of dower, to a tenant for years, or at will can be no bar of dower, because she cannot demand it against them." Cro. Jac. 151.

Neither is the demandant to be estopped by this conveyance. Estoppels, to be binding, must be reciprocal. As between the demandant and Joab Harriman, she would be estopped. But the release to Joab does not inure to his grantees, and, not inuring by estoppel to their benefit, they cannot set it up as a bar. It has been repeatedly settled, that a grantee is not estopped from setting up a subsequent title, by language such as is found in the deed of Joab to James Harriman. Nor do the subsequently acquired rights of Joab inure to the use of his grantee. *Pike v. Galvin*, 29 Maine, 183.

Case to stand for trial.

WRONKOW v. OAKLEY.

133 NEW YORK, 505. — 1892.

PECKHAM, J. — In relation to the question arising upon this application of the purchaser, Wolf, to be relieved from his bid at the judicial sale on the ground that the interest of the wife of Bauer had not been duly conveyed by virtue of her power of attorney to her husband, we are of the opinion that the order of the General Term is erroneous and for the reasons stated in the dissenting opinion of Mr. Justice Andrews at the General Term * * * we think there is no objection to the title arising out of the power of attorney given by the wife to the husband. She had the right to execute a power of attorney under the act, chap. 300 of the Laws of 1878,¹ and in executing such power she could appoint her husband her agent or attorney in fact. * * *

(d.) Testamentary gift in lieu of dower.

KONVALINKA v. SCHLEGEL.

104 NEW YORK, 125. — 1887.

ANDREWS, J. — The question is whether the widow of the testator is put to her election between dower and the provision in the will.

The estate of the testator consisted of both real and personal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bed-room furniture in his dwelling house, and to his children the rest of the furniture therein, proceeds as follows: "All the rest, residue and remainder of my estate, property and effects of every nature, kind and description, I give, devise and bequeath to my executors and executrix hereinafter named and I authorize and direct them to sell and dispose of the same at such time and on such terms as to them shall seem best, and to divide the proceeds thereof equally among my wife and children, share and share alike."

There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or by necessary implication. Where there are no express words there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will

¹ § 187 N. Y. R. P. L. — ED.

furnishes this demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement or even because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this State showing the general principle and the wide range of application. *Adsit v. Adsit*, 2 J. Ch. 449; *Sandford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Den. 430; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Havens v. Havens*, 1 Sand. Ch. 324, 331; *Wood v. Wood*, 5 Paige, 596.

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds, and the lands descended to the heirs of the testator, subject to the execution of the power. 1 Rev. Stat. p. 729, § 56; *Cooke v. Platt*, 98 N. Y. 35. It is strenuously urged that the power of sale being peremptory, worked an equitable conversion of the lands into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust, it is alleged, is inconsistent with a claim of dower. The doctrine of equitable conversion, as the phrase implies, is a fiction of equity which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property as between real and personal representatives, and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees in order to effectuate the purposes of the testator in creating it, a clear case for an election

is presented. *Vernon v. Vernon*, 53 N. Y. 351. But the mere creation of a trust for the sale of real property and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee. In the cases of *Savage v. Burnham*, 17 N. Y. 561, and *Tobias v. Ketcham*, 32 Id. 319, the widow was put to her election, not because the vesting of the title in trustees was *per se* inconsistent with a claim for dower but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter cases, which disconnected with the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed, which is mainly to be looked to, because a correct principle is sometimes misapplied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration. It has frequently been declared that powers of, or in trust for sale, are not inconsistent with the widow's right of dower. *Gibson v. Gibson*, 17 Eng. L. and Eq. 349; *Bending v. Bending*, 3 Kay & J. 257; *Adsit v. Adsit*, *supra*; *In re Frazer*, 92 N. Y. 239. And it was held in *Wood v. Wood*, 5 Paige, 596, that the widow was not put to her election where the testator devised all his property to trustees with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached under very similar circumstances in *Fuller v. Yates*, 8 Paige, 325, and *In re Frazer*, *supra*, the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory. The general doctrine is very clearly stated by the vice-chancellor in *Ellis v. Lewis*, 3 Hare, 310: "I take the law to be clearly settled at this day that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially does not *per se* express an intention to devise the land otherwise than subject to its legal incidents, dower included." This remark of the vice-chancellor also answers the claim that the testator, when he described as the subject of the dower, "all the rest, residue and remainder of my estate," meant the entire title, or the estate as enjoyed by him. A similar argument was answered by Lord Thurlow in *Foster v. Cook*, 3 Bro. Ch. C. 347. "Because," he said, "the testator gives all his property to the trustees, I am to gather from his having given all he has,

that he has given that which he has not." The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were, by the will, to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation which has been settled.

Judgment affirmed.¹

(f.) *Estoppel.*

HARRIMAN *v.* GRAY.

49 MAINE, 537. — 1860.

[*Reported herein at p. 704.*]²

(g.) *Statute of Limitations.*³

(6.) ASSIGNMENT TO WIDOW OF HER DOWER.

GRIMKE, J., IN LARROWE *v.* BEAM.

10 OHIO, 498. — 1841.

THE remaining question relates to the mode in which dower should be assigned. There is a difference where the land is conveyed by the husband in his lifetime, and where it is conveyed by the heir. In the former case, the widow is entitled to her dower according to the value at the time of alienation, for the heir is not bound to warrant, except according to the value as it was at the time of the sale. But here the alienation was by the heir; and it appears that fifty acres have been cleared on the lot at a cost of \$12 an acre, and buildings have been erected worth \$300 or \$400, and these improvements, with a very small exception, not worth noticing, have been

¹ See §§ 180-182 N. Y. R. P. L. See also *Matter of Gorden*, 172 N. Y. 25, and *Horstman v. Flege*, 172 N. Y. 381. — ED.

² See also under "Title" *infra*. — ED.

³ See *infra* under "Title." — ED.

made by the heir. They were then made at his own risk; he is presumed to have placed them there with a full knowledge of his obligations, and of the rights of the complainant; and she is entitled to be endowed according to the value of the land (exclusive of the emblements) at the time of the assignment.

WEBB v. TOWNSEND.

I PICKERING (MASS.), 20. — 1822.

THIS was a writ of dower. The question in the case was, whether the demandant was entitled to dower in land aliened by her husband during the coverture, while it was wild and uncultivated, but which at the time of the demand of dower had been brought into a state of cultivation by the husband's grantee and those claiming under him.

It was agreed that certain persons should be a committee to assign the dower, in case it should be allowed.

Mills, for the demandant. If this question were to be decided by the common law of England, the demandant would be entitled to dower. The decision in *Conner v. Shepherd*, 15 Mass. Rep. 164, made an inroad upon the common law. There the land continued in a wild state at the time of the demand; which is the only point of difference between that case and the present one. We do not ask the court to revise their decision in that case, but they will not go beyond it to the prejudice of the right of dower. Where the land continues wild, the widow can receive no benefit from her dower without committing waste, which would be a forfeiture. Here she may immediately enjoy the profits without committing waste. The case of *Nash v. Boltwood*, decided by this court in 1783, and reported in Story's Pleadings, 366, is precisely like the present, and is not overruled by the case of *Conner v. Shepherd*, because in this last case the land continued wild at the time of the demand.

In New York it is settled that a tenant for life may cut down trees in order to put wild land in a state of cultivation; *Jackson v. Brownson*, 7 Johns. Rep. 237; and that there may be tenant by the curtesy of wild land; *Jackson v. Selluk*, 8 Johns. Rep. 262. Tenant by the curtesy and tenant in dower are correlative terms, and they are in general entitled to their respective estates in the same kind of land.

The reasoning of Dewey, who argued for the tenant, appears sufficiently in the opinion of the court.

Per Curiam. In *Conner v. Shepherd*, it was decided, that a widow is not dowable of land in a wild and uncultivated state. In several

other cases it has been determined, that when land of which a widow is dowable shall have been increased in value by a grantee of her husband, her dower shall be assigned according to the value of the land when alienated.

Stearns v. Swift, 8 Pick. 532; *Ayer v. Spring*, 9 Mass. R. 8; *Catlin v. Ware*, 9 Mass. R. 218; *Ayer v. Spring*, 10 Mass. R. 80; *Winder v. Little*, 1 Yeates, 152; *Humphrey v. Phinney*, 2 Johns. R. 484; *Dorchester v. Coventry*, 11 Johns. R. 510; *Hale v. James*, 6 Johns. Ch. R. 258; *Coates v. Cheever*, 1 Cowen, 460; *Shaw v. White*, 13 Johns. R. 179. See also *Gore v. Brazer*, 3 Mass. R. 544. But in *Thompson v. Morrow*, 5 Serg. & R. 289, and *Powell v. Monson & Brimfield Man. Co.*, 3 Mason, 347, it was held, that the widow shall be endowed of the actual value of the lands at the time of the assignment of the dower, excluding from the estimate the increased value arising from the improvements made by the alienee. See also *Powell v. Monson & Brimfield Man. Co.*, 3 Mason, 459. In the case before us, when the alienation took place, the land was in a state of nature, and the demandant could not have had dower. At the time when dower was demanded, the land had become a cultivated farm, but altogether by the labor of the grantee, or those who claim under him. It is contended that some of the reasons on which the decision in *Conner v. Shepherd* was founded do not apply in this case, because now the land is in a state to admit of the enjoyment of dower without committing waste, and thus forfeiting dower the moment it is begun to be enjoyed; which would not be the case in respect to land wholly uncultivated. But if the principle settled in the case of *Libby v. Swett et al.*, Story's Pleadings, 365, is to be applied, it would follow that there would be nothing on which the commissioners could act, who should be appointed to assign the dower. They would be required by the commission to set off such a part of the land as would yield one-third part of the rents and profits as they were at the time of the alienation; at which time there were no rents and profits; so that the widow could get nothing. It follows necessarily from the cases before settled in relation to dower, that the demandant cannot prevail in this action. The husband was not seized during the coverture of any estate of which the widow could be endowed. The land in which she now demands her dower has been put into the state which subjects it to dower, only by the labor and expense of the tenant, and those under whom he claims. This cannot be to the benefit of the widow of him who left it without having done anything to change its natural state.

The case of *Nash v. Boltwood* was determined before we had reports of the decisions of this court, and we do not know the grounds on

which it was decided. A widow is dowerable of a lot of wild land, which was used by her husband, in connection with his dwelling house and cultivated land, for the purpose of procuring fuel and timber for repairs. *White v. Willis*, 7 Pick. 143. But not of mines unopened at the death of her husband. *Coates v. Cheevers*, 1 Cowen, 460.

Demandant nonsuit.¹

c. Homestead.

HELM *v.* HELM.

II KANSAS, 19. — 1873.

KINGMAN, C. J. — This case came up from a decision of the District Court sustaining a demurrer to the petition of plaintiff in error. It appears from the petition that plaintiff in error and the defendant, James M. Helm were married on the 15th of April, 1871; that James M. Helm was then the owner of eighty acres of land, upon which the husband and wife resided, and which was their homestead. On the 17th of June thereafter, and while they were residing on said land as their homestead, the land was conveyed to William Helm for the consideration of nine hundred dollars, by deed signed by husband and wife; and two days thereafter the husband abandoned his wife. She seeks to have the deed set aside on two grounds. One is, that her signature was procured by the false representations of the defendant that her husband had purchased other lands in Shawnee county for a home; the other is, that her signature was procured by the threats and menaces of the defendants, they threatening her life unless she would sign the deed, and in apprehension of great danger if she did not sign the deed, she did sign it. The relief sought certainly could not be granted because the husband made representations that were false to induce his wife to sign the deed. If she relied on them, it was at her peril alone.

The second ground we think is sufficient to authorize the relief asked. Our homestead provision is peculiar. The homestead cannot be alienated without the joint consent of the husband and wife. The wife's interest is an existing one. The occupation and enjoyment of the estate is secure to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home. It may be difficult to define the estate, but it is one nevertheless. It is not

¹ For the New York statute as to assignment of dower, see Code Civil Proc., §§ 1596-1625. See *Kyle v. Kyle*, 67 N. Y. 400. — ED.

like dower. Dower is only a possible estate, an inchoate interest that, depending on uncertain events, the wife may never enjoy. That the wife's right under our homestead laws is an existing interest, probably none will deny. She then having been compelled to sign away the interest by duress, has a right to come into court and have that act declared null and void, so that her rights shall not be lost by the illegal conduct of those who attempted to profit by their violence. When her signature is declared void, the law comes in and disposes of the deed made by her husband without her consent. § 1, page 473, Gen. Stat. If the wife could not maintain this action, then an estate, to the immediate enjoyment of which she is entitled, and which might finally become hers absolutely, might be wholly lost. For the record shows that she has parted with her estate. It may well be questioned whether an innocent purchaser would not hold the land against her who had stood silent while he purchased for a full consideration. The land which the record showed belonged to William Helm. Having then an estate in the land, with a right to immediate enjoyment, and her signature procured by threats being not that consent that the law requires for the transmission of the homestead, it seems to us that the demurrer ought not to have been sustained.¹

¹ For the New York statute as to homesteads, see Code Civ. Proc. §§ 1397-1404. — Ed.

CHAPTER II.

ESTATES AS TO QUANTITY AND QUALITY: ESTATES LESS THAN FREEHOLD.

I. Nature of leaseholds in general.

1. REAL OR PERSONAL INTERESTS IN LAND.

BREWSTER *v.* HILL.

1 NEW HAMPSHIRE, 350. — 1818.

[*Reported herein at p. 53.*]¹

2. LEASEHOLDS ARE TO BE DISTINGUISHED FROM:—

a. Cases in which occupant of land is in as servant of owner.

KERRAINS *v.* PEOPLE.

60 NEW YORK, 221. — 1875.

ERROR to review a judgment sustaining a verdict convicting plaintiff in error of assault with intent to kill.

CHURCH, CH. J. — The principal question of law contested on the trial, and elaborately argued in this court is, whether the relation

¹ See also *Goodwin v. Goodwin*, *supra*, p. 8, and *Northern Bank of Kentucky v. Roosa*, *supra*, p. 10. In some of the States terms for years of long duration are under some circumstances or for some purposes regarded as realty. The Massachusetts statute is as follows. "Section 1. When land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and demise thereof upon the decease of the owner, the right of dower therein, the estate in lieu of dower, the sale thereof by executors, administrators, guardians, or trustees, the levying of executions thereon, and the redemption thereof where mortgaged or when taken on execution, and whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder for all purposes." Mass. Pub. Stat. (1882-7), ch. 121. By § 2, *Id.*, in case dower is assigned out of such a term the widow must pay to the owner of the unexpired residue of the term one-third of the rent reserved in the lease under which the husband held the term. — ED.

of master and servant, or landlord and tenant, existed between the prisoner and the prosecutor, Mr. Son, in respect to the house occupied by the former. Although not decisive of the guilt or innocence of the prisoner, the determination of the question had properly a material influence.

If the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose; and that the defendant would not be justified in using force to prevent it. And yet, if the acts of the prosecutor were of such a threatening character, by the use of a pistol or other deadly weapon, that the prisoner believed, and had reason to believe, that his life was in imminent danger, he might be justified in using the necessary means to avert it. On the other hand, if the prisoner was holding the house as a tenant, and had a lawful right to defend his possession, and his property, by the use of proper and necessary means, yet, if the force used was unnecessary or excessive, either in amount or the kind of weapons employed under the circumstances presented, and after making due allowance for provocation and irritation, he might still be amenable to a criminal prosecution.

The court charged the jury that the prisoner occupied the house as a servant, and not as a tenant; and hence that the prosecutor had the legal possession.

The defendant stated the contract to be, that he was to work for Mr. Son a year at thirteen shillings a day, and have the use of the house he lived in and garden for that period. The prosecutor stated it substantially the same. He said: "I made a bargain with him for a year, if he and I could agree, I was to pay him thirteen shillings a day, and he was to have a house furnished him." There was no dispute but that the defendant was to have the house in which he then resided. It does not appear whether the wages were less by reason of furnishing the house, or whether any or what allowance was intended on that account. Nor does it distinctly appear whether a residence in that particular house was necessary to the proper discharge of the duties of the defendant. If the occupation is connected with the service, or if it is required, expressly or impliedly, by the employer for the necessary or better performance of the service, then it is for his benefit, and he continues in possession. Such was clearly the case of *Haywood v. Miller*, 3 Hill, 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *The People v. Annis*, 45 Barb. 304, was substantially the same,

although I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. In order to have that effect the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient, but I can see no principle which would change the occupant *eo instanti*, from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time or consent would be inferred. Whether this time is a day or a week may depend upon circumstances. In *Doyle v. Gibbs*, 6 Lans. 180, the consent of the employer that the employed might remain until his wife recovered from an illness, was held not to amount to a consent.

The circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, is not decisive. The question is, what was the character of the holding under the contract? If that was a tenancy, then the party holding over would be a tenant at will, and the landlord would not be justified in entering with strong hand. So, while a deduction from wages of a specified sum for the use, or the absence of such an arrangement, would be a material circumstance, it would not be in all cases conclusive either way. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. And this, I think, is the result of all the cases. The question has often arisen in England, under the poor laws, to determine what occupation would confer a settlement, the courts recognizing, as controlling the distinction between, an occupation as a tenant or as a servant. *R. v. Minister*, 3 M. & S. 276; *R. v. Kelstern*, 5 Id. 136; *R. v. Chesnut*, 1 B. & A. 473; *R. v. Milkridge*, 1 T. R. 598; *R. v. Langrville*, 10 B. & C. 899; *R. v. Benneworth*, 2 Id. 755. The case of *Hughes v. Chatham*, 5 M. & G. 54, arose under the reform act, requiring a registry of voters, the statute requiring that the person should occupy as owner or tenant. The facts were, that a master rope-maker in a royal dockyard had, as such, a house in the dockyard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. If he had not had it, he would have had an allowance for a house, in addition to his salary. The case was elaborately argued, and thoroughly considered, and it was held, that the rope-maker occupied as a tenant, and not as a servant. Findal, C. J., in delivering the opinion of the court, said: "There is no

inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, or at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration. . . . And, as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong."

I have cited the language of the court, because it lays down concisely the correct rule for determining the question involved in this class of cases. The question in the case before us is presented somewhat differently. Each party relied upon the terms of the contract, with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as a laborer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged; or, in other words, whether it was not occupied as an appendage to the mill, and really for the benefit of the owner; nor was there any evidence of an allowance for rent, but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a servant, and not as a tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employé for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant, but from the facts proved there was no error in holding that he occupied as a servant. Both parties regarded it as a question of law upon sub-

stantially undisputed facts, although there are cases where the character of the holding is so uncertain, from conflicting evidence or inferences which may be drawn, as to render it proper to submit the question to a jury. 3 M. & S. 790.¹ * * *

b. Cases of contracts for "lodgings."

WHITE *v.* MAYNARD.

III MASSACHUSETTS, 250. — 1872.

GRAY, J. — This is an action by the keeper of a boarding house against a lodger for breach of an oral contract, by which the plaintiff agreed to provide the defendant and his family of four persons with board, and with three specified rooms as lodging, in her house, and to light and heat such rooms, from November 26, 1866, to May 1, 1867, at the weekly rate of \$75, and the defendant agreed to board and lodge with the plaintiff accordingly.

The defendant at the trial contended that this agreement was for an interest in or concerning lands, within the statute of frauds, and created no more than an estate at will. Gen. Sts., c. 105, § 1, cl. 4; c. 89, § 2. His omission to plead the statute of frauds, not having been objected to at the trial, when the answer might have been amended, cannot now be availed of by the plaintiff. *Jones v. Sisson*, 6 Gray, 288. But we are of opinion that the ruling of the Superior Court was right, and that the agreement declared on was not for any interest in lands.

The opinions of eminent judges, in cases under English statutes giving the elective franchise to the sole occupiers of houses of a certain value, assume it as unquestionable that a mere lodger in the house of another is not a tenant. In *Fludier v. Lombe*, Cas. Temp. Hardw. 307, Lord Hardwicke held that a man who let rooms to lodgers was still the sole occupier of the house; and said: "A lodger was never considered by any one as an occupier of a house. It is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger." And this definition was cited with approval by Chief Justice Erle in *Cook v. Humber*, 11 C. B. (N. S.) 33, 46. So in *Brewer v. M'Gowen*, L. R. 5 C. P. 239, it was held that the owner or tenant of a dwelling house was not a joint occupier

¹ The judgment below was reversed, however, on account of an error in rejecting certain testimony. — Ed.

with a lodger to whom he let the exclusive use of a bed room and the joint use of a sitting room; and Mr. Justice Willes, after observing that the lodger "clearly was not a joint occupier of the room in which he took his meals," added: "And with respect to the bed room, he clearly had not an occupation as owner or tenant, but only an occupation as lodger."

In like manner, under the English valuation and tax acts, it has been held that, in order to constitute a tenancy, there must be a putting of a lessee into the exclusive occupation of the apartment, and not a mere admission of a common lodger or inmate, the landlord retaining the legal possession of the whole house. *Smith v. St. Michael*, 3 E. & E. 383; *Stamper v. Overseers of Sunderland*, L. R. 3 C. P. 388; *The Queen v. St. George's Union*, L. R. 7 Q. B. 90.

It was decided by Lord Ellenborough, and admitted by Barons Parke and Alderson, that a covenant, in a lease of a coffee-house in London, not to lease or underlet the premises or any part thereof, was not broken by permitting a man to lodge for a year in a particular room, "of which he had exclusive possession," unless under a distinct demise of the room so as to enable him to maintain trespass. *Doe v. Laming*, 4 Camp. 73; *Greenslade v. Tapscott*, 1 C., M. & R. 55; s. c. 4 Tyrwh. 566. An entire floor, or a series of rooms, or even a single room, may doubtless be let for lodgings, so separated from the rest of the house, as to become in fact and in law the separate tenement of the lessee. *Newman v. Anderton*, 2 B. & P. N. R. 224; *Fenn v. Grafton*, 2 Bing. N. C. 617; s. c. 3 Scott, 56; *Monks v. Dykes*, 4 M. & W. 567; *Swain v. Mizner*, 8 Gray, 182. But in such a case, as observed by this court in *Swaine v. Mizner*, he is "a housekeeper, and not a lodger only." In *Monks v. Dykes*, it was held that a lodger, occupying one room in a house, the woman who owned the house residing therein and keeping the key of the outer door, had no such occupation of the room that he could maintain trespass against a stranger intruding into the room; and Baron Parke said: "I think that neither in law nor in common sense can a man be described as being in possession of a dwelling house when he is a mere lodger."

It has indeed been held in two English cases, cited for the defendant, that agreements to take certain apartments in a house as lodgings at a yearly rent were within the statute of frauds. *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 Tyrwh. 293; s. c. 1 C. & J. 391. But there is nothing in either of the reports to show that the rooms were in a boarding house; and, as suggested by the judges in *Wright v. Stavert*, 2 E. & E. 721, each appears to have been a case of an agreement, which, if perfected by entry, would

have amounted to an actual demise, and would have given the occupant all the possessory rights of a tenant.

In *Wright v. Stavert*, on the other hand, it was held that an oral agreement to pay a certain sum yearly for the board and lodging of a gentleman and his servant in a boarding house, terminable by a quarter's notice on either side, was not an agreement for any interest in real estate; and Chief Justice Cockburn said that to hold such a case to be within the statute of frauds would lead to most absurd and inconvenient consequences. The only distinction between that case and the present is that it states one of the terms of the agreement to have been that "the defendant was to have no exclusive right to or interest in any particular rooms, but to be considered simply as a boarder and an inmate."

But in the similar case of *Wilson v. Martin*, 1 Denio, 602, it is implied in the statement of the case, and expressed in the opinion, that the agreement, which was held to create no lease, and no interest in lands, was for the use of particular rooms, as well as for board, in the plaintiff's boarding house; and Mr. Justice Bronson, in delivering judgment, said: "This was nothing more than an agreement for board and lodging, with a designation of the particular rooms which the defendant was to occupy. It was not a contract for the hiring and letting of real estate. When one contracts with the keeper of a hotel or boarding house for rooms and board, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires, he cannot maintain ejectment; and while he remains the hotel keeper cannot get his pay by distraining for rent in arrear."

In the case at bar, the declaration alleged, and the evidence introduced at the trial tended to prove, an ordinary agreement for board and lodging in the plaintiff's boarding house, by which the plaintiff, as keeper of the boarding house, retained the legal possession, custody and care of the whole house and of every room therein. The defendant took, by reason of the fact that the rooms in which he and his family were to lodge were specified in the agreement, no greater legal right in those rooms, than he would, if they had not been so specified, have taken in the house. There was no evidence to warrant the inference of an agreement that the defendant should have any such exclusive possession of the rooms specified as would enable him to maintain any action founded on that possession, either against the plaintiff or against a stranger. The only rights of action between the parties are upon the agreement itself. *Wright*

v. *Stavert*, 2 E. & E. 721, 727; *Underwood v. Burrows*, 7 C. & P. 26; *McCrea v. Marsh*, 12 Gray, 211.

The instructions requested were, therefore, rightly refused, and no exception appears to have been taken to the instructions given.

Exceptions overruled.

c. Cases of cultivating a crop on shares.¹

CASWELL v. DISTRICH.

15 WENDELL (N. Y.), 379. — 1836.

ASSUMPSIT for rent. Plaintiff's testator agreed in writing to let Districh have his farm for one year, the latter to sow oats and give testator one-third in the half bushel, to sow corn and give one-third in the basket, etc., etc. Plaintiff proved quantities of grain sowed and rested. Defendant asked for a non-suit on the ground that the instrument was not a lease but made the parties to it tenants in common of the crop. Non-suit granted. Plaintiff appeals.

By the Court, NELSON, J. — The agreement between the parties was a letting of the premises upon shares, and, technically speaking, was not a lease. 8 Johns. R. 151; 3 Id. 221; 2 Id. 421, n.; 8 Cowen, 220. There is nothing which indicates that the stipulation for a portion of the crops was by way of rent; but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest to the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the tenant until a division. Where a farm is let for a year upon shares, the landlord looks to his interest in the crop as his security, and thereby is enabled to accommodate tenants, who otherwise would not be trusted for the rent.

This case is clearly distinguished from that of *Stewart v. Dougherty*, 9 Johns. R. 108. There the court, from the correspondence between the phraseology of the instrument and the terms usual in leases in the reservation of rent, came to the conclusion that the proportion of the crops specified in the agreement was intended as payment of rent in kind, and that, therefore, the whole interest belonged to the tenant. If my conclusion be correct, then the parties were tenants

¹ In some cases of this kind there is a true lease — rent paid in kind. In some the cropper is a servant — paid in produce; in other cases the parties are tenants in common of the crop. — Ed.

in common in the crops, and as the plaintiff stood in the place of her testator, she was not entitled to sustain her action, and the Common Pleas did right to grant a nonsuit.

Judgment affirmed.

d. Cases of leases in fee reserving a fee-farm rent.

VAN RENSSELAER *v.* HAYS.¹

19 NEW YORK, 68. — 1839.

[Reported herein at p. 81.]

INGERSOLL *v.* SERGEANT.

1 WHARTON (PA.), 336. — 1836.

[Reported herein at p. 86.]

e. Agreement for a lease:

AMES, J., IN KABLEY *v.* WORCESTER GAS LIGHT COMPANY.

102 MASSACHUSETTS, 392. — 1869.

THE question whether a written instrument is a lease, or only an agreement for a lease, depends on the intention of the parties to be collected from the whole instrument. *Bacon v. Bowdoin*, 22 Pick. 401. The form of expression "we agree to rent or lease" is far from being decisive upon this question, and does not necessarily import that a lease is intended to be given at a future day. On the contrary those words may take effect as a present demise, and the words "agree to let," have been held to mean exactly the same thing as the word "let," unless there be something in the instrument to show that a present demise could not have been in contemplation of the parties. *Doe v. Benjamin*, 9 Ad. & El. 644. The test seems to be that if the agreement leaves nothing incomplete it may operate as a present demise. *Doe v. Ries*, 8 Bing. 178. The agreement

¹ "No lease or grant of agricultural lands, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." Const. N. Y., art. I., §. 13. This appears for the first time in the constitution of 1846. As to a lease of such lands for other than agricultural purposes, see *Odell v. Durant*, 62 N. Y. 524. As to what is meant here by "rent," see *Parsell v. Stryker*, 41 N. Y. 480. — ED.

relied upon by the plaintiffs contains no stipulation for a lease at any future time, and there is nothing to show that any more formal document was contemplated. It is not prospective or executory, and it does not indicate that anything remained to be done on the part of the plaintiffs. It gave to the defendants an immediate right of possession. *Staniforth v. Fox*, 7 Bing. 590; *Doe v. Ashburner*, 5 T. R. 163; *Jenkins v. Eldredge*, 3 Story, 325. It creates a term, beginning with the delivery of the instrument, and ending upon the completion of the gas-holder in a reasonable time; and it stipulates for a rent, the amount of which was to be determined by arbitration. So far as the plaintiffs are concerned, it has all the essential qualities of a present demise. The report finds that the agreement which we have considered as effectively a lease, was delivered to the defendants, and was accepted by them. Under such circumstances, their liability to pay rent is not qualified, or taken away, by proof that they never actually occupied the premises. It is enough that they accepted the conveyance, which gave them the right of immediate and exclusive occupation. The law would imply, from such acceptance, a promise to comply with the terms of the lease *Guild v. Leonard*, 18 Pick. 511, 516; *Goodwin v. Gilbert*, 9 Mass. 510; and such a promise is not within the statute of frauds. *Felch v. Taylor*, 13 Pick. 133. Under that implied promise the defendant would be responsible, even though they refuse to take possession of the property. *Taylor, Landl. & Ten.*, § 176. They hold the premises whether they occupy them or not, *Pinero v. Judson*, 6 Bing. 206; and such holding constitutes legal or constructive possession.

f. An interesse termini.

BECAR *v.* FLUES.

64 NEW YORK, 518. — 1876.

CHURCH, CH. J. — From the facts disclosed in this case, the loss occasioned by not renting the premises, by either of the parties, was unnecessary. The evidence tends to establish that the defendant's testator, in February or March, 1874, leased the premises by parol of the plaintiff, by her son, for one year from the first of May thereafter, the testator then being in possession under a prior lease. The testator died in April, and the family not desiring to retain the house, the defendant gave notice that they would not retain it, and on the first of May they abandoned the possession and tendered the key, which was declined. This action is brought for three-quarters' rent.

The defendant proved that the plaintiff might have rented the house for nearly as much as the defendant's testator was to pay for the same. A verdict was directed for the plaintiff. It is claimed by the defendant that between the making of the contract and the time for taking possession, the contract was executory, and that the defendant having refused to perform it, the plaintiff could only recover the actual damages, which, within the general rule, the plaintiff was bound to make as small as possible. 28 N. Y. 72; 43 Id. 237. While the rule of law invoked is well settled, I feel constrained to hold that it is not applicable to this contract. The error is in the position that this was an executory contract. This court decided, in *Young v. Dake*, 5 N. Y. 463,¹ that a parol lease for a year, to commence *in futuro*, is valid and obligatory. Such a lease vests a present interest in the term. It is assignable before entry, and the lessee can bring ejectment if possession is withheld. *Whitney v. Allaire*, 1 N. Y. 307, and authorities cited. The same principle was recognized in *Trull v. Granger*, 8 N. Y. 115. It was there held that although ejectment would lie, the tenant might also bring an action for damages upon the implied agreement to give possession, or in tort for a violation of duty. If the landlord could not rescind, the tenant could not. The rights and liabilities in this respect are mutual. Each party acted upon their strict legal rights, and while the result we can see will operate harshly upon the defendant and the estate, we are compelled to adjudge the law as we find it. When the plaintiff refused to accept this rescission, the defendant still held the term, and was responsible for the rent of the house. The lease, although verbal, is as binding as if in writing. It granted *in præsent*i a term of one year in the premises, which the testator agreed to pay for. It is like the sale of specific personal property to be delivered. In such a case the title passes to the vendee, and, of course, he is liable for the purchase-money. * * *

The judgment must be affirmed.

g. Licenses.²

¹ Reported below at p. 728. — ED.

² See *McCrea v. Marsh*, p. 807, *infra*. — ED.

II. Estates for years or "terms."

I. THE ESSENTIAL FEATURE OF A TERM—CERTAINTY AS TO COMMENCEMENT, DURATION¹ AND TERMINATION.

MURRAY v. CHERRINGTON.

99 MASSACHUSETTS, 229. — 1868.

ACTION to recover possession of a dwelling house. Defendant contends that he holds the premises of right by virtue of a letter addressed to him by plaintiff, of which the material part is as follows: "I hereby let you the whole of my house on Mercer street in South Boston, when said house is suitable to be occupied by you, for a rent of four hundred and eighty dollars per annum, * * * but it is to be understood that, in case after two years subsequent to your moving into said house, I should wish to live in the house myself, I can do so, and that then you may still retain, if you wish to do so [certain rooms] for such a time as may be agreeable to us both." Defendant entered under the letter in Sept., 1866, and continued in possession to the date of the writ, April, 1867. There were also in evidence certain receipts for rent. The court refused to rule that the facts constituted a valid lease for the term of two years and defendant (Cherrington) excepted.

FOSTER, J. — * * * We are also of opinion that the ruling of the presiding judge was correct, that the terms of this letter did not create an estate for years, namely, a lease for two years, between the parties. The duration of a lease for years must be certain; this includes both its commencement and termination. It may be conceded that a lease for years may begin "when a house is suitable to be occupied," according to the maxim, *Id certum est quod certum reddi potest.* But the fatal objection remains that no period of termination is fixed by this letter. A leasehold interest for an uncertain and indefinite term is an estate at will only. Shaw, C. J., in *Cheever v. Pearson*, 16 Pick. 271; *Bishop of Bath's Case*, 6 Co. 35; Bac. Ab. Lease, L. 3. It is indisputable that an entry by the lessee under this instrument would not bind him to remain for any definite period. He could terminate his tenancy in the modes provided by statute; as to him there is no term of certain duration. Consequently, there can be none as to the landlord.

The proviso that after two years from the commencement of the occupancy the landlord may live in the house if he wishes to do so,

¹ For a limitation on the length of a term in certain cases, see n., p. 721, *supra*. — ED.

and that then the tenant may still retain, if he wishes, certain rooms cannot change the construction. This clause has no tendency to show that the tenant was bound to remain during the two years.

Exceptions overruled.¹

a. It is a sale of the land for such fixed period.

FOWLER *v.* BOTT.

6 MASSACHUSETTS, 63. — 1809.

SEWALL, J. — (After stating the plaintiff's demand, the several issues, and the verdict.) By a motion in arrest of judgment, this question, arising upon the defendant's third plea, is to be decided by the court, viz., whether, after a destruction by fire of the buildings demised, the lessors, without rebuilding, can recover their rent.

The supposed hardship of the case has been urged upon the attention of the court, as an argument for the defendants. The answer to this argument is, that a lease for years is a sale of the demised premises for the term; and, unless in the case of an express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents, or any other deterioration. The rent is in effect the price, or purchase money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser.

Independently, however, of the general reasoning, which has been gone into upon this question, the law applicable to the case at bar has been long settled. In the case of *Belfour v. Weston*, cited for the plaintiffs, the same question was made which arises in this case; but the Court of King's Bench refused to hear an argument upon it, being of opinion that the point had clearly been determined by the authorities, and on that occasion Justice Buller refers to the opinion of Lord Mansfield in the case of *Pindar v. Ainsley and Rutter*, where the question occurred in an action of ejectment brought by the tenant, in a lease for years, against the landlord, for the possession of some houses, which, having been burnt down, had been rebuilt by the landlord during the term; but after acts by the tenant, from which abandonment of the lease was to be presumed. Lord

¹ The end as well as the commencement of the term may depend on some event other than the mere lapse of time, in accordance with the maxim cited above. See *Kabley v. Worcester Gaslight Co.*, p. 721, *supra*. But an estate depending on the duration of human life is of course a life estate. — ED.

Mansfield stated, as an established principle of law, that the consequence of the house being burnt down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole of the term.

Nor is it correct to say that, in cases of this nature, the courts of equity in England afford relief. The cases cited in the argument for the defendant, as in point to that purpose, are noticed by Justice Buller in the case of *Doe v. Sandham*; and he speaks of them as decisions on particular circumstances, and not upon any general principle or rule of equity.

Upon the whole, this established rule of law determines the construction and operation of the contract relied on by the plaintiffs in the case at bar. When words of the same import are used, as were employed in the contracts upon which the decisions cited and referred to were made, the intentions of the parties must be understood in conformity to those decisions, even admitting the supposed hardship of the case, or severity of the demand. But even this objection seems inapplicable, when we consider the lease as a bargain and sale for the term at an agreed price. When there is no covenant on the part of the lessor to insure against fire, or any engagement to repair the premises in that event, or any other casualty by which they may be impaired or destroyed, the accident becomes the misfortune of the lessee, and he is not excused from his rent.

Judgment is not arrested, but must be entered according to the verdict.¹

BROWN'S ADMINISTRATORS *v.* BRAGG.

22 INDIANA, 122. — 1864.

WORDEN, J. — On the 1st of April, 1859, Brown let to Bragg certain real estate, to be held by the latter for the term of one year from that date; for which Bragg was to pay, as rent, the sum of \$450, to be paid quarterly, at times specified in the instrument of writing creating the tenancy executed between the parties. On the 1st of December, 1859, a quarter's rent being due and unpaid, Brown served on Bragg a notice to quit the premises at the expiration of ten days, unless the rent in arrear should be paid within that time.

Bragg failing to pay the rent or quit the premises, this action was brought by the representatives of the lessor to recover possession. The suit was brought before the expiration of the term.

¹ See *Graves v. Berdan*, *infra*. — ED.

The court below held on the facts above stated, that the plaintiffs were not entitled to recover, and we think the decision was in accordance with the law of the case.

We suppose that, independently of any statutory provisions, the proposition that the failure to pay the rent due, did not work a forfeiture of the estate of the tenant, is too clear to require the citation of any authorities in its support. In order that a failure to pay rent should work a forfeiture, it should be so expressed in the lease or agreement of the parties, which was not done in the case before us. As well might a man who sells a horse to be paid for in the future, claim to recover him back on failure of the purchaser to pay according to his stipulation, as the lessor of real estate to recover it from his tenant because of his failure to pay rent, there being no stipulation that such failure should work a forfeiture.

But we have the following statutory provision, which is claimed by the appellants to be applicable to the case before us. "If a tenant at will, or from year to year, or for a shorter period, neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, unless such rent shall be paid at the expiration of said ten days." 2 G. & H. P. 359, § 4.

The case before us does not come within any of the clauses of the statute above set out. * * *

The lease in the case before us, created an estate which the law defines to be an estate for years. Such would also have been its character had it been less than a year in duration. "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years." 2 Shars. Blackstone, p. 142. "Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great." 7 Washburn on Real Estate, p. 291.

The defendant being a tenant for years, and not at will, or from year to year, or for a shorter period, it was not competent for the lessor to terminate the tenancy before the expiration of the term, on the ground of failure to pay the stipulated rent.

Judgment below affirmed.

b. The term may be created to commence in futuro.¹

YOUNG v. DAKE.

5 NEW YORK, 463. — 1851.

SUMMARY proceedings brought by landlord to remove a tenant who is alleged to be holding over his term. In Sept., 1848, while the defendant was in possession of the premises under a lease which would expire April 1, 1849, a parol agreement was entered into between the parties that Dake should occupy the store for another year, commencing April 1st, 1849, on the same terms as for the then current year. This proceeding was commenced April 3, 1849. Judgment for defendant below. The judgment was sustained on *certiorari* to the Supreme Court. Plaintiff appeals.

MCCOUN, J. — The importance of this case is owing chiefly to the fact that the judgment of the Supreme Court in the fourth district, on the opinion of Mr. J. Paige, which is appealed from, and a judgment in the fifth district in *Croswell v. Crane*, 7 Barb. 192, on the opinion of Allen, J., upon precisely the same question, are directly in conflict with each other. That question is simply this, whether a parol agreement to let, or demise, a house or other real estate, for the term of one year, to commence in futuro, is valid in law?

There are two sections of our present statute concerning "fraudulent conveyances and contracts relative to lands," which bear upon the question, and by which it must be determined. These are sections 6 and 8, 2 R. S. 134.² The first of these sections relates to the manner of creating an estate or interest in land, and of assigning it, etc. The other prescribes the requisites of a valid contract for the sale of lands; and both, by way of exception, leave "leases for a period not exceeding one year," and "contracts for the leasing for a period not longer than 'one year,'" unaffected by the formalities and requisites therein prescribed.

It follows, therefore, that a lease "for a term not exceeding 'one year,'" and a contract for "a lease or letting for a period 'not longer than one year'" are valid, though made by parol; but the question is whether the lease or contract, in order to be thus valid, must be confined to one year from the time of granting, or entering into it. The statute does not say so. There is no word or expression which would seem to attach any such qualification or condition to a parol

¹ For the nature of the lessee's interest in such case before the term actually begins, see *Becar v. Flues*, *supra*, p. 722. — Ed.

² §§ 207 and 224 N. Y. R. P. L. — Ed.

lease, or contract of letting for a year, as that it shall commence immediately, and cannot be made to commence at some future day. The appellant nevertheless insists, and the reasoning of the court in *Croswell v. Crane* is to the same effect, that the words "from the making thereof" are to be supplied, so that these sections of the Revised Statutes must be understood as having the same qualification in that respect which existed in the old statute, allowing parol leases and parol contracts for leases not exceeding three years.

It appears that the revisors did not purpose to make any alteration of the old law in respect to leases, and contracts for leases by parol, but prepared the sections limiting their term or duration to three years "from the making thereof," as in the then existing statute; and in that form and with a view to a re-enactment, submitted the sections 6 and 8 to the Legislature. The appellant's counsel supposes that Mr. Justice Paige was mistaken in saying that the Legislature struck out the words "from the making thereof," whereas those words were dropped or stricken out by the revisors. The counsel has been misled on this subject. The revisors' original reports, as printed for the use of the Legislature, show that they prepared the 6th section for adoption, allowing of parol leases for three years, with the explanatory words, "from the making thereof." Whatever alteration it underwent, therefore, was an alteration by way of amendment in the Legislature. The term of three years, as proposed, was reduced in the enactment to one year, and the words "from the making thereof" were entirely omitted.

Now, who can say, or can have a right to say, that when those alterations and amendments were made in the law, the Legislature did not intend to dispense entirely with the qualification which the latter words would seem to import?

It appears to me a much more rational supposition, that the Legislature did so intend, than that they did not, for if the object had been merely to substitute one year for three years, and to make no other alteration in the principle of the law, they would have permitted the other words to remain. Those words were there already, and they were just as appropriate to the term of one year as to three years. They were not the less required to explain and limit the commencement of the term and duration of the lease in the one case, than in the other, provided it was the intention that contracting parties should still regard it as the law, that their verbal contracts and leases for a year must not be made to commence on a future or subsequent day. Omitting to re-enact those words when the term of a verbal lease was reduced to one year, shows, I think, very conclusively, a design to take off the restrictions they were calculated to

impose, as not being necessary when the letting should be but for a single year.

The section of the statute now under consideration appears to me not to come within the rule of construction adverted to in *Croswell v. Crane*, that a mere change of phraseology in the revision of statutes does not work a change in the law, because I think the intention of the Legislature in this instance to change the law, is too apparent to admit of any doubt, from the circumstances I have mentioned. 2 Hill, 380; 6 Hill, 574.

The statute then threw no obstacle in the way of a parol lease, or of an agreement for a letting for a year, to commence *in futuro*; and there is nothing in the common law to prevent it. From the making of a contract or lease to take effect afterwards, a present interest vests — an *interesse termini* — though not an interest in possession, until the lessee enters upon the possession. 2 Preston's Shep. Touch. 267, 241; 1 Comstock's R. 311.

The time between the making of the lease and its commencement in possession, is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself by virtue of the lease from the time it vests in possession. When, therefore, our statute speaks of a lease for a term not exceeding one year, and of a contract for a lease for a period not longer than one year, it has reference to the time for the tenant to possess and occupy the premises, and does not include any previous or intermediate time. A lease, therefore, for the term of one year, may as well be made to commence at a future day, as at the day of making it. If it should not expire until two years from the time it was made, it might still be a lease only for one year.

Another point has been presented by the appellant, viz., that there was an agreement, not in writing, which, by its terms, was not to be performed within a year from the making thereof, and therefore it was void. 2 R. S. 135, § 2, sub. 1.¹

The agreement in question took place on the 11th Sept., 1848, by which the defendant was to hold and occupy the premises for a year, to commence on the 1st April, 1849.

In *Croswell v. Crane*, the court appears to have considered that the above provision of the statute also applied to such cases, and was fatal to this agreement.

That provision of the statute is a part of the title II of the statute

¹ These provisions are now in § 21 of the New York Personal Property Law, Laws of 1897, ch. 417. — ED.

to prevent frauds in conveyances and contracts; and the whole of that title and all its provisions has reference only to "fraudulent conveyances, and contracts relative to 'goods, chattels, and things in action.'" It is very obvious that none of its provisions have any application to, or effect upon, contracts or agreements concerning lands, or interest in lands. The first title of the statute performs that office. The second title applies to contracts and transactions affecting personal property only. The learned court of the fifth district must have overlooked this fact, when that part of the opinion was adopted, which supposes that the agreement or lease in question came within its provisions.

Judgment affirmed.

c. The term may be subject to a condition subsequent or to a limitation express or implied.¹

JACKSON EX DEM. WELDON *v.* HARRISON.

17 JOHNSON (N. Y.), 66. — 1819.

EJECTMENT to recover leased premises on the ground that the lessee has broken certain conditions contained in the lease. Verdict for plaintiff, subject to the opinion of this court.

VAN NESS, J., delivered the opinion of the court. — The stipulation in the concluding part of the lease, prohibiting the lessee from making alterations in the buildings, rests in covenant merely, and is not made a condition for the breach of which the estate is forfeited. Nor can the lessor of the plaintiff avoid the lease because one of the buildings was underlet.

The condition in the lease is, that the lessee shall not "assign over, or otherwise part with, this indenture, or the premises thereby leased, or any part thereof, to any person," etc. These words must be construed to mean an assignment of the premises, or part of them, for the whole term; and no forfeiture is incurred by letting for a shorter period; under-leases not being considered as coming within the terms of the condition, or proviso. This principle was fully settled, in the case of *Crusoe ex. dem. Blencowe v. Bugby*, 3 Wils. 234, and has been repeatedly sanctioned since and applied to conditions expressed in stronger terms than in the present case. A lease may

¹ A lease made by a life tenant is subject to such implied limitation. In some states the devisee of a life interest may (by the will) be given power to make leases which shall extend beyond his own life. See N. Y. R. P. L., §§ 123, 135. — Ed.

be so expressed as to produce a forfeiture for underletting, as well as for assigning the whole term; but this is not the language of the lease in question.

The plaintiff equally fails in showing a right of re-entry, by reason that the defendant did not pay the United States tax, because, the indispensably necessary step of making a demand of the defendant, within the period required by law, in order to create a forfeiture, was not taken.

It remains to be considered, whether the plaintiff is entitled to recover, on the ground that a forfeiture has been incurred by the nonpayment of the rent. This is a proceeding at common law, and the claim of the plaintiff being *stricti juris*, all the niceties required by the common law must be previously complied with, to entitle the reversioner to re-enter. There must be a demand of the rent due on the last day, a convenient time before sunset; and, if there be a house on the land, the demand must be made at the house of the tenant, if he is at home. Several other things are required to be done, which it is not necessary to detail for the purpose of deciding this case.¹ Co. Litt. 201 b, 202 a; 1 Saund. 287 n 16 and the cases there cited. On the 1st and 20th of November, 1817, Reid, the agent of the lessor of the plaintiff, went to the house of the defendant, the lessee, in the afternoon, and demanded payment of the quarter's rent then due; but the defendant answered, "he could not pay." A similar demand was made by the agent, on the 1st and 20th of February, in the same year, of the quarter's rent then due, and the defendant promised to pay it, but did not. The question is, whether or not, under these circumstances, the right to re-enter accrued.² I think it did not. The agent says he made the demand "in the afternoon;" now, this may have been immediately after 12 o'clock, and a demand at so early an hour would not be good. "The last time of demand of the rent," says Lord Coke, "is such a convenient time before the sun-setting of the last day of payment, as the money may be numbered and received." And it is laid down by Hale, Ch. B., that the time of sunset is the time appointed by law to demand rents; *Duppa v. Mayo*, 1 Saund. 287, and though this is probably not literally correct, yet it serves to show that the demand necessary to be made, to create a forfeiture, must be immediately preceding sunset, so that the money may be counted, and the necessary receipt or acquittance given, while there is light enough reasonably to do so. This may appear to be unnecessarily rigorous, and a sacrifice of substance to form; but when it is considered that the

¹ See *Smith v. Whitbeck*, 13 Oh. St. 471. — ED.

² A right of re-entry for non-payment of rent was reserved in the lease. — ED.

consequence of a proceeding of this kind, is the forfeiture of the tenant's whole interest under the lease, every necessary form which the law has prescribed must be most scrupulously observed. "The court have always looked nearly into these conditions, covenants, or provisos." *Crusoe v. Bugby*, 3 Wils. 234. It was incumbent on the plaintiff to have shown during what part of the afternoon the demand was made, and that it was towards sunset, or late in the afternoon. The defendant, in a case of this description, had a right to remain passive, and to avail himself of any defect of proof on the other side, necessary to establish his right to recover. This point being decisive, the other objections to the plaintiff's right to recover need not be noticed. The defendant is entitled to judgment.

Judgment for the defendant.

d. The term may end (before the time fixed) by forfeiture, surrender, merger, or the exercise of the power of eminent domain.

JACKSON EX DEM. WELDON *v.* HARRISON.

17 JOHNSON (N. Y.), 66. — 1819.

[*Reported herein at p. 731.*]

LOUGHRAN *v.* ROSS.

15 NEW YORK, 792. — 1871.

[*Reported herein at p. 325.*]¹

e. Effect of destruction of the premises in whole or part.

GRAVES *v.* BERDAN.

26 NEW YORK, 498. — 1863.

ROSEKRANS, J. — The opinion delivered by Justice Emott in this case, in the Supreme Court, is a correct exposition of the law applicable to it, and for the reasons stated therein, the judgment should be affirmed. The case of *Stockwell v. Hunter*, 11 Metc. 448, may be added to the authorities cited by Justice Emott to show that a lease of basement rooms or chambers, in a building of several stories in

¹ For a case of merger of a term in the fee, see *Carroll v. Ballance*, 26 Ill. 9, and compare *Boykin v. Ancrum*, p. 615, *supra*. — ED.

height, without any stipulation, by the lessor or lessee, for rebuilding, in case of fire or other casualties, gives the lessee no interest in the land upon which the building stands, and that if the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil and rebuild upon the ruins of the former edifice.

It may be added that at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. In Rolle's Abridgment, 236, it is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned for, though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term. Com. Land. and Ten. 218; Gilb. on Rents, 182.

Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood, beneficially, to some extent, without the building, or he may rebuild the edifice; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachments of the sea, mentioned in Rolle's Abridgment; and the established rule for the abatement or apportionment of the rent, should be applied in the former as well as in the latter case. The same reason exists for its application in both cases.

But even if the lessee's interest in the demised apartment, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessor could recover rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment. The rule seems to be

settled in England, that where a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story. *Humphrey v. Brogden*, 12 Q. B. 739; s. c. 1 Eng. Law and Eq. 241; *Rowbotham v. Wilson*, 36 Id. 236; *Harris v. Roberts*, 6 El. & Br. 643; s. c. 7 Id. 625. In the case last cited the duty of such support is recognized as a general common law right. In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment. It has been decided in this court that the statute forbidding the implication of covenants in conveyances of real estate, does not apply to leases for years. *Mayor of New York v. Maybee*, 3 Kern. 151; *Vernam v. Smith*, 15 N. Y. 332, 333.

The judgment should be affirmed.¹

FOWLER v. BOTT.

6 MASSACHUSETTS, 63. — 1809.

[Reported herein at p. 725.]

f. Holding over the term.

(1.) WHEN TENANT WILL BE HELD FOR ANOTHER YEAR.

HAYNES v. ALDRICH.

133 NEW YORK, 287. — 1892.

FINCH, J. — Judgment was ordered against the defendant upon the trial of this action for rent accrued after the expiration of her original lease, upon the ground that by holding over after such expiration, she became a tenant for another year upon the terms of the prior written lease. The facts disclosed were that such lease ended by its terms on May 1, 1889; that it contained a provision that the premises should be occupied as a private dwelling, and a covenant not to sublet without the written consent of the lessor. Both

¹ But see the dissenting opinion by WRIGHT, J., and the case of *Helburn & Co. v. Mofford*, 7 Bush. (Ky.) 169. See also § 197, N. Y. R. P. L. — ED.

stipulations were violated. The tenant, without permission, rented the premises to Mrs. Coventry, who occupied them as a boarding house, and received, as one of her boarders, a lady who was a chronic invalid and continuously ill. On the 4th of February, 1889, the lessor inquired of the lessee whether she desired to renew her lease for another year, and was informed that she did not. The first day of May was a holiday, and possibly the tenant had until noon of the next day for a surrender of possession. But the possession was retained by the tenant until the afternoon of May 4th, when the keys were tendered, but refused. The excuse given is that on the second day of May, there was difficulty in engaging trucks; that the removal began on the third, but the sick boarder could not then be moved with safety, and was not moved until the fourth.

This court held in *Commissioners of Pilots v. Clark*, 33 N. Y. 251, that the rule is too well settled to be disputed that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord and not with the tenant, and that the latter holds over his term at his peril. In *Conway v. Starkweather*, 1 Den. 114, the tenant had notified the landlord of his intention not to remain for another year, as was the fact in the present case, but, nevertheless, did hold over for a fortnight, and the fact of the notice was held to be immaterial, the court saying, "the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant, and it is not in his power to throw off that character, however onerous it may be."

The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily and for his own convenience that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant. The cases cited by the appellant do not bear out his contention. In *Smith v. Allt*, 7 Daly, 492, the holding over was in part the act and assent of the landlord and occasioned by pending negotiations, and could not have been said to be the sole act of the tenant. In *Shanahan v. Shanahan*, 53 J. & S. 344, it appeared that the first of May was Sunday, that the tenant began to move on the afternoon of the second, that the removal continued

during the third, and for that reason the tenant was held liable. The courts did interject the remark that there was no unavoidable delay in moving, but without seeking to change or modify the rule. In *McCabe v. Evers*, decided in 1890 in the New York City Court, it appeared that the tenant moved out on the first of May, but left behind him an old stove and some rubbish, and tendered the key on the second of May. The court held that the evidence of a holding over was inconclusive and ambiguous, and the question should have been submitted to the jury. In *Maney v. Clemens*, decided by the same court, the term expired on February second, at noon; the tenant began his removal in the morning and worked till midnight. There was a verdict against the landlord which the court refused to set aside.

These cases, even if regarded in all respects as correctly decided, fall very far short of establishing the appellant's doctrine or justifying a reversal in the present case. There is no question here about the fact of a holding over, and no question, therefore, in that regard for the solution of a jury. The tenant remained in possession voluntarily, for her own convenience and that of her sick boarder. If it was unsafe to remove the latter, the situation was wholly the fault of the tenant, who sets up as an excuse for one violation of the lessor's rights the consequences of her own earlier violation of the terms of the lease. No impossibility of removal was shown, merely difficulty and inconvenience, which should have been and might have been foreseen and provided against. If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine and tend to involve the rights of both lessor and lessee in uncertainty and confusion.

I do not mean to say that whether there has been a holding over at all may not sometimes be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question also, whether there might not be an unavoidable delay, in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act.

It is claimed, however, that the further question whether the lessor exercised the permitted option or took possession in her own right, should have been submitted to the jury. I think the facts admit of but one inference. The lessor did exercise her option, and that

promptly and clearly. When the keys were tendered to her mother they were refused. In the afternoon of May fourth the lessor went to the house to see what was occurring. She found it deserted and the windows open. Her property needed protection. Under the lease she had a right to enter and relet it as the agent of the tenant. A policeman entered through the open window. Some keys were found on the mantel and thereafter used, but evidently not all, for others were restored much later. The premises were somewhat damaged and the lessor had a little painting and some plumbing done, amounting only to ordinary and needed repairs. She tried to rent the house but failed, and went to Europe during the summer, and occupied the house in the fall under a stipulation which expressly reserved her existing rights. Upon these facts no inference was justified, except that drawn by the court. There was a clear refusal to accept the surrender offered and the repairs were consistent with that position and with the right reserved in the lease.

We think the judgment was correct and should be affirmed, with costs.¹

(2.) WHEN HE MAY CLAIM TO BE A TENANT AT SUFFERANCE.

SMITH *v.* LITTLEFIELD.

51 NEW YORK, 539. — 1873.

EJECTMENT. Defense, that defendant was in possession under a lease. Judgment below for plaintiff. Defendant appeals.

EARL, C. — The defendant hired the premises in question for one year, ending on the eighteenth day of April, 1865. He held over until the nineteenth day of June, without the consent of the plaintiff, when this action was commenced. The plaintiff had served no notice to quit, and the sole question for our consideration is, whether such a notice was necessary. At common law, a tenant who held over after the expiration of his term became a tenant by sufferance. He had only a naked possession, and no estate which he could transfer or transmit. He stood in no privity to his landlord, was not liable to pay any rent and was not entitled to any notice to quit. He held by the laches of the landlord, who could enter and put an end to the tenancy when he pleased. 4 Kent's Com. 118. This is still the law, except as modified by the statute. At common law, when by the terms of the lease the tenancy terminated at a day certain, the landlord could always commence his action of ejectment

¹ See also *Schuyler v. Smith*, 51 N. Y. 309. — Ed.

to recover possession of his land, after the expiration of the lease, without any notice to quit; and this he could do, although the tenant became a tenant by sufferance by holding over the term without his permission. It was only in a tenancy from year to year, the termination of which was uncertain, that the tenant was entitled to notice to quit. The object of the notice was to give him information when the lease would terminate. In the former case such notice was contained in the lease itself, and in such case I cannot discover that it was ever made the subject of complaint that the tenant could be removed without notice. If within the meaning of our statutes (1 R. S. 745, 746)¹ every tenant holding over his term for the briefest period is to be deemed a tenant by sufferance, and thus entitled to one month's notice to quit, then every lease for one year will be, at the will of the tenant, practically extended to a lease for thirteen months, as no proceedings can be instituted for his removal until the expiration of the month's notice. It cannot be conceived that the Legislature, in a case where the parties have in the lease fixed a day certain for the termination of the tenancy, intended that the tenant may, by his own wrong, extend his holding for another month; and a construction leading to such a result should not be tolerated if it can be avoided. The first statute in this State, for the summary removal of a tenant holding over his term, was passed April 13, 1820, and in that statute it was provided that "if any tenant or lessee at will or at sufferance or for part of a year, or for one or more years, or from year to year, hold over and continue in possession of the leased premises after the expiration of his term without the permission of his landlord," he may be removed in the mode prescribed in the act, provided that, "in case of a tenancy at will or sufferance, the landlord or lessor shall give three months' notice in writing to the tenant," etc. Under this statute the construction contended for by the plaintiff in this case would have prevented any procedure by the landlord, in the case of a lease for one year, until the expiration of fifteen months. It is quite clear that the tenancy at sufferance mentioned in this act which required the notice was not one created by simply holding over a definite term for a brief period without the permission of the landlord. This statute was substantially re-enacted in the Revised Statutes (2 R. S. 513),² and they authorize the same summary proceeding where the tenant "shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the per-

¹ § 198, N. Y. R. P. L. — Ed.

² §§ 2231-2265, N. Y. Code Civ. Pro. — Ed.

mission of the landlord." This authorizes, and has always been understood to authorize, the proceeding without previous notice in all cases where the tenant holds over a definite term without the permission of his landlord, notwithstanding § 31, which requires that before the magistrate shall issue the summons in the case of a tenancy at will, or at sufferance, he shall be satisfied "that such tenancy has been terminated by giving notice in the manner prescribed by law," and the notice required is one month. 1 R. S. 745. Why terminate the tenancy by notice when its termination is definitely fixed by the terms of the lease? Was it the intention of the Legislature that, in the case of a tenancy for one year, the tenant could wrongfully hold over for fifteen, twenty or thirty days without the permission of his landlord, and then, by his own wrong, entitle himself to one month's notice before he could be removed, or even proceedings instituted to remove him?

The notice is clearly necessary only in case there is such a tenancy at will or by sufferance as needs to be terminated. Such a tenancy is not created within the meaning of the statute by the tenant simply holding over his term without the assent of his landlord. To entitle the tenant who holds over a definite term to notice, the holding over must be continued for such a length of time after the expiration of the term, and under such circumstances as to authorize the implication of assent on the part of the landlord to such continuance. In such case the tenancy existing by the implied assent of the landlord ought to be terminated before the tenant can be removed, and in such case the tenant is a tenant by sufferance within the meaning of the statute and cannot be removed by summary proceedings or action of ejectment without the previous notice to quit. The construction I have thus given to these statutes is the one generally, if not universally, prevailing in practice, and while I have found no controlling decision directly in point, it is sanctioned by the opinions of learned judges. It is sustained by the opinion of Ch. J. Savage in *Rowan v. Lytle*, 11 Wend. 617, and by the judges who wrote opinions in the following cases: *Allen v. Jaquish*, 21 Wend. 631; *Garner v. Hannah*, 6 Duer, 270; *Livingston v. Tanner*, 12 Barb. 484.

I, therefore, reach the conclusion that the judgment should be affirmed with costs.

2. CREATION OF THE TERM.¹a. *By deed or other writing or by parol.*²BRADLEY, J., IN TALAMO *v.* SPITZMILLER.

120 NEW YORK, 37. — 1890.

THE plaintiff not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year not in writing was void. 2 R. S. 135, §§ 6, 8.³ The agreement between the parties and under which the plaintiff entered into joint occupancy with the defendant being void, gave to the plaintiff no right and imposed upon the defendant no obligation to permit him to go into or remain in possession of any portion of the house, and unless he became a yearly tenant, his liability was for use and occupation for the time only which he occupied. *Thomas v. Nelson*, 69 N. Y. 118.

The mere fact that a person goes into possession under a lease void because for a longer term than one year, does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year. And the terms of the lease, void as to the duration of term, would control in respect to the rent. *Coudert v. Cohn*, 118 N. Y. 309. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession, have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred, something which tends to show that it is within the inten-

¹ This may be by devise or by an agreement *inter partes*. Probably the only case of a term arising by operation of law is the widow's quarantine. § 184, N. Y. R. P. L., and similar statutes. — Ed.

² Technical words to create a lease are, demise, lease, to farm let, but "whatever words are sufficient to explain the intent of the parties that the one should divest himself of the property and the other come into it for a determinate time, whether they run in the form of a license, covenant or agreement, will, in construction of law, amount to a lease as effectually as if the most proper and pertinent words were made use of for that purpose." *Watson v. O'Herne*, 6 Watts (Pa.), 362, 368. — Ed.

³ § 207, N. Y. R. P. L. In many of the States a parol lease is valid if not made for a longer term than three years. — Ed.

tion of the parties. The payment and receipt of an instalment or aliquot part of the annual rent, is evidence of such understanding, and goes in support of a yearly tenancy, and without explanation to the contrary, it is controlling evidence for that purpose. *Cox v. Bent*, 5 Bing. 185; *Bishop v. Howard*, 2 Barn. & C. 100; *Braythwayte v. Hitchcock*, 10 M. & W. 494; *Mann v. Lovejoy*, Ryan & M. 355; *Thomas v. Packer*, 1 Hurl. & N. 672; *Doe v. Crago*, 6 C. B. 90.

While there may appear to have been some confusion in the cases in this State upon the subject, this doctrine has been more recently recognized *Reeder v. Sayer*, 70 N. Y. 184; *Laughran v. Smith*, 75 Id. 209.

In the cases last cited the tenants had been in possession more than a year when the question arose, but having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and when once created could be terminated by neither party, without the consent of the other, only at the end of the year. The contention, therefore, that by force of the original agreement between the parties, aided by the fact that the plaintiff went into the possession with the consent of the defendant, a tenancy from year to year was created is not so, and this is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises, which charged him with liability other than for use and occupation, during the time he remained in possession. The defendant's counsel, to support his proposition that the entry by the plaintiff with the consent of the defendant made him a yearly tenant, cites *Craske v. C. U. P. Co.*, 17 Hun, 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year."

If that was intended by the learned justice as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in *Laughran v. Smith*, *supra*. That remark in the *Craske Case* was not essential to the determination there made, as rent was in fact paid for a portion of the term, nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named, and that when he goes into pos-

session under it with the consent of the lessor, without any further agreement, he is tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. *Barlow v. Wainwright*, 22 Vt. 88. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay and a purpose manifested to accept a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise to the plaintiff to pay one-half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years and pay one-half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the defendant. *Woodfall's Landl. & Ten.* (1st Am. ed. from 13th Eng. ed.) 221.

3. ALIENATION OF THE TERM.

a. Assignment or subletting.

COLLINS v. HASBROUCK.

56 NEW YORK, 157. — 1874.

FOLGER, J. — This is an action of ejectment, brought by a landlord against an under-tenant. When the action was commenced, the term created by the original lease, had not expired by the lapse of time. It is claimed, however, that there had been a forfeiture of the lease, by a breach by the lessees, of their covenant not to sublet. That covenant is, that they will not sublet, without the written consent of the lessor. It is followed by the condition, that in case of a violation or breach thereof, the lease shall terminate, at the option of the lessor.

The first question is, did the lessees sublet the premises, without the written consent of the lessor. They executed an instrument to Brower, by which they gave him a right in the premises, for two years and seven months, and a privilege for four years longer by his giving two months' notice. The defendant contends that this is not a sublease, but that it is an assignment of the lease to them, or of their term. It is said, that when a lessee conveys his whole estate to an alienee, the conveyance amounts to, and is called, an assignment; and that the distinction between an assignment and a lease

depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. An assignment creates no new estate, but transfers an existing estate into new hands; an under-lease creates a perfectly new estate. Comyn on Land. and Ten. 51, 52. In this case, these general principles will not entirely satisfy; and we must learn how they have been applied in particular instances. We find that though a lessee make an instrument, which by its terms conveys the whole of his interest in the premises, if he reserve to himself a reversion of some portion of the term, it is an under-lease, and not an assignment. Archbold on Land. & Ten. 10. It has accordingly been held, that though the instrument dispose of the whole unexpired term, if it contain a covenant to surrender the premises on the last day of the term it is an under-lease and not an assignment. *Post v. Kearney*, 2 N. Y. 394. And again, if there be a right reserved to the lessor to re-enter on breach of conditions, this makes a sublease. *Doe ex. dem. v. Bateman*, 2 Barn. & Ald. 168. So it has been held that a reservation of a new rent makes the instrument a sublease. *Piggot v. Mason*, 1 Paige, 412. Undoubtedly, the chief of these is the reversion of some portion of the term. See Platt on Lease, 1 vol. p. 10 *et seq.* Therefore, though the instrument executed to Brower does, in the term of two years and seven months demised, and in the privilege for the further term of four years, cover the whole unexpired term demised by the plaintiff to the Bronners; yet it is a sublease and not an assignment. It is in the form of a lease; it reserves to the Bronners rent at a new rate and at a new time of payment; it stipulates for a right of re-entry on nonpayment of rent, and on the breach of certain conditions contained in it; it provides for a surrender of the premises to them on the expiration of the term. Thus the Bronners did not part with their whole interest in the premises and in the lease thereof to them.

• The case of *Bedford v. Terhune*, 30 N. Y. 453, cited by defendant, does not conflict with these views. There no agreement to under-let was proven, nor any fact from which an under-letting could be fairly inferred. The court recognized the general rule, that a transfer of the whole unexpired term is an assignment thereof and not an under-letting, and it declined to presume from the facts proved, that there was what would have worked a forfeiture; but held, in the absence of evidence of the bargain between the lessees and their assigns, that the presumption was, that the latter took the whole unexpired term.

Having shown that the Bronners did sublet the premises, it is plain that it was without the written consent of the lessor. * * *

Judgment reversed.

PECK *v.* INGERSOLL.

7 NEW YORK, 528. — 1852.

ACTION for rent. Plaintiffs were lessees of Mrs. Dunscombe, under certain conditions stated in the opinion, and had sublet a portion of the premises to defendants. Defendants were allowed, under objection and exception, to prove that they had paid the rent claimed by plaintiff to Mrs. Dunscombe on account of the rent reserved under the original lease. Judgment for defendants. Plaintiffs appeal.

GARDINER, J. — The original lease between Mrs. Dunscombe and the plaintiffs contained a covenant of re-entry on the nonpayment of rent by the lessees for ten days after it fell due. The jury have found that the ground rent due to Mrs. Dunscombe has been paid by the defendants, the lessees' tenants; and the only question of any importance, is whether they were justified in making such payment and entitled to have the amount applied in discharge of their rent due the plaintiffs.

It has been frequently decided upon the most obvious principles of justice that if an under-tenant is compelled to pay rent to the head landlord he may deduct it from the rent due to his immediate lessor; or if the sum paid exceeds that due the lessee the tenant may in an action of assumpsit for money paid to the use of the lessor, recover the excess. 1 Smith's Leading Cases, 4 Am. ed. 202, 3 and 4 marg., pages 73, 4, 5, and cases there cited; 4 Term, 511. This privilege upon the part of the under-tenant exists, if there be in the head landlord a legal right by the exercise of which the person who pays may be damnified unless he satisfies it. 1 Leading Cases, 203. It is not necessary that the head landlord should distrain or even demand the money or commence or threaten a suit. The right to enforce his claim in this way will make the payment by the under-tenant compulsory within the principle of the decisions.

In this case the original lessor had, as we have seen, the right of re-entry. The under-tenant was authorized to protect his possession against the exercise of this right by paying the rent to the head landlord. Such a payment is not voluntary, and there is no question but that it was made by the defendants in good faith with an honest purpose to shield themselves from damage. I think the judgment of the common pleas should be affirmed.

Judgment affirmed.

SANDERS v. PARTRIDGE.

108 MASSACHUSETTS, 556. — 1871.

ACTION on contract to recover rent. The original lessees, Jackson and Muzzey, sublet the premises and afterwards transferred the lease itself to Partridge by a writing endorsed thereon, but not under seal. Partridge received the rent paid by the under-tenants. Other facts appear in the opinion. The case was reserved for the opinion of this court.

WELLS, J: — To maintain an action for rent requires privity of contract or privity of estate. Either will suffice, if rent is due.

When a lease is assigned, and the assignee enters under it, he becomes tenant of the lessor; he is bound by all the covenants of the lease which are not personal to the lessee, and he is liable to the lessor for all the rents which accrue while he holds the estate. If there is no express covenant for the payment of rent contained in the lease, then the covenant implied from the reservation of the rent binds the lessee, and "runs with the land" so as to bind the assignee also. *Patten v. Deshon*, 1 Gray, 325; *Blake v. Sanderson*, 1 Gray, 332; *Croade v. Ingraham*, 13 Pick. 33; *Waldo v. Hall*, 14 Mass. 486; *Smith, Landl. & Ten.* 287; 1 Washb. Real Prop. 326; 4 Blytherwood's Conveyancing, 388.

In the present case, the defendant entered into the enjoyment and control of the leased premises, under what purported to be an assignment of the lease. If that transaction operated in any manner to transfer to the defendant the entire leasehold estate, then he was in as assignee, and may be held by the lessor for the rent which fell due while he so held the estate.

The defendant insists that the lease, being under seal, could be assigned only by an instrument under seal. This rule, applied to an assignment of the instrument itself, as a contract, is well settled at law. *Wood v. Partridge*, 11 Mass. 488; *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371. If, therefore, a leasehold estate can be transferred only as an assignment of the instrument by which it was created, this objection must be held to be decisive.

But we do not so understand the law. A lease, by whatever form or instrument it is made, conveys to the lessee an estate or interest in the land. He may in turn convey to another any subordinate interest, or his entire estate, in any appropriate form, without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise; by sale on execution as a chattel (Gen. Sts. c. 133, § 49); or sale by an administrator as personal

assets. In all these cases the purchaser becomes bound to the lessor to pay the rent and perform the covenants that run with the land, because the law imposes that obligation upon him by reason of his succession to the estate of the lessee. The same result follows from any transfer by the lessee of his entire estate. A seal is not essential to such transfer, even of a lease for more than seven years. No written instrument is necessary, except to satisfy the statute of frauds. Gen. Sts. c. 89, § 2. Even if the provisions of § 3 are applicable to the assignment of a lease, as well as to the creation of an estate by lease, a seal is only required to give it effect against parties other than the assignor, his heirs and devisees, and persons having actual notice thereof. The defendant cannot set it aside for the want of a seal.

The real question, then, is whether this instrument is sufficient to satisfy the statute of frauds, as an assignment of an estate or interest in land.

It is endorsed upon and refers to the original lease; and the lease was delivered with it to the assignee. The description of the premises, the terms upon which they are to be held, and the intent to convey the estate are thus all made to appear by the writing. "All our right, title and interest in and to the within lease" includes whatever leasehold estate the assignor might hold by virtue of that lease. If a seal had been attached, there would be no question of its operation to convey the estate of the assignor in the land described in the instrument referred to. *Patten v. Deshon*, 1 Gray, 325; *Blake v. Sanderson*, Ib. 332.

So far as it affects the sufficiency of the writing, under the statute of frauds, we do not see that it makes any difference that the instrument referred to is under seal, while the transfer is not. The reference is not merely to the instrument itself as the subject-matter of the assignment, but also to its contents as defining the subject-matter upon which the assignment is intended to operate.

We are of the opinion that the writing relied on as an assignment in this case was sufficient to satisfy the statute of frauds; and that between the parties a seal was not rendered necessary to its operation as an assignment either by reason of the length of the term, or from the fact that the assignor acquired his title by a lease under seal. Tayl. Landl. & Ten. § 427, and cases cited in notes.

It is not necessary that the defendant should execute any writing, or make any express agreement. His obligation is implied by law from his acceptance of the assignment, and his entering upon the enjoyment of the estate.

The report states such an acceptance and entry by the defendant.

His employment of the former agent of his assignor to collect the rents for him was a sufficient entry. He is liable, then, for the rent which fell due July 1, 1870, for the preceding quarter, unless he had before that time ceased to hold the relation of tenant, or assignee of the lease. The liability of an assignee, upon covenants running with the land, extends only to such as are required to be performed while he holds that relation. *Patten v. Deshon*, 1 Gray, 325. It is stated in the report that "on or about May 18, 1870, the defendant executed an assignment of said lease," by a writing not under seal, to one Newhall. If Newhall entered under that assignment, and the defendant ceased to collect the rents, control the premises or have any interest therein, before the end of the quarter, he would not be liable for any rent which should afterwards fall due. But the case does not find that Newhall ever entered or collected the rents under his assignment; nor that the defendant at any time ceased to collect and receive the rents through his agent; and any inference to that effect would be inconsistent with the distinct statement of the report that upon the entry of the defendant under his assignment from the lessees "the rents were thereafter collected by said agent and paid over to the defendant."

Upon the report, we must assume that the defendant's evidence went no farther than to show a formal instrument of assignment, without change of possession. That would not be sufficient to relieve the defendant from his liability as assignee of the lessees.

It is stated generally in the text-books, that an actual entry upon the demised premises, by an assignee of the lease, is not requisite in order to charge him with the performance of covenants running with the land. But we think this proposition will hold good only in respect of assignments by deed recorded and delivered; which are usually regarded as effecting a transfer, not only of title, but also of the legal possession. An assignment without deed as of a chattel interest only, requires some act of entry, or change of actual possession, to complete its operation and divest the assignor, of responsibility which arises from the holding of the estate. *Taylor, Landl. & Ten.* §§ 449-451.

It was not necessary for the plaintiff to assent to the assignment, or recognize the assignee as his tenant, otherwise than by his suit for the rent.

It does not appear that the plaintiff had already received his rent from Jackson and Muzzy; or that the defendant had any equitable defence as against them. The fact that Jackson and Muzzy remained liable for the rent upon their express covenants in the lease, notwithstanding their assignment, is sufficient explanation of

the statement that the suit was brought with the plaintiff's consent, and at the request of Jackson and Muzzy.

The report shows that the defendant became responsible to the plaintiff as assignee of the lessees, and does not disclose any facts sufficient to defeat his action for the rent which thereafter became due upon the lease. According to the terms of the report, therefore, the plaintiff is to recover judgment for the full quarter's rent, \$1,450, and interest.

Judgment for the plaintiff accordingly.

MORTON, J., IN MCNEIL *v.* AMES.

120 MASSACHUSETTS, 481. — 1876.

THE only ground upon which the plaintiff can maintain an action, either at law or in equity, is that at the time of the levy of the execution in favor of the Lancaster National Bank, Samuel T. Ames held terms for years or leasehold estates in the premises in controversy, which were duly seized and sold under said execution. Assuming this to be so, the plaintiff stands in the position of an assignee in law of the terms for years, with substantially the same rights as if they had been voluntarily assigned to him by Ames. His remedy at law to enforce his rights as such assignee is plain, adequate and complete. He can compel the under-lessees to pay the rent agreed to him, and can enforce the performance of the covenants of the lessor in her leases. *Howland v. Coffin*, 9 Pick. 52; *Shelton v. Codman*, 3 Cush. 318; *Patten v. Deshon*, 1 Gray, 325; *Hunt v. Thompson*, 2 Allen, 341.

b. Restraints on alienation of a term.

JACKSON EX DEM. WELDON *v.* HARRISON.

17 JOHNSON (N. Y.), 66. — 1819.

[Reported herein at p. 731.]

4. ALIENATION OF THE RENT OR OF THE "REVERSION."

MOFFATT *v.* SMITH.

4 NEW YORK, 126. — 1850.

ASSUMPSIT for use and occupation of a dwelling-house. One Lawrence had leased the premises to defendant Smith by a writing not under seal for the term of two years. During the term Lawrence

assigned the lease to plaintiff Moffatt, but did not transfer to him the reversion. One Shepherd was in actual possession of the premises. Judgment for plaintiff. Defendant appeals.

RUGGLES, J. — Payment of rent by the defendant Smith to the plaintiff was sufficient *prima facie* to show that Shepherd's occupancy of the demised premises was under Smith, the defendant; and the case stands, therefore, as if Smith had himself been the actual occupant under the lease from Lawrence.

But the defendant insists that this action cannot be maintained in Moffatt's name, because he was not the assignee of the reversion as well as of the rent. It has been settled in England and here, that the assignee of the rent alone, without the reversion, may recover in his own name in an action of debt. *Allen v. Bryan*, 5 Barn. & Cres. 512; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Demarest v. Willard*, 8 Cowen, 206; *Willard v. Tillman*, 2 Hill, 277. This was on the ground, formerly, that after attornment by the tenant, the privity of contract was transferred to the assignee of the rent. *Robbins v. Cox*, 1 Levinz, 22; 5 Barn. & Cres. 512, n. Attornment by the tenant is now unnecessary. 1 R. S. 739, § 146.¹ The consent of the lessee was, however, in this case, proved by the payment of rent to the lessor's assignee. The lease from Lawrence to Smith, together with the lessor's assignment to the plaintiff, and the payment of rent to the plaintiff, established the relation of landlord and tenant between the plaintiff and the defendant, and brought the case within the terms of the statute which gives the action for use and occupation to any landlord where the demise is not by deed.² The plaintiff, by the lessor's assignment became the landlord, under whom the defendant held the demised premises, and the defendant could not dispute his title. The lease of the 18th of April, 1845, and the assignment thereof, were properly admitted for the purpose of showing this relation between the parties; and the previous lease of the 11th of January was also properly received in evidence, to show the duration of the term, in relation to which the latter lease referred to the former.

The offer by the defendant to prove the premises out of repair, was rightly rejected. There was no agreement or obligation on the part of the lessor to repair the premises, and the plaintiff was therefore entitled to recover the amount of rent agreed to be paid. * * *

Judgment affirmed.³

¹ §§ 194, 213, N. Y. R. P. L. — ED.

² § 190, N. Y. R. P. L. — ED.

³ See § 193, N. Y. R. P. L. — ED.

FISHER v. DEERING.

60 ILLINOIS, 114. — 1871.

MR. JUSTICE WALKER delivered the opinion of the court. — It appears, from an examination of the authorities, that at the ancient common law a lease was not assignable so as to invest the assignee with the legal title to the rent. Such instruments were, in that respect, on a footing with other agreements and choses in action. But the 32 Hen. 8, chapter 34, § 1, declared that the assignee of the reversion should become invested with the rents. But notwithstanding this enactment, the courts held that the assignee of the reversion could not sue for and recover the rent unless the tenant should attorn, when the holder of the reversion might recover subsequently accruing rent in an action of debt. *Marle v. Fake*, 3 Salk. 118; *Robbins v. Cox*, 1 Levinz, 22; *Ards v. Walkins*, 2 Croke's Eliz. 637; *Knowles' Case*, 1 Dyer, 5 b.; 5 Barn. & Cress. 512, and the note.

In *Willims v. Hayward*, 1 Ellis & Ellis, 1040, after reviewing the old decisions on this question, it was, in substance, held that, under the 32 Hen. 8, an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the 4 of Anne, recover without an attornment.

The courts seem to have proceeded upon the ground that there could be no privity of contract unless the tenant should attorn to the assignee of the reversion; that, whilst the assignment of the reversion created a privity of estate between the assignee and the tenant, privity of contract could only arise by an agreement between them. Some confusion seems to have got into the books from calling the purchaser of the reversion an assignee of the lease, by its passing by the conveyance as appurtenant to the estate. But where the tenant attorned to the assignee of the reversion the assignment became complete, and then there existed both privity of estate and of contract between the assignee and the tenant, and by reason of the privity of contract the assignee might sue in debt, and recover subsequently accruing, but not rent in arrear at the time he acquired the reversion.

To give the assignee of the reversion a more complete remedy, the 4 and 5 Anne, chapter 16, section 9, was adopted, dispensing with the necessity of an attornment which the courts had held to be necessary under the 32 Hen. 8, to create a privity of contract. But this latter act has never been in force in this State, and hence the decisions of the British courts, made under it, are not applicable. In many States of the Union this latter act has been adopted, and the decisions of their courts conform, of course, to its provisions.

But we having adopted the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, except certain enumerated statutes, and which are of a general nature and not local to that kingdom, they are declared to be the rule of decision, and shall be considered of full force until repealed by legislative authority. Gross' Comp. 1869, 416. It then follows that the 32 Hen. 8, chapter 34, § 1, is in force in this State, as it is applicable to our condition, and is unrepealed. And we must hold, that the construction given to that act by the British courts was intended also to be adopted.

The facts in this case show such a privity of contract as brings it fully within the rule announced in the above cases. Appellee paid to appellant several instalments of rent falling due under the lease after it was assigned to him. By paying the rent, the lessee fully recognized the appellant as his landlord, and created the necessary privity of contract to maintain the action.

The case of *Chapman v. McGrew*, 20 Ill. 101, announces a contrary doctrine. In that case this question was presented, and notwithstanding the lessee had fully recognized the assignee of the lease as his landlord, it was held that the lessor of the premises might maintain an action to recover the rent. In that case, the fact that the lessee had attorned to the assignee, was given no weight, and the fact that such privity was thereby created as authorized the assignee of the lease to sue for, and recover the rent, was overlooked. In that, the decision was wrong. The right of action could not be in both the lessor and his assignee, and the privity thus created gave it to the latter.

The subsequent case of *Dixon v. Buell*, 21 Ill. 203, only holds that such an assignee, whether he holds the legal or equitable title to the lease, may have a claim for rent growing out of the lease, probated and allowed against the estate of the lessee. That case has no bearing on the case at bar.

Judgment reversed ¹

¹ The statute has since been changed. See *Barnes v. N. T. Co.*, 169 Ill. 112. — ED.

5. RIGHTS AND DUTIES OF LANDLORD AND TENANT INDEPENDENT OF COVENANTS

a. Landlord.

(1.) MAY PROTECT REVERSION, BUT HAS NO ACTION FOR AN INVASION OF THE POSSESSORY RIGHT.

FRENCH *v.* FULLER.

23 PICKERING, 104. — 1839.

WILDE, J., delivered the opinion of the court. — It was testified by one of the witnesses, that the tenements, for the entering of which the defendant is charged as a trespasser, were, at the time, occupied by under-tenants; and the fact we understand is admitted; and if so, it seems quite clear, that this action cannot be maintained. To maintain an action of trespass *quare clausum* for an injury done to real property, the plaintiff must prove, that he has the actual possession of the property; for, though the freehold of the land may be in him, he cannot maintain the action, if the land, at the time of the trespass, was in the lawful possession of another. It is not denied that this is the general rule, but it has been argued, that when land is in the possession of a tenant at will, the rule is not applicable, as the possession of a tenant at will is the possession of his landlord; and the case of *Starr v. Jackson*, 11 Mass. R. 519, is relied on in support of this position. But it is very clear, that the decision in that case is no authority in support of the present action. It was decided in that case, that trespass *quare clausum fregit* lies for the owner of land in the possession of his tenant at will, where the injury affects the permanent value of the property, as the cutting down of trees, destruction of buildings, and like acts. There can be no doubt, that for such an injury the owner of the land would be entitled to a remedy; the perplexing doubt in that case, was as to the form of the action, whether it should be trespass or trespass on the case. In the case under consideration, no such question can be raised; for upon the facts argued no injury has been done to the freehold, and the plaintiff is not entitled to an action in any form. All that appears by the statement of facts, is, that the defendant had been on the premises at sundry times, exercising act of ownership, such as demanding rent and letting some of the tenements to the tenants in possession. It does not even appear, that the entry was tortious, so that the tenants could support an action of trespass. But however this may be, no actual damage was done to any one; and, most certainly, the plaintiff cannot maintain an action for the

mere disturbance of the possession. In the case of *Little v. Palister*, 3 Greenleaf, 6, the defendant entered upon land in the possession of a tenant at will, and threw down a fence erected by the tenant for his own convenience; and it was held, that the landlord could not maintain trespass, or any other action, for the wrong, the injury being wholly to the rights of the tenant. We think the decision in that case is unquestionably correct, and, consequently, that this action cannot be maintained.

I think it proper to add, to prevent misapprehension, that it must not be inferred, that the judgment of the court would be different, if this case had been in all respects similar to that of *Starr v. Jackson*. Since the decision of that case, the law in respect to the rights of tenants at will has been materially changed. By the Revised Stat. c. 60, § 26, it is enacted, "that all estates at will may be determined by either party, by three months' notice in writing, for that purpose, given to the other party." A similar provision was contained in a previous statute.

Since this change of the law regulating the manner of terminating estates at will, the possession of a tenant at will before notice, and for three months after, can in no sense be held to be the possession of the landlord. The tenant has not only the possession, but also the right of possession, and, in this respect, he stands on the same footing as a tenant for a term certain. The landlord's remedy, therefore, for an injury to his freehold, or reversionary interest by a stranger, is by an action on the case and not by an action of trespass *quare clausum fregit*.

Plaintiff nonsuit.

(2) DISTRESS FOR RENT.¹

PRESCOTT *v.* DE FOREST.

16 JOHNSON, 159. — 1819.

IN error, on *certiorari* to a Justice's Court.

This was an action of trover, brought in the court below, by the plaintiff in error. The material facts in the case are as follows:

¹ See also *Ingersoll v. Sergeant*, *supra*, p. 86, for further discussion of the subject. Distress has been abolished in most of the States, including New York (1846). The landlord's remedies for rent at present depend on the circumstances of the case, but one or more of the following are usually available. (a) Action of debt; (b) on contract; (c) covenant, express or implied, the latter if rent is reserved, but there is no express agreement for its payment; (d) re-entry or ejectment if the right of re-entry is expressly reserved; (e) summary proceedings to recover the land in the cases provided for in such statutes as that of New York Code Civ. Proc., §§ 2231-2265; (f) under some circumstances an action for use and occupation. See N. Y. R. P. L., § 190. — Ed.

On the 1st of February, 1817, Stewart leased a house in Pearl street, in the city of New York, to Samuel Satterlee, for one year, from the 1st of May, 1817; Satterlee then leased part of the house, retaining the front part as a store, to the plaintiff, for the annual rent of \$1,000, payable quarterly, for the same term at which he had taken it. On the 1st of February, 1818, Satterlee obtained a new lease of the house for a year from the first day of ensuing May. On the 2d of March, 1818, the plaintiff having only paid Satterlee \$32 of her rent, he distrained her goods, upon the premises, and sold them at public auction, in due form of law. The defendant was a purchaser of several articles of furniture at this sale, and there had been a demand and refusal of them before suit was brought.

It was proved, that the plaintiff had said, that Satterlee had a right to distrain her goods for the rent, and expressed gratitude for his forbearance; but at the time of the demise from Satterlee to her, nothing was said as to the right to distrain, and there was no agreement that he should have that right. It was also proved by two constables, and another witness, that they had each known one instance in the city of New York, in which the party distraining for rent had no reversionary interest in the leased premises, and that no objection was taken on that account. The plaintiff objected to all evidence of this kind, but the objection was overruled. A verdict and judgment were taken for the defendant below.

PLATT, J., delivered the opinion of the court. The lease from Satterlee to the plaintiff, for a part of the house, for the whole term, must be deemed an assignment, and not an underletting. There was no privity of estate between the plaintiff and Satterlee, but a privity of contract merely. The plaintiff did not hold as tenant to Satterlee, but as tenant to Stewart, the original lessor and reversioner. The right of distress is incident to, and inseparable from, the reversion; under such an assignment of the whole term, Stewart had a right to distrain on the assignee, and a double right of distress cannot exist in Satterlee and in Stewart, unless there was an express agreement for that purpose between the assignee and Satterlee. Stewart, by reason of the privity of contract and estate, may sue the plaintiff, or distrain her goods, for the rent due to him; but Satterlee, having a privity of contract only, without privity of estate, and without express power to distrain, can only sue upon the contract. Woodfall L. & T. 285, 286, 196; 2 Wils. 375; 1 Term. Rep. 441. There is no difference, in this respect between an assignment of the whole of the demised premises, or a lease or assignment of the whole term, in a part of the premises. Nor can the second lease to Satterlee, for the year ensuing, that is, from the 1st of May, 1818,

to the 1st of May, 1819, make any difference in the case. That was a lease to commence *in futuro*, and cannot operate as an assignment of the reversion, which still remained in Stewart. By granting, on the 1st of February, the new lease to commence on the 1st of May following, Stewart did not transfer or lose his right of distraining for the rent, under the old lease. And whether the new lease for the ensuing year was granted to Satterlee or a stranger, could make no difference in the rights of the parties in relation to the first lease.

The plaintiff's declaration, that Satterlee had a right to distrain, must be ascribed to her ignorance of her legal rights, and cannot vary the rule of law. The evidence of custom in New York was futile, and ought not to have been received. The witnesses, on that point, failed to prove any custom in regard to distress for rent in such cases; but if they had proved it, we cannot allow any custom in this State to control the general rules of the common law. Where a custom is of such antiquity that we cannot trace its origin, it is coeval with the common law itself; and then it forms an exception to the general rule; because, there is ground to presume that they are of equal authority, and that the same power which established the rule, also made the exception. If Satterlee had no right to distrain and sell the goods, it necessarily follows, that the defendant, though a *bona fide* purchaser for valuable consideration, acquired no title. It was an unauthorized sale, and transferred no right. I am, therefore, of opinion, that the judgment ought to be reversed.

b. Tenant.

(1.) HAS RIGHT TO ESTOVERS AND EMBLEMENTS, BUT MUST NOT COMMIT WASTE.¹

(2.) IS ESTOPPED TO DENY HIS LANDLORD'S TITLE.

VERNAM *v.* SMITH.

15 NEW YORK, 327. — 1857.

ACTION for rent for the first year under a demise for the term of two years. The complaint did not state that the lease was under seal, and it was not alleged that the defendant had entered into possession. The defendant, by his answer, alleged that the plaintiff, at the time of making the lease, was not the owner of any estate or interest in the premises; and that no estate or interest vested in the defendant by virtue of the lease.

Plaintiff demurred to the answer, and succeeded below.

Defendant appealed.

¹ See Part III. — Ed.

DENIO, C. J. — It was a good plea, at common law, in an action of debt for rent, by virtue of a parol demise, or upon a lease not under the seal of the lessee, that the plaintiff had nothing in the tenements at the time of the lease; Co. Litt. by Thomas, 415; *Sullivan v. Stradling*, 2 Wils. 217; and the reason of this is, according to Lord Coke, that "in every contract there must be *quid pro quo*, and therefore, if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor anything for which he should pay a rent." If the lease be made by deed indented, then both parties are concluded, and this plea cannot be interposed. The lessee in that case is bound by a technical estoppel, by deed, to deny that the term passed by the lease. Further exceptions to the rule of the common law have been created by the modern doctrine of equitable estoppel, arising out of circumstances unconnected with a deed. Thus, it has been very often decided that in debt or assumpsit for use and occupation, the defendant cannot deny the title of the lessor. *Lewis v. Willis*, 1 Wils. 314; *Cooke v. Loxley*, 5 Term. R. 4; *Phipps v. Schulthrope*, 1 Barn. & Ald. 50; *Fleming v. Gooding*, 10 Bing. 549; *Dolby v. Iles*, 11 Adolph. & Ellis, 335; *Curtis v. Spitty*, 1 Bing. N. C. 15; *Agar v. Young*, 1 Carr. & Marsh. 78. The action for the use and occupation is given by statute, and it arises where there has been an enjoyment by the defendant of the plaintiff's lands or tenements, under a demise or agreement not made by deed. Stat. 11 Geo. II., ch. 19, § 14; 1 R. S. 748, § 26. The statutes do not declare that the defendant in this action shall be precluded from pleading *nil habuit in tenementis*; but inasmuch as the action is given for the use and occupation, which presupposes an entry and enjoyment of the premises, the courts have constantly held that the defendant was estopped from showing that the lessor was not the owner of the land. The judges have applied the equitable principles referred to in the construction of the statute. "I cannot help thinking," said Lord Chief Justice Willes, "but that they, the Legislature, intended to take away the plea of *nil habuit*, etc., as if they had said, after the tenant has enjoyed the land by a demise or permission of the landlord, he shall not be permitted to pry into the title, and pick holes in settlements and wills." *Sullivan v. Stradling*, *supra*. Lord Kenyon, in *Cooke v. Loxley*, said that the rule precluding the tenant in this class of actions from contesting the title of the landlord, was not a mere technical rule, but one founded in public convenience and policy. * * *

Judgment affirmed.

6. RIGHTS UNDER COVENANTS IMPLIED IN LAW.

*a. Implied covenant for quiet enjoyment.*MAYOR *v.* MABIE.

13 NEW YORK, 151. — 1855.

ACTION for rent. Defendant seeks to recoup damages suffered by him by reason of the breach of an implied covenant for quiet enjoyment. Judgment for plaintiff below. Defendant appeals.

DENIO, J. * * * There is not found in the contract set out in the complaint any express undertaking, on the part of the corporation, that Mabie shall have and enjoy the interest conveyed; but the defendants insist that there is one implied in law. If the grant in question was a lease of corporeal property for a term, there is no doubt whatever but that, independently of the statute which we shall presently consider, there would be an implied covenant by the grantors for quiet enjoyment by the grantee. *Noke's Cases*, 4 Coke, 80, *b.*; *Barney v. Keith*, 4 Wend. 502; 8 Paige, 597; *Platt on Covenants*, 40. But the right to wharfage, which was the subject conveyed by the corporation to Mabie, was an incorporeal right; and it does not necessarily follow that all the legal incidents of a lease for years, of land, attach to the conveyance. On examination of the cases, however, I have come to the conclusion that the principle is not limited to a demise of tangible property, but that it applies in its full force to conveyances of incorporeal rights. * * *

Other instances of covenants of quiet enjoyment, implied in conveyances of incorporeal hereditaments, will be found referred to in *Platt on Covenants*, 58.

The main object of a covenant for quiet enjoyment is to protect the lessee from the lawful claims of third persons having a title paramount to the lessor; but such a covenant, when fully written out, provides also for the protection of the lessee against the unlawful entry of the lessor himself. *Platt on Covenants*, 312. Consequently, where the law implies such a covenant from the character and terms of a conveyance not containing any express engagement, the scope of the implied guaranty should be equally extensive. The case of *Seddon v. Senate*, above mentioned, is a striking application of that principle; and other cases may be found in the section on implied covenants in Mr. Platt's treatise (p. 40, *et seq.*) It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful,

and he, therefore, a trespasser to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title. Platt on Covenants, 319, 320. It need not be averred in the pleading that the grantor acted under a claim of title; but if the character of the act be such as reasonably to show that the defendant acted upon such an assumption, the action will be sustained. Thus, where the defendant demised to the plaintiff with a full covenant for quiet enjoyment, certain premises, to which a pew in a church was appurtenant, and the lessee brought covenant against him, alleging that he had disturbed him in the use and enjoyment of the pew by sometimes sitting in it himself, and at other times putting other persons into it, and by locking it up on other occasions, the objection being taken that these acts were mere trespass, the court said: "The act itself asserts a title; for the defendant locked up the pew, which is as strong an assertion of right as can well be imagined." *Loyd v. Tomkins*, 1 Term. R. 671. The acts imputed to the plaintiffs in this case are equally unequivocal; and when we consider that they were a municipal corporation, acting by agents, and were moreover the general owners of the wharfage, and that they authorized and directed those agents to assume a control over the berths and locations which ships were accustomed to occupy, and granted such berths and locations to ship-masters for a compensation to be paid by them, we must infer that this was done under some claim of right.

These considerations have led me to the conclusion that there was in this case, upon the principles of the common law, an implied covenant by the plaintiffs to abstain from interfering with the right which they granted to Mabie, in the manner which the answer charges them with having done. It remains only to inquire whether the statute has forbidden the implication of a covenant of quiet enjoyment in such a case as this.

The Legislature has declared that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." 1 R. S. 738, § 140.¹ If this grant of wharfage for one year is a conveyance of real estate, no covenant can be implied in it, and there can be no recoupment for an alleged breach of covenant. I am of opinion that it is not a conveyance of real estate. Section 10 of title 5, of the same chapter of the Revised Statutes in which the foregoing provision is found, defines certain of the terms there used, thus: "The terms 'real estate' and 'lands,' as used in this chapter, shall be construed as coextensive in meaning with lands, tenements and hereditaments." Id. 750.

¹ § 216, N. Y. R. P. L. — Ed.

In a subsequent chapter of the Revised Statutes, that which relates to the proof and recording of conveyances, there is another definition of one of these terms, as follows: "The term 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real, except leases for a term not exceeding three years." 2 R. S. 762, § 36. There is much significance in the language added to the first definition when the same terms came again to be defined for another purpose. It is a virtual declaration that the words employed to define real estate, in the first definition, would not embrace chattels real. We must intend that in those definitions, language was used with great care and discrimination. The object being to remedy, by precise definitions, the inconvenience arising from the use of words to which different meanings might otherwise be attached, we cannot suppose that any vagueness of expression would be indulged. In comparing these two definitions with each other, we arrive at a pretty satisfactory conclusion that the Legislature understood the words, "lands, tenements and hereditaments," as excluding terms for years in land. And in this I think they were clearly right. The Legislature was dealing with terms of art and is presumed to have used them in their technical sense. We might lay out of view in this case the word "lands" for that word always refers to something corporeal; but the other two words may be correctly applied to an estate in incorporeal hereditaments. Now a term for years in lands (and *a fortiori* in incorporeal rights), is not in law a tenement or a hereditament. Coke says that "*tenementum*, tenement, is a large word, to pass not only lands and other inheritances which are holden but also offices, rents, common profits *apprender* out of lands and the like, wherein a man hath any frank-tenement, and whereof he is seized *ut de libero tenemento*." 1 Co. Litt. by Thomas, 219. "But hereditament," he says, "is the largest word of all that kind; for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real, personal or mixed." Id. The first of these definitions requires that the estate, or interest to amount to a tenement, should be a freehold at least; and to be termed a hereditament, according to the second, it must be descendible by inheritance. Terms for years fall within the definitions of things personal. They go to the executors like other chattels, and although they are denominated chattels real to distinguish them from mere movables, they are not, when speaking with legal accuracy, considered real estate. 2 Bl. Com. 386. In *The People v. Westervelt*, 17 Wend. 674, the meaning of the terms "real estate" and "tenements," at common law, was shown to exclude terms for

years and other chattel interests; and it was furthermore shown that these words were used in that sense in that part of the Revised Statutes which relates to the redemption of lands. The Supreme Court, it is true, in *Kinney v. Watts*, 14 Wend. 38, held that the provision in the Revised Statutes, forbidding the implication of covenants, embraced leases and other conveyances of terms for years where the term exceeded three years; but this conclusion was arrived at by inadvertently applying to the case the second definition of real estate, which is found in the chapter respecting the recording of conveyances. The learned judge who delivered the opinion does indeed say that the legal import of the terms would be the same which he gave them if there had been no legislative definition; but having found, as he supposed, a statutory definition which precisely suited the case, he examined less attentively than he otherwise would have done as to their meaning at common law. Chancellor Walworth had occasion to examine this question in *Tone v. Brace*, 11 Paige, 566; and he held that the Supreme Court in *Kinney v. Watts*, fell into an error, and that the statute referred to had no application to terms for years. See also 8 Paige, 597, and 1 Clarke's Ch. R. 507. I am satisfied that the construction adopted by the chancellor is the true one, and that there is nothing in the provision of the Revised Statutes under examination which forbids us from finding, in the grant in question, an implied covenant against the acts of the grantors and against others claiming by lawful title. The result would be the same if the question had arisen upon a lease for years of land. The evidence offered by the defendants at the trial should have been received. If such evidence shall be produced on a future trial, it will still be competent for the plaintiffs to show, if they are able, that the acts complained of as a disturbance of the rights of the lessee, were done in the lawful exercise of a power to regulate the disposition of vessels in the public docks, under any ordinances or legal regulations which may exist upon that subject. We do not intend to express any opinion upon that question, the evidence not being before us. The judgment of the Superior Court must be reversed, and a new trial ordered in that court.

DALY v. WISE.

132 NEW YORK, 306. — 1892.

ACTION for rent on a lease of an unfurnished house. Defendant objects that the house was in an untenable condition and that he had abandoned it for that reason. Judgment for plaintiff. Defendant appeals.

FOLLETT, Ch. J. — * * * In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract which contains no covenant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant on the part of the lessor that the dwelling is without inherent defects rendering it unfit for a residence. *Franklin v. Brown*, 118 N. Y. 110. In *Smith v. Marrable*, 11 M. & W. 5, a contrary rule was laid down by Baron Parke. That case rose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week, left, paying the rent for that week. In an action brought to recover rent, it was held in the opinion delivered by Baron Parke, concurred in by Barons Alderson and Gurney: "That if the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state."

Chief Baron Abinger concurred upon the ground that: "A man who lets a ready furnished house surely does so under the implied condition or obligation, call it which you will, that the house is in a fit state to be inhabited." The opinion of Baron Parke was rested on the authority of *Edwards v. Etherington*, Ry. & M. 268; s. c. 7 D. & R. 117; and *Collins v. Barrow*, 1 M. & Rob. 112, both of which cases, together with *Salisbury v. Marshal*, 4 C. & P. 65, were expressly overruled by *Hart v. Windsor*, 12 M. & W. 68, in which Parke said: "We are under no necessity of deciding in the present case, whether that of *Smith v. Marrable* be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*, 12 M. & W. 52, for it was the case of a demise of a ready furnished house for a temporary residence at a watering place. It was not a lease of real estate merely. But that case

certainly cannot be supported on the ground on which I rested my judgment."

Smith v. Marrable was decided at Hilary Term, 1843, and *Hart v. Windsor* and *Sutton v. Temple*, at Michaelmas Term of the same year. The rule laid down in *Smith v. Marrable* by Abinger, B., as applicable to furnished houses, has been followed in *Campbell v. Lord Wenlock*, 4 F. & F. 716, and *Wilson v. Hatton*, L. R. (2 Exch. Div.) 336, but the rule as stated by Parke, B., has not been followed in England or in this State. *Franklin v. Brown*, 118 N. Y. 110. The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition?

In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. *Wallace v. Lent*, 1 Daly, 481; *Jackson v. Odell*, 12 Id. 345; *Rheinlander v. Seaman*, 13 Abb. N. C. 455; *Cesar v. Karutz*, 60 N. Y. 229. In the case at bar the defendant testified, and in this he was not contradicted, that when he first went to the house with the plaintiff's agent he said: "I complained to him, the agent, at the time, that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff, determined not to put in any new, that it was all in good condition, that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff, or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or her agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to in respect to the owner's liability in case he fraudulently misrepresents the condition of the dwelling, or knowing that it is in bad condition fraudulently conceals the fact from the person who becomes the lessee.

Is the defendant liable for having stated that a material fact existed which did not exist, *i. e.*, that the plumbing was in good order, upon the theory that she was bound to know whether or not the statement was true.

In case a party, for the purposes of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 Id. 562; *Oberlander v. Spiess*, 45 Id. 175; *Wakeman v. Dally*, 51 Id. 27; 2 Pom. Eq. Juries, §§ 887, 888; Story's Eq. Juris. § 193.

It does not appear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition," was made without actual or supposed knowledge of its condition, nor that it was made in bad faith, and we think the case does not fall within the principle of the authorities last cited.

The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty because it is not so pleaded in the answer.

Judgment affirmed.

7. EXPRESS COVENANTS.

a. For renewal of a lease.

BLACKMORE v. BOARDMAN.

28 MISSOURI, 420. — 1859.

EJECTMENT by Blackmore to recover the possession of certain premises. Plaintiff had held a lease of the land for a ten years' term. The lease contained a covenant for renewal in the following language: "And it is hereby covenanted and agreed by and between the said parties, that at the end of the term hereby demised this lease shall be renewable for the further term of ten years; and so on from time to time perpetually at the option of the party of the second part, his executors, administrators or assigns, he or they giving to the party of the first part, in every instance, a notice in writing of his or their wish to renew the same three months at least before the end of the term. And every renewal lease shall contain all the covenants, agreements, clauses and stipulations herein contained." * * *

The interest of plaintiff was sold out on a judgment against him to one Hayne, under whom defendant, Boardman, holds. Just before the expiration of the term Blackmore and Hayne both made

application for a renewal of the lease and the renewal was executed to Blackmore, who now seeks to obtain possession of the land. Judgment for defendant. Plaintiff appeals.

RICHARDSON, J., delivered the opinion of the court. — The numerous authorities cited by the defendant's counsel establish in his favor the first two propositions presented in the statement. As the law discourages perpetuities, it does not favor covenants for continued renewals; but, when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it cannot be passed without the principal, the conveyance of the principal by a proper description will necessarily carry the incident. They are inseparable, and a right of action cannot exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant, being annexed to the estate, runs with it, and cannot be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the land under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for as the purchaser, after he acquires possession, is bound to pay the rent and in that way assumes the burdens of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value of the estate. * * *

PHILLIPS *v.* STEVENS.

16 MASSACHUSETTS, 238. — 1819.

PARKER, C. J. — The point presented by the pleadings in this case seems to have been considered to be very clear by the bar; for the counsel for the defendant, although industrious and able, could produce no authority to justify their plea. On the other hand, the authorities in favor of the plaintiff are numerous, clear and decisive; so that, whatever may be thought of the merits of the doctrine they maintain, when first established, there is no escape from it now, until the Legislature shall see fit to alter the law, which it is hardly probable they will ever do; since parties may always protect themselves against it, by due caution in making their contracts.

A formal opinion, in a case so free from doubt, and so well settled in the books would be unjustifiable, were it not for the ignorance generally prevailing in the country, of the legal effect of covenants in leases and other instruments, which are often executed without

any particular inspection or knowledge of their contents; and thus people are surprised into contracts, which neither party intended, when the instrument was executed.

Printed forms of leases are most generally made use of, and when they are not obtained, copies are made from books of forms, or from some old instrument in print. In this way covenants are transmitted from one generation to another, which are never made in England, without being very well understood; but, with us, often astonish the party to be bound, when the occasion arises, which calls for the performance of them.

Thus it was matter of surprise a few years ago that a lessee for years, who had covenanted to pay rent during the term, should be held to pay it after the buildings, which alone were valuable, were destroyed by fire. And yet nothing was more clear than that he had stipulated so to do; as was found in the case of *Fowler et al. v. Bott et al.*, referred to by the counsel for the plaintiff. So in the present case, although the defendant had, under his hand and seal, stipulated that he would keep in repair, support and maintain the fences and buildings, with the exception of natural decay, he was undoubtedly astonished at being called upon to rebuild a house, etc., the use of which he had enjoyed but for one year; and yet he has, in express terms, covenanted so to do. His excuse would be that he never read the covenants in his lease, or that he did not understand the force and effect of the terms. But the law does not protect men from their own carelessness or ignorance. The former they must cure; the latter they must provide against by asking counsel. Any lawyer, in any village of the commonwealth, could have stated the hazard, and would have guarded against it, by introducing such an exception, as is now generally adopted in mercantile contracts, "fire or other casualty excepted;" which would make the contract conformable to the intention of both the parties, as the words "dangers of the sea and inevitable accidents" do in a charter party or bill of lading.

The case of *Walton v. Waterhouse*, and the cases cited by Sergeant Williams in his note to that case, contain all the law upon this subject; the principle extracted from which is, "that although a man may be excused from a duty imposed upon him by the law, if he is disabled from performing it without any fault of his own; yet if by his own contract, he creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." This doctrine is recognized and enforced in the case of *Bullock v. Dommitt*, and in the case from our own reports, before referred to

Men must be more cautious in making their contracts, and not rely upon the hardship of their cases to relieve them, when they are brought into difficulty. Such mistakes rarely occur in England, although there is a court of equity there which may sometimes relieve in such cases. With us there is no such authority. The law must have its course, and the citizens must take care of themselves in making their bargain.

Plea adjudged bad.

III. Estates at will.

I. HOW CREATED.

(a.) *By express agreement therefor.*

DOE EX DEM. BASTOW *v.* COX.

II ADOLPHUS & ELLIS N. S., (ENG., Q. B.), 122. — 1847.

EJECTMENT for premises in Surrey. On the trial, before Coltman, J., at the last Surrey assizes, it appeared that the defendant, on June 18, 1844, mortgaged his interest in the premises to the trustees of a building society, now lessors of the plaintiff, by a deed containing this proviso:

“The said W. Cox doth hereby agree to become tenant to the said R. Bastow,” etc., “their executors,” etc., “of the premises hereby demised, henceforth, at their will and pleasure, at and after the rate of £25. 4s. per annum, payable quarterly.”

The defendant retained possession and paid a year's rent, but afterwards made default. In January, 1847, the lessors of the plaintiff distrained for four quarters' rent then due; and on May 6, 1847, they gave him notice to quit in a week, which not being obeyed, the present action was brought. The defendant's counsel insisted that, by the proviso, he was tenant from year to year, and entitled to six months' notice. Coltman, J., was of a different opinion, but reserved leave to move for a nonsuit. Verdict for plaintiff.

Lush now moved that a nonsuit might be entered. The legal operation of the proviso was to create a tenancy from year to year. The courts have always favored such a construction where a yearly rent has been reserved, and the lessors of the plaintiff recognized a yearly tenancy by the distress for four quarters. (ERLE, J. Is there any instance in which the words “at will” have been overlooked? COLERIDGE, J.: “So long as both parties shall please” is very different.) This, under the circumstances, was a tenancy at the pleasure of both.

LORD DENMAN, C. J. — The courts are desirous to presume a tenancy from year to year, where parties do not express a different intention; but here they have expressed it. To hold otherwise would be going beyond any decided case.

COLERIDGE, J. — Mr. Lush says the rule has been to presume in favor of a yearly tenancy. But it is also a rule that documents shall be construed according to the apparent intention; which, in the present instance, clearly is to create a tenancy at will. Rent, at the rate of £25. 4s. per annum, is to be paid quarterly; but that is, if the will continues undetermined; otherwise the reservation by quarters will not take effect.

WIGHTMAN, J. — I am of the same opinion. The meaning of the reservation is, that the tenant shall pay at such and such a rate during the time for which he may occupy.

ERLE, J. — I am of the same opinion. The intention is, that the tenant shall hold at the will of the lessors, and at will only.

Rule refused.¹

BURNS v. BRYANT.

31 NEW YORK, 453. — 1865.

CAMPBELL, J. — The defendant was in possession, holding for no particular time, paying no rent, making no compensation for the use of the land, but under agreement to surrender the premises whenever the landlord should require the possession. He was clearly a tenant at will. *Post v. Post*, 14 Barb. 253, and cases and authorities cited there. As such tenant at will the defendant was entitled to one month's notice to quit and surrender the premises. 3 R. S. 5th ed., p. 35, §§ 7, 8, 9.² The duration of the tenancy is uncertain, and the landlord cannot eject the tenant summarily. He has one calendar month in which to make his arrangements to remove. The form of the notice is not prescribed further than it must require the tenant to remove from the premises, and it must be in writing. The 9th section declares that "at the expiration of one month from the service of such notice the landlord may re-enter, etc." In this case, the premises being unoccupied at the time, the landlord re-entered by the plaintiff before the expiration of the month. But the trespasses were not committed till May and June following, two or three months after the month had expired. The fact that the notice was served on the 24th of January, requiring the tenant to remove on the 20th February, could make no difference, as there is

¹ See also *Larned v. Hudson*, 60 N. Y. 102. — ED.

² N. Y. R. P. L. § 198. — ED.

no claim for trespasses committed prior to the 24th February. All the defendant was entitled to was one month's notice to quit. It could make no difference that a specific day was fixed in the notice. The statute would still give him the month in which to make his preparations to remove. This month had long expired when the defendant virtually undertook to re-enter himself, as against his landlord, claiming that his tenancy had not terminated.

It seems to me very clear that there was no foundation for such a claim on the part of the defendant.

This judgment should be affirmed.

b. By implication of law.

(I.) TENANT ENTERS UNDER VOID PAROL LEASE OR PAROL CONTRACT FOR A SALE.

TALAMO *v.* SPITZMILLER.

120 NEW YORK, 37. — 1890.

[*Reported herein at p. 741.*]

RAPALLO, J., IN HARRIS *v.* FRINK.

49 NEW YORK, 24 (32). — 1872.

I HAVE, thus far, examined the case without reference to the position of the plaintiff's counsel, that the plaintiff, having entered upon the land with the license and permission of the owner to occupy and work it, became a tenant at will, and, as such, entitled to the emblements (Co. Litt. 55 b.), notwithstanding that he entered under contract of purchase.

The simplest form of a tenancy at will was where one man let to another to hold at the will of the lessor. Co. Litt. § 68. But a tenancy at will may be created otherwise than by express contract; it may arise by implication. Craft on Real Prop. § 1544. And an obligation to pay rent is not a necessary incident of such a tenancy. Where one enters by permission of the owner for an indefinite period, and without the reservation of any rent, he is, by implication of law, a tenant at will. *Doe v. Baker*, 4 Dev. N. C. 220. If he be placed upon the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant at will. *Jackson v. Bradt*, 2 Caines' R. 174; 4 K. C. 114-125, 11th ed.; *Post v. Post*, 14 Barb. 253; *Burns v. Bryant*, 31 N. Y. 453. Where a householder permitted

another to occupy, rent free, the occupant was held to be a tenant at will. *Rex v. Collett*, Russ & Ry. 498; *Jackson v. Bryan*, 1 Johns. 322, and would be entitled to emblements. *Doe v. Price*, 9 Bing. 357, 358. A parol gift of land creates a tenancy at will. *Jackson v. Rodgers*, 1 Johns. Cas. 33; s. c. 2 Caine's Cases, 314. And there is much authority in favor of the position, that one who is let into possession under a contract to purchase is strictly a tenant at will. Washburn on Real Property, 511, 513, 515, 3d ed.; *Howard v. Shaw*, 8 M. & W. 118-122; *Waring v. King*, Id. 571; *Doe v. Miller*, 5 Car. & P. 595; *Doe v. Chamberlaine*, 5 M. & W. 14; *Right v. Beard*, 13 East, 210; *Gould v. Thompson*, 4 Met. 224; 12 Mass. 325. And he has the right of ingress and egress to remove his effects. *Love v. Edmonston*, 1 Iredell, N. C. 152; *Jones v. Jones*, 2 Rich. L. R. S. C. 542; *Doe v. Baker*, 4 Dev. 220; *Manchester v. Doddridge*, 3 Iredell, 360; *Lowry v. Tew*, 3 Barb. Ch. 414; 5 Wend. 29. He is not liable for rent, because a promise to pay rent cannot be implied in such a case, the tenant having entered under a different contract. *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 Id. 489; *Winterbottom v. Ingham*, 7 Q. B. 611. But, nevertheless, he is a tenant at will. *Howard v. Shaw*, 8 M. & W. 122. And he is not entitled to notice to quit if he makes default in his contract. *Jackson v. Miller*, 7 Cow. 747. A tenant strictly at will was not, prior to the Revised Statutes, entitled to notice to quit. *Jackson v. Bradt*, 2 Caines' R. 169; *Doe v. Baker*, 4 Dev. 220; *Jackson v. Bryan*, 1 Johns. 322; 13 Maine, 214; 2 Esp. 717; Crabb on Real Property, § 1559; *Post v. Post*, 14 Barb. 253. From considerations of equity, tenancies at will were, under certain circumstances, treated by the courts as tenancies from year to year merely for the sake of notice to quit. 4 Cow. 350. This is called by Chancellor Kent a species of judicial legislation. 4 K. C. 127, 11th ed.; *Jackson v. Bryan*, 1 Johns. 322. But this indulgence was not extended to a tenancy at will created by entry under a parol contract of purchase. 7 Cowen, 751, 752; *Suffern v. Townsend*, 9 Johns. 35; 9 Id. 331. In England, a tenant at will by entry under a contract of purchase is not entitled to notice to quit at a future time; but, unless he does some wrongful act to terminate the tenancy, he cannot be treated as a trespasser or sued in ejectment without a demand of possession. 5 Carr. & P. 595; 13 East. 210; 5 M. & W. 14. If he makes default in his contract of purchase or commits waste, or in any other manner terminates the tenancy by his own wrongful act, he becomes a trespasser, and may be sued as such or in ejectment, and he cannot dispute the title of the party under whom he entered; *Cooper v. Stower*, 9 Johns. 331; *Doolittle v. Eddy*, 7 Barb. 74; 1 Wend. 418; 5 Id. 30; 6 Johns.

34, 49; and he would, no doubt, forfeit his right to emblements under those circumstances. Co. Litt. 55 b.

Expressions are to be found in some of the authorities cited, to the effect that one entering under a contract of purchase does not stand in the relation of tenant to the vendor. 6 Johns 46; 13 Id. 489. These expressions are used, however, in reference to the question whether an undertaking to pay rent can be implied. But where a purchaser of a farm enters upon it under an express agreement of the vendor that he may occupy and work it until the vendor is prepared to convey, and the agreement to sell is merely by parol, and the question arises with reference to the rights of such an occupant, in case of a refusal of the vendor to perform, and a termination by him of the occupancy, without any default on the part of the occupant, there is strong reason for according to such occupant the rights of a tenant at will. The permission to occupy unaccompanied by any contract of sale, would clearly create a tenancy at will. 31 N. Y. 453; 2 Caine's R. 174, and cases *supra*. The effect of the invalidity of the contract of sale is to reduce the right of the vendee to that of a mere licensee, and to enable the vendor to revoke the license at his pleasure. When he exercises that right there is no injustice in placing him in the same position as if the contract of sale which he repudiates had not been made. The holding, from the beginning was, in fact, at his will; and the principles upon which emblements are allowed to a tenant at will would seem applicable to such a case. Comyns' Dig., title Biens. G. 2; Co. Litt. 55 a., 55 b.

2. TERMINATION OF TENANCY AT WILL.

a. By express determination of the will. Notice.

DOE EX DEM. BASTOW *v.* COX.

11 ADOLPHUS & ELLIS N. S., (ENG. Q. B.), 122. — 1840.

[*Reported herein at p. 767.*]

BURNS *v.* BRYANT.

31 NEW YORK, 453. — 1865.

[*Reported herein at p. 768.*]

b. By implied determination of the will.

(I.) TRANSFER OF INTEREST OF EITHER PARTY.

ALLEN, J., IN RECKHOW *v.* SCHANCK.

43 NEW YORK, 448. — 1871.

THE defendants now claim that their lessors were tenants at will, or by sufferance of the plaintiff, and that they, by the act and assent of such tenants having acquired the possession of the premises, have thereby become and are the tenants of the plaintiff, holding by the same tenure and entitled to the same notice to quit as those to whose possession they have succeeded. Assuming that the case establishes the relation of landlord and tenant between the plaintiff and Reckhow & Hudson, under whom the defendants claim to have acquired the possession and right of possession, which is by no means clear, the result claimed by the defendants by no means follows. A tenant at will is disqualified from granting a lease available against anyone but himself; for the demise would amount to a termination of the will, and it would be optional with the landlord to regard the entry of the lessee of the tenant at will as a disseisin. 1 Platt on Leases, 104. The same rule holds as to a tenant by sufferance. *Id.* 122. The yielding of the possession of the premises terminates the original tenancy, and a new tenancy at the will of the owner cannot be created except by his or her assent. Every lease at will is at the will of both parties, and a tenant at will has no certain and indefeasible estate; nothing that can be granted by him to a third person. If a tenant at will assigns over his estate to another who enters on the land he is a disseisor, and the landlord may have an action of trespass against him. 1 Greenleaf Cruise, 278; *Campbell v. Proctor*, 6 Greenleaf R. 12. A tenancy by sufferance, existing only by the *laches* of the owner, cannot give the occupant an estate or interest capable of transmission to another. At common law, a tenant at sufferance is not entitled to notice to quit. There is no evidence that the plaintiff assented to the occupancy of the defendants, or that she had any knowledge of such occupancy prior to the commencement of the action. It is undoubtedly true that when the relation of landlord and tenant is established, it attaches to all who may succeed to the possession through or under the tenant; but this cannot apply to tenancies that are terminated by the very act of transmission of the possession. The defendants have not shown any permission from the plaintiff to enter upon the premises, and they were, therefore, trespassers and not entitled to notice to quit.

IV. Estates from year to year.

I. HOW THEY ARISE.

a. *By express agreement.*

PUGSLEY v. AIKIN.

II NEW YORK, 494. — 1854.

GARDINER, Ch. J. — I do not perceive that distinct causes of action are united in this complaint, as the defendants have alleged, and the Supreme Court have determined. The tenancy created by the original contract between the defendant's testator and those represented by the plaintiff was to continue until the parties to it, one or both, elected to terminate the demise, by giving the half year's notice prescribed by law.¹ If, after the close of the first year, the lessee rightfully remained in possession, it was not by virtue of a new demise, but by force of the old one. That he continued, under a contract for the possession of some kind, must be and is admitted; otherwise, the occupation would be tortious, and the tenant holding over could have been ousted at any time at the election of the landlord. No such right upon the part of the lessor is pretended. The supposition of a new agreement, made at the commencement of the second year, for a continuance of the tenancy, is not only untrue in fact, but in this case conflicts with the allegations of the complaint which are admitted by the demurrer. The plaintiff there avers "that the testator hired and rented the farm for the term of one year, and an indefinite period thereafter." There was, therefore, but one contract, and we are not at liberty to suppose another. For although the law will sometimes tolerate a fiction, it is always in aid of, and never to the prejudice of the right of a party. In *Legg v. Strudwick*, 2 Salk. 414, it was adjudged in reference to a lease of this description, "that it was a lease for a year certain; and that every year after it was a springing interest arising upon the first contract, and parcel of it; and that the lessor might avow as for rent due upon an entire lease, and not for a several rent, due upon several leases, accounting each year a new lease." In a note in Bacon's Abridgement, (Lease, L. p. 626,) it is said, "that notwithstanding the puzzle in the books respecting these running leases, the law is now considered settled agreeably to the case of *Legg v. Strudwick*. They are leases for one, two and more years certain, according to the form of the lease, depending for their further continuance upon the will of the parties. And that such will

¹ The lease was "for the term of one year and an indefinite period thereafter," at an annual rent. — Ed.

be their will, the law presumes, unless the contrary be evidenced by a regular half year's notice, that the tenant continuing in possession is not a tenant at will, but a tenant for years."

The doctrine of these authorities, when analyzed, amounts to this: that when a tenancy from year to year is created by the agreement of the parties, it continues until terminated by a legal notice. The estate does not depend upon a continuance of possession; for the tenant cannot put an end to the tenancy, or his liability for rent, by withdrawing from the occupancy of the premises. The notice is a condition of the contract, in the language of these authorities, arising out of it, which must be complied with, in order to absolve him from further responsibility.

If this view is correct, there is no misjoinder of distinct causes of action in the case before us. The testator had manifested his election, that the lease should not terminate during the year succeeding his death; and was, as we have seen, liable for the rent of the year 1842. After his decease, in April, his executors, as such, entered into possession. They were under no obligation to put an end to an interest which the decedent had deemed beneficial, and which they as his representatives thought advantageous to his estate. They would have violated a plain duty, as trustees of the property, by relinquishing by their own act a valuable lease, without any equivalent. They therefore continued, as the representatives of the testator, to occupy the lands during the period in which the rent accrued for which this action is brought. This is distinctly averred in the complaint. And having as trustees and executors rightfully received the profits of the demised premises, they are liable in that character to the payment of the rent.

The second cause of demurrer, viz., that the complaint did not state a cause of action, is consequently untenable. The current year, according to the terms of the lease stated in the complaint, would expire on the first of April. To terminate the tenancy the lessee must have given, six months previously, notice of his intention to do so, or the lease would continue another year. The testator died in the month of April, 1841, without having given any notice whatever, and, of course, his liability for the rent of that year had its inception, in any view of the case, in the lifetime of the lessee, and when that time expired, became a debt properly chargeable against his estate. The Supreme Court accordingly placed their decision upon the first cause of demurrer, which is obviously the only one deserving consideration.

The judgment of the Supreme Court at General Term must be reversed, and that of the Special Term affirmed.

*b. By implication of law.*REEDER *v.* SAYRE.

70 NEW YORK, 180. — 1877.

FOLGER, J. — * * * The plaintiffs went into occupation, in pursuance of what passed, orally, between them and Tuthill. The oral agreement was void, by the statute of frauds, as to the term attempted to be created, or any interest in lands to be derived from it. 2 R. S. p. 134, § 6. The right to take off a crop of wheat, after the two years had expired, though sowed before, was an interest in lands. *Earl Falmouth v. Thomas*, 1 Crompt. & Mees. 89; *Stewart v. Doughty*, 9 J. R. 108. So that the whole agreement was void, and might have been legally repudiated, as soon as it was made, by either party to it. But occupation of the lands was taken with the consent of the owner and the rent was paid to him, in pursuance of and under the void agreement. In such case the occupation inures, as a tenancy from year to year.' *Clayton v. Blakey*, 8 T. R. 3; *Thunder v. Belcher*, 3 East, 449; *Lounsbery v. Snyder*, 31 N. Y. 514; *Schuyler v. Leggett*, 2 Cow. 660; *The People v. Rickert*, 8 Id. 226.

The agreement, though by parol, and void as to the term and the interest in lands sought to be created, regulates the relations of the parties to it in other respects upon which the tenancy exists, and may be resorted to to determine their rights and duties, in all things consistent with, and not inapplicable to a yearly tenancy, such as the amount of rent to be paid, the time of year when the tenant could be compelled by the landlord to quit, and any covenants adapted to a letting for a year. *Doe v. Bell*, 8 T. R. 579; 8 Cow. *supra*; *Arden v. Sullivan*, 14 Q. B. (Ad. & El. N. S.) 832; *Doe v. Amey*, 12 Ad. & El. 476; *Berry v. Lindsley*, 3 M. & F. 498; *Edwards v. Clemons*, 24 Wend. 480.

We are thus enabled to ascertain the relations to each other, of the Reeders and Tuthill, when Sayre, the defendant, came in, as the vendee of the premises by a valid contract of sale and purchase. * * *

They were entitled to remain and use through the year 1873 and up to the 1st of April, 1874, unless the occupation was sooner determined by mutual assent of them and Tuthill, or his successors in interest, or by a sufficient notice to quit from some one having legal right to give it.

It is said that so to construe is to make the lease interminable. It is interminable, save as it may be terminable, by the notice to

¹ See *Talamo v. Spitzmiller*, p. 741, *supra*. — ED.

quit of the lessor or the lessee; or by an actual or implied surrender. "In truth, he is a tenant from year to year, as long as both parties please," says Lord Kenyon in *Rex v. Inhabitants of Stone*, 6 T. R. 295; *Doe v. Wood*, 14 M. & W. 682.

A sufficient notice to quit, given in 1871, would have terminated their right of occupation on the first day of April, 1872. *People v. Rickert, supra*. A sufficient notice to quit in 1872, would have terminated their right of occupation on the first day of April, 1873; and either of such notices, given before seeding, would have prevented the right to sow in 1873 for a crop of wheat to be gathered in 1874. For, in case of a tenancy from year to year, growing out of a parol lease void by the statute of frauds, the lessor has a right, in any year of the occupancy under it, to give a sufficient notice to quit and thus to terminate the tenancy on the last day of the rental year. A formal notice was necessary to terminate their holding, or to cut off the rights accrued and accruing to them from their occupation as tenants from year to year, under the void lease, except as hereinafter noticed. *Bradley v. Covel*, 4 Cow. 349; *Jackson, ex dem. v. Salmon*, 4 Wend. 327. The notice to quit must have been for the end of some year of the holding. 4 Cow. *supra*. In this case, for the first day of April, 1873.

So that we have before us in May, 1872, the Reeders, the plaintiffs as tenants, and Tuthill, the owner, as landlord; the Reeders, with the right to remain and use, through the year 1873 and up to April 1st, 1874, unless, in due time, a due notice to quit, is given to them by their lessor, or by some one succeeding to his rights. * * *

But the question then is, was it necessary that the Reeders should have service of notice to quit, ending when the term would have ended by the parol agreement? In England it has been held, that a tenant from year to year, under an agreement for a lease for seven years, which lease was never executed, was not entitled to notice to quit at the end of the seven years, as the contract itself gave him sufficient notice. *Doe ex dem Tilt. v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 Ell. & Bl. 36.

It has been held in this State, that under a valid lease, which fixed the length and ending of the term, no notice to quit was necessary. *Allen v. Jaquish*, 21 Wend. 628. I know of no decision expressly holding that the same rule does not apply to a holding from year to year, begun under a void lease, which named a time for the termination of the tenancy; but see 4 Wend., *supra*.

But what was the time for the termination of the tenancy in this case? Was it the first day of April, 1873, or was it after the crop of wheat, sowed in 1872 was harvested? We think that it was not

until the latter event that the whole interest of the Reeders in the lands terminated. They knew that their right to remain on the farm ceased, so far as the oral agreement gave right, on the first day of April, 1873. A surrender of the premises generally at that time, of itself made no difference in their right to an off-going crop. 9 J. R. *supra*. They also knew that the same agreement gave right to sow and reap a crop of wheat thereafter, and that this was a prolongation of their term. *Beavan v. Delahay*, 1 Hy. Bl. 5; *Boraston v. Green*, 16 East, 71. Under the decisions above cited, they are held to no more than to take note of the time of the termination of their interest in the lands, and to govern themselves accordingly. Their interest in the lands, under an operative and valid lease, would not have ceased entirely until they had harvested and threshed the crop of wheat sowed in 1872. So that we are brought to the conclusion that they had a right in the lands after the first day of April, 1873, which, while it could have been terminated by a sufficient notice to quit, given by one legally entitled so to do, could not be terminated in any other way. As Tuthill, the owner of the legal title, did not give that notice, the tenancy was not terminated. * * *

The judgment appealed from should be affirmed.

2. ALIENABILITY, ETC.

PUGSLEY *v.* AIKIN.

11 NEW YORK, 494. — 1854.

[*Reported herein at p. 773.*]

3. TERMINATION. NOTICE.

STEFFENS *v.* EARLE.

40 NEW JERSEY LAW, 128. — 1878.

SUMMARY proceeding to recover real property from a tenant. Judgment for the landlord. The tenant appeals.

REED, J. — * * * What, then, in the first place, is the character of this tenancy, in respect to time?

To support the judgment in this case, it must be a monthly letting. The defendant insists that the words employed by the claimant, in the affidavit, import a tenancy at will, or from year to year, and therefore a three months' notice was requisite to determine the tenure. The question is important from the fact that, acting upon the supposition that the tenancy was monthly, only a month's notice

was attempted by the claimant. Indeed, the distinction between tenancies from year to year and tenancies for a less period, in all the cases, seems to be important only in relation to the notice by which the determination of either kind can be effected. Unless it can be shown that monthly or weekly tenancies are unknown, I do not see how it is possible to hold the tenancy described in the affidavit to be other than a monthly tenancy. That such tenancies have an existence, the cases hereafter cited will establish, and to hold that the contract here shown is a monthly letting is only giving to the words of the affidavit their literal force. Further argument would be wasted upon this point.

If a monthly tenancy, is there a sufficient notice shown?

The rule relative to notices seems to be as follows: Where there is a lease for a certain period, the term determines without notice. *Cobb v. Stokes*, 8 East, 358; *Right v. Darby*, 1 Term R. 159; *Decker v. Adams*, 7 Halst. 99. In uncertain tenancies, reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII., according to Lord Ellenborough, been six months. *Doe d. Strickland v. Spence*, 6 East, 120.

This rule was applied to all uncertain tenancies in this State, whether rent was or was not reserved. *Den v. Drake*, 2 Green, 523. The time was changed to three months by act of 1840, Pamph. L., 104, now, with a little change in the text, the twenty-seventh section of the landlord and tenant act in the revision. Rev., p. 575.

In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is, that the notice must be regulated by the letting, and must be equivalent to a period. Taylor on Land. and Ten. § 478; Archb. on Land. and Ten. 87. How the rule arose is uncertain. It certainly did not have its origin in any resolutions of the courts. Indeed, Baron Parke, in *Huffell v. Armistead*, 7 C. & P. 56, said that he knew of no decision holding a week's or month's notice was necessary to determine a weekly or monthly tenancy. See, also, the remarks of the judges, to the same import, in *Towne v. Campbell*, 3 C. B. 921.

It seems, however, to have clearly shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from year to year, was, according to Lord Ellenborough, very early held to be six months, was, probably by a custom equally as old, in tenancies for less periods, established as now stated by the books.

By strict relativeness, the rule of a half year's notice in tenancies from year to year, would only require a half month's or a half week's

notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former kind of tenancies, was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight and authority as if they had expressly ruled the point.

The first is the case of *Doe ex dem. Parry v. Hazell*, 1 Esp. 94. It was a case of ejectment, tried before Chief Justice Kenyon in 1794. The full report of the case is as follows: The defendant had taken the house by the month; and a month's notice to quit had been given. It was agreed that the notice had reference, in all cases, to the letting, and that a month's notice was sufficient to entitle the plaintiff to recover.

In *Peacock v. Raffan*, 6 Esp. 4, tried before Lord Ellenborough in 1808, the court remarked that a week's notice to quit was certainly sufficient where the holding was weekly.

In *Doe d. Campbell v. Scott*, 6 Bing. 362, the same rule was, in 1830, recognized by the Court of Common Pleas. The rule was incorporated in the text of the books of authority upon this subject as the law, and may be considered as settled both in England and in this country, excepting where the matter of notice has been the subject of statutory regulation. *Prindle v. Anderson*, 19 Wend. 391; s. c. 23 Wend. 616; *Seem v. McLees*, 24 Ill. 192; *Walker v. Sharpe*, 14 Allen, 43.

The common-law rule I take to be undoubted, that notice is necessary to determine a monthly or weekly renting, and that a month's or week's notice, respectively, is sufficient.

2d. It is said that the notice in this case is insufficient, because the day for quitting named in the notice was the first of August, and not the last day of July.

The point made is, that according to the statement of the affidavit, the term originally commenced on the 1st day of May, and, by the usual mode of computation, it determined on the last day of the month. So, throughout the tenancy, the recurring periods each terminated on the last day of each month. It is, therefore, urged that the notice was given to quit on a day subsequent to the last day of the term, and that then a new term had commenced to run, and that, therefore, the tenant's holding must continue until determined by a new notice. *Taylor on Land. and Ten.* § 477.

It is true that the notice required to determine these tenancies

must be given to quit at the end of a period. When a term has commenced without such notice, the tenant is entitled to remain during and bound to pay for the term.

A notice given to quit, in the middle of a term, is ineffectual. * * *

By strict computation, the term set out by the present affidavit probably terminated on the last midnight of July. I think it would be carrying the rule that a notice to quit must be made with reference to the end of the term, to an illogical and unreasonable length to hold that a notice given for the day commencing at that midnight is not a good notice. The law is ignorant of fractions of a day. The notice covers all and any period of the twenty-four hours from midnight to midnight. The very moment the tenancy expires the tenant is confronted with a direction to quit. On what process of reasoning can it be said that a new term has commenced before notice is given? * * *

Judgment affirmed.

COUDERT *v.* COHN.

118 NEW YORK, 309. — 1890.

BRADLEY, J. — The action was brought to recover rent of premises described in a written lease made by the agent of the plaintiff's intestate to the defendants in January, 1884, for the term of two years and five months, commencing on the first day of March, 1884, and ending on the first day of August, 1886, at the yearly rent of \$3,000, payable in equal monthly payments, on the last business day of each month. The authority of the agent to make the lease not being in writing, it was void. 2 R. S. 134, § 6. The defendants went into possession on the first of March, 1884, and continued to occupy and pay rent up to August, 1885, when they left the premises and sought to surrender the possession up to the plaintiff's intestate, who declined to accept it. He recovered for the amount of rent at the rate mentioned in the lease from the first of August, to the first of March following. While the cases are not entirely in harmony on the subject, the doctrine now in this State is such that the defendants on going into possession of the premises and paying rent, became, by reason of the invalidity of the demise, tenants from year to year, and in such case the continuance of occupancy into the second year rendered them chargeable with the rent until its close. They could then only terminate their tenancy at the end of the current year. *Reeder v. Sayre*, 70 N. Y. 180; *Laughran v. Smith*, 75 N. Y. 205.

The question presented is: When did the rental year arising out of such relation commence and terminate? It is contended by the

defendants' counsel that inasmuch as the end of the term designated by the terms of the lease was the first of August, 1886, that was the time when the yearly tenancy in contemplation of law terminated, and, therefore, the surrender was properly made on the first of August, 1885. It is urged that this view is in harmony with the recognized principle that, although the lease was invalid, the agreement contained in it regulated the terms of the tenancy in all respects, except as to the duration of the term, and *Doe v. Bell*, 5 D. & E. 471, is cited. There a farm was, in January, 1790, let by a parol lease, void by the statute of frauds, for seven years, the lessee to enter upon the land when the former tenant left, on Lady-day, and into the house on the 25th of May following, and was to quit at Candlemas. He entered accordingly and paid rent. A notice was served upon the tenant September 22d, 1792, to quit on Lady-day. In ejectment brought against him it was claimed, on the part of the lessee, that his holding was from Candlemas, and, therefore, the notice was ineffectual to terminate the tenancy. Lord Kenyon, in deciding the case, said and held that "it was agreed that the defendant should quit at Candlemas, and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas." That case has in several instances been cited by the courts of this State upon the question of the force remaining in the terms of the agreement embraced in a void lease. And in *Schuyler v. Leggett*, 2 Cow. 663, it was remarked by Chief Justice Savage, in citing it, that such an agreement "must regulate the terms on which the tenancy subsists in other respects; as the rent, the time of year when the tenant must quit, etc." And the citation was repeated to the same effect by the Chief Justice in *People v. Rickert*, 8 Cow. 230.

The question here did not arise in either of those two cases, nor can they be treated as authority that the time for termination of a tenancy from year to year, in any year other than that of the designated expiration of term, is governed by such designation in a void lease for more than one year rather than by the time of entry. The effect sought to be given in the present case to the case of *Doe v. Bell* is not supported by English authority. In *Berrey v. Lindley*, 3 M. & G. 496, the tenant entered into possession of premises under an agreement void by the statute of frauds, by the terms of which he was to hold five years and a half from Michaelmas. Several years after his entry, and after expiration of the period mentioned in the agreement, the lessee gave notice to his landlord to terminate the tenancy at Michaelmas. It was there contended on the part of

the latter, and *Doe v. Bell* was cited in support of the proposition, that the time designated in the agreement for the termination of the tenancy governed in that respect. But the court decided otherwise, and held that the notice was effectual to terminate the tenancy. The views of the court there were to the effect, that, although the tenancy was from year to year, the tenant might without notice have quit at the expiration of the period contemplated in the agreement, but having remained in possession and paid rent subsequently to that time, he must be considered a tenant from year to year with reference to the time of the original entry.

The same principle in respect to holding over a term was announced in *Doe v. Dobell*, 1 A. & E. (N. R.) 806, where it was said that "in all cases the current year refers to the time of entry unless the parties stipulate to the contrary."

The doctrine of the English cases seems to be that a party entering under a lease, void by the statute of frauds, for a term, as expressed in it, of more than one year, and paying rent, is treated as a tenant from year to year from the time of his entry, subject only to the right to terminate the tenancy without notice at the end of the specified term. And to that extent and for that purpose only, the terms of agreement, in such case, regulate the time to quit. This right is held to be reciprocal. *Doe v. Stratton*, 4 Bing. 446. That proposition is not without sensible reason for its support. The lease, for more than one year, unless made in the manner provided by the statute, cannot be effectual to vest the term in the lessee, yet in other respects the rights of the parties may be determined by its terms, so far as they are consistent with its failure, to create any estate or interest in the land or any duration of term for occupancy by the lessee. And that principle is properly applicable to such leases. *Porter v. Bleiler*, 17 Barb. 154; *Reeder v. Sayre*, 70 N. Y. 184; *Laughran v. Smith*, 75 N. Y. 205, 209.

This view does not aid the defendants. They became tenants from year to year as from the time of their entry; and although by virtue of the terms of the agreement, in that respect, in the lease, they may have been at liberty to quit on the first of August, 1886, if they had remained until then, such time in that, or the year previous, could not be treated as the end of any year of the tenancy. The defendants having entered upon the second year from the time of the original entry, it was not within their power to terminate their relation or liability as tenants until the end of the then current year, which did not terminate until the first day of March, was reached.

Judgment affirmed.

ADAMS *v.* CITY OF COHOES.

127 NEW YORK, 175. — 1891.

ACTION for rent. The tenant held under a void parol lease from May 1, 1875, and paid his rent for some years in May and November. In August, 1885, without notice to the landlord, he moved out. Plaintiff has recovered the rent to May 1, 1886, in former actions. This action is to recover rent due November 1, 1886. Judgment for defendant. Plaintiff appeals.

POTTER, J. — There are two questions involved in the consideration of this appeal. The one is whether the defendant was bound to give the plaintiff notice of its intention to quit the premises before it could successfully maintain a defense to the claim for rent set forth in the complaint in this action and if it was so bound, whether the undisputed facts established upon the trial of the action, do not constitute such notice.

If such notice was not required, or if required and was sufficiently given, the direction of the trial court to the jury to render a verdict for the defendant was proper.

From the examination I have given the record in this case, I entertain a clear conviction that the defendant was not bound to give the plaintiff such notice, and if it was bound to, sufficient notice was given.

The plaintiff's contention is to the effect that the tenancy of the defendant to the plaintiff, formerly existing, had not been legally terminated prior to May 1, 1886, and that the defendant continued liable to pay the plaintiff the rent of the premises from that date to the 1st day of November, 1886. It is undisputed that the occupation of the premises by defendant ceased upon the 1st day of August, 1885, and I am of the opinion that the legal tenancy ceased on the first day of May following that date.

The defendant had, prior to May, 1875, occupied the premises with the consent of the plaintiff for some years, and paid the plaintiff as annual rent from the same, the sum of seven hundred dollars in half yearly payments, upon the first days of May and November in each year.

In the month of April, 1875, the plaintiff gave the defendant notice that from May 1, 1875, the rent of the premises occupied by defendant would be twelve hundred dollars a year. Thereupon the common council of the defendant passed a resolution authorizing its mayor to lease the premises of the plaintiff for the period of three years from May 1, 1875, at a rent of twelve hundred dollars a year. There

was no specification either in the requirement of the plaintiff or in the resolution of defendant when or in what instalments the rent should be payable. But that is not at all important, for the defendant paid the increased rent half yearly as it had paid the former rent.

No written lease was executed between the parties, and as a parol lease for a period beyond one year is void, the relation that resulted between the parties was a lease for a year if the tenant occupied the premises during that period; and if the tenant continued in the occupancy of the premises beyond the year, he thereby became a tenant from year to year at the same rate of rent. *Reeder v. Sayre*, 70 N. Y. 180-182; *Laughran v. Smith*, 75 Id. 209; *Coudert v. Cohn*, 118 Id. 309-311; *Talamo v. Spitzmiller*, 120 Id. 37-43.

The language of the court in *Reeder v. Sayres*, *supra*, is: "The agreement, though by parol, and void as to the term and the interest in lands sought to be created, regulates the relations of the parties to it in other respects upon which the tenancy exists, and may be resorted to to determine their rights and duties in all things consistent with and not inapplicable to a yearly tenancy, such as the amount of rent to be paid, the time of year when the tenant could be compelled by the landlord to quit and any covenants adapted to a letting for a year. *Doe v. Bell*, 8 T. R. 579; 8 Cow. *supra*; *Arden v. Sullivan*, 14 Q. B. (Ad. & El. N. R.) 832; *Doe v. Amey*, 12 Ad. & El. 476; *Berry v. Lindley*, 3 M. & G. 498; *Edwards v. Clemons*, 24 Wend. 480."

And the court through Justice Bradley in the above cited case, *Talamo v. Spitzmiller*, says: "While there may appear to have been some confusion in the cases in this State upon the subject, this doctrine has been more recently recognized. *Reeder v. Sayre*, 70 N. Y. 184; *Laughran v. Smith*, 75 Id. 209.

In the cases last cited the tenants had been in possession more than a year when the question arose, but having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and when once created could be terminated by neither party without the consent of the other, only at the end of the year.

The plaintiff contends that until the tenancy was terminated by a notice from the defendant that he intended at some definite future period to quit the premises, the tenancy and defendant's liability to pay the rent continued. Now what are the relations between landlord and tenant in a tenancy for a year or from year to year in respect to the amount of rent and the duration of the term or of the cessation of tenant's liability to pay rent? The rate of rent is that

specified in the lease for a year or in the void lease. When the term expires in a valid lease, at a fixed and defined period, or when the term is for one year by reason of the lease being void, under the statute of frauds and occupation for that period, no notice to quit is necessary. When the parties have agreed in the lease or the law has fixed the period of the termination of the tenancy, it would be a work of simple supererogation to give such notice. Hence where the duration of the term is fixed, there is no rule nor any reason for a rule, requiring any notice to quit to be given. § 107, McAdam, Landlord and Tenant, and cases cited.

In tenancies for a term fixed by the lease or by law for the want of a valid lease as to the term, the rights of the parties are determinate. The landlord in such lease has the right of an election. He may, if the tenant does not vacate the premises at the end of the term, treat him as a wrongdoer and bring ejectment or take summary proceedings under the statute to remove him from the premises, and he is not required before doing so to serve the tenant with any notice to quit, *Park v. Castle*, 19 How. Pr. 29, and the cases there cited, or the landlord may waive his right to the immediate possession and the wrong of the tenant in remaining beyond the expiration of the term and recover of him the rent for another year, for the tenant by remaining over has, by implication, become a tenant for another year from the expiration of his term. § 21, McAdam L. and T., citing *Schuyler v. Smith*, 51 N. Y. 309; *Mack v. Burt*, 5 Hun, 28; *Conway v. Starkweather*, 1 Denio, 113. So absolute is the implication from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year and had hired other premises which would be ready for his occupancy in a few days. *Schuyler v. Smith*, *supra*. A good illustration of this rule is to be found in the judgments put in evidence in this case where the plaintiff herein recovered the rent of the entire year, although the defendants had removed from the premises with the knowledge of the plaintiff nine months before the end of the year for which the plaintiff recovered the rent. At the end of the year thus hired by implication, the rights and the remedies which existed at the end of the former term are again revived. Those rights are, as we have seen, that the landlord may remove the tenant without notice and the tenant may quit the possession without giving the landlord any notice of his intention to do so. § 110, McAdam, L. and T.; *Park v. Castle*, and the other cases above cited.

In *Ludington v. Garlock*, 29 N. Y. S. R. 600, it was held in a case

of a lease from month to month and the tenant held over, that the tenant who vacated the premises at the end of a subsequent month and gave the agent of the landlord notice of that fact and left the keys with him, that the tenant was no longer liable for the rent of the premises. That case is analogous to this in all respects, except that was a tenancy from month to month and this is a tenancy from year to year. In that case the tenant paid during the time of the occupancy and quit at the end of the month. In the case at bar the defendant did not quit the possession at the end of the year as it had the right to do and was, therefore, compelled to pay for nine months after it quit the premises, because it did not quit the premises at the end of the year, but occupied them three months beyond the end of a year.

It is quite apparent from the cases above cited that the necessity or occasion for the service of a notice to quit upon the part of the landlord or tenant, has no application to a tenancy which terminates at a fixed period. It is only in cases where the end of the term is not fixed, as in tenancies at will or at sufferance, that the landlord is required by law before bringing ejectment or summary proceedings to recover possession from a tenant to give notice to quit. 2 R. S. 5, § 28; 1 Id. 745, § 7. Those statutes are evidently based upon that theory. *Park v. Castle, supra*.

I find no case, and upon principle I should not expect to find a case, holding that it was not the right of the tenant to leave the premises at the end of the term or requiring him to give the landlord in such case a notice of his intention to quit the premises.

We have before seen in *Park v. Castle, supra*, and the other cases cited, that in such case the landlord is not bound to give the tenant notice to leave even for the purpose of instituting summary proceedings to recover possession of the premises.

If such is the case in respect of the landlord, why should it not be so as to the tenant? Their rights and duties are correlative or reciprocal.

My conclusion is that the defendant in this case had the right to quit the premises at the end of any year from the first day of May, without giving the plaintiff any notice of his intention to do so.

Judgment affirmed.

V. Tenancy at sufferance.**JACKSON EX DEM. VAN CORTLANDT v. PARKHURST.**

5 JOHNSON (N. Y.), 127. — 1809.

THIS was an action of ejectment. The cause was tried at the Oneida Circuit, the 5th June, 1809, before Mr. Justice Yates.

At the trial it was proved that the lessor of the plaintiff, by his attorney, duly authorized for that purpose, on the 1st of April, 1803, executed a lease of the premises in question to the defendants, for three years, ending on the 1st April, 1806. On the 15th December, 1807, the attorney of the plaintiff sent a written notice to the defendants, demanding a surrender of the possession of the premises, and that, if they neglected to deliver up the possession, they would be answerable for double rent; and that the lessor refused to let them occupy the premises. The defendants were in possession when this suit was commenced. It appeared, that in June, 1806, one of the defendants applied to the attorney of the lessors, to know if he had received any instructions as to leasing or selling the premises; who replied, that he had not, nor was he authorized to make any new agreement with the defendants, but advised them to continue in possession, until they heard from the lessor. The attorney received no instructions as to a new agreement, until some time in the autumn of 1807, when he was empowered to execute a new lease of the premises to the defendants for seven years; but the defendants refused to accept the lease.

The counsel for the defendants insisted, that the defendants were entitled to a notice to quit, previous to bringing the ejectment; and, under the direction of the judge, the jury found a verdict for the plaintiff, subject to the opinion of the court, on the question, whether the defendants were entitled to such notice.

The case was submitted to the court without argument.

Per Curiam. — No notice to quit was requisite in this case. After the expiration of the lease, the tenants did not continue in possession by any new agreement with the plaintiff; nor did the plaintiff do any act whatever, from which a renewal of the contract, or a consent to the tenant to hold for a year could be inferred. The proof is decisive, that the agent, who gave the lease for three years, had no authority to make any new agreement, and that he so declared to the tenants. The defendants were, therefore, no more than tenants at sufferance. There must be a judgment for the plaintiff.

Judgment for the plaintiff.¹

¹ But of course notice would be required now in New York. R. P. L., § 198 For other cases on tenancy at sufferance see pp. 735-740, *supra*. — ED.

CHAPTER III.

LICENSES.

I. Nature of a license.

1. IN GENERAL.

COOK v. STEARNS.

11 MASSACHUSETTS, 533. — 1814.

[Reported herein at p. 480.]¹

2. HOW A LICENSE DIFFERS FROM A LEASEHOLD INTEREST.²

3. HOW A LICENSE DIFFERS FROM AN EASEMENT.

THE GREENWOOD LAKE AND PORT JERVIS R. R. CO. v. THE NEW YORK AND GREENWOOD LAKE R. R. CO.

134 NEW YORK, 435. — 1892.

[Reported herein at p. 472.]

4. EXECUTED AND EXECUTORY LICENSES.

COOK v. STEARNS.

11 MASSACHUSETTS, 533. — 1814.

[Reported herein at p. 480.]¹

¹ See also *G. L. & P. J. R. R. Co. v. N. Y. & G. L. R. R. Co.*, *supra*, p. 472; *Huff v. McCauley*, *supra*, p. 76, and the cases reported below. As a license does not properly give an interest in the land, but merely furnishes a defense for an act which would otherwise be a trespass, the subject may seem out of place in this "Part." However, its superficial resemblance to an estate at will and the fact that a few states treat it as an "interest" under certain circumstances may justify its treatment here. — ED.

² A leasehold gives the exclusive possession of the land to the lessee as against the lessor. See cases reported herein. — ED.

II. How a license may be given.

I. IN EXPRESS TERMS OR BY IMPLICATION.

FOSTER, J., IN *STERLING v. WARDEN*.

51 NEW HAMPSHIRE, 217. — 1871.

THE substance of the defendant's attempted justification is, not merely that, as assistant postmaster, an officer and agent of the United States government, — the agent and servant also of his immediate principal, Gilchrist, the postmaster, an officer and agent of the government, — he committed the acts charged in the declaration, solely and necessarily in pursuance of his right and duty; but, also, that his entry upon the premises and removal of the personal property were justified by the license and permission given by the plaintiff to his principal, Gilchrist, and that the assault upon the plaintiff was committed in self-defense, and was accompanied with no unnecessary force. He also attempts to justify his entry into the building, by insisting upon the right of a citizen to enter a public post-office for the purpose of getting his mail-matter, alleging that he went there for that purpose, making his errand known to the plaintiff.

We will first consider the subject of the license given by the plaintiff to Gilchrist, — bearing in mind that upon demurrer, all the allegations of the defendant are to be regarded as established facts.

It appears, then, that with full notice on the part of the plaintiff of the appointment and qualification of Gilchrist and the defendant as postmaster and assistant postmaster, and special information from Gilchrist that he proposed and intended to go to the post-office room on the thirtieth of July, “and then and there remove and take away therefrom the furniture, articles, and other things belonging to said post-office, and remove the same to another building,” the plaintiff then and there “assented thereto, and gave his consent, license, and permission that said Gilchrist might and should take away and remove said furniture, articles, and things, as aforesaid.” It also appears that the defendant was employed by Gilchrist, and acted under his direction, in the attempt to take possession of and to remove the property, and that his assistance was necessary for this purpose. * * *

The plea alleges that the plaintiff “gave his consent, license, and permission that said Gilchrist might and should take away and remove” the public property.

“A license is express where, in direct terms, it authorizes the performance of a certain act, — as where a man who owns a dam authorizes his neighbor to draw water from it to his mill; in this case the

licensee has a right to enter the premises to get the water." 2 Bouv. Inst. 567. A bare parol license, though without consideration, will furnish a justification for an act which would otherwise be a trespass. *Marston v. Gale*, 24 N. H. 177; *Batchelder v. Sanborn*, Ibid, 479; *Rawson v. Morse*, 4 Pick. 127.

Such a license, though ordinarily regarded as personal, extending only to the party to whom it is expressly given, will nevertheless apply to and protect the agents and servants of the licensee, whenever from the circumstances it can be presumed that there was an implied license to such persons, — "as where a license is given to a man to remove a weighty matter, which requires the assistance of several other persons." 2 Bouv. Inst. 568. A license to a man to remove a bank safe would imply a license to as many servants of the licensee as should be requisite for his assistance. A license necessarily implies the right to do everything without which the act cannot be done. *Taylor's Land. and Ten.* § 766; *Curtis v. Galvin*, 1 Allen, 217.

The plea in this case is conclusive upon this fact, and establishes the license to the defendant. It alleges that Gilchrist requested the defendant to assist him, and that "it was necessary and proper, in order that said Gilchrist should be able to have sufficient force conveniently and properly to take away and remove said furniture, articles, and things from said post-office room as aforesaid, that he should then and there be aided and assisted by the defendant."

Undoubtedly a bare license is revocable before it is executed; but there are licenses which are irrevocable, though they relate to an entry upon and the occupation of land or real estate, and are by parol; "as where, for instance, the license is directly connected with the title to personal property which the licensee acquires from the licensor at the time the license is given, whereby the license is coupled with an interest. Thus, where one sells personal chattels on his own land, and, before a reasonable time to remove them, forbids the purchaser to enter and take them, it was held to be a license which he could not revoke within such reasonable time. *Nettleton v. Sikes*, 8 Met. 34; *Wood v. Manley*, 11 Ad. & E. 34; *Parsons v. Camp*, 11 Conn. 525; *White v. Elwell*, 48 Me. 360; 1 Washb. Real Prop. *401.

And it is said that a license coupled with an interest is where the party, obtaining a license to do a thing, also acquires a right to do it; in such case the authority conferred is not merely a permission; it amounts to a grant, and it may be assigned to a third person. 2 Bouv. Inst. 568.

It is not indispensable to the condition of such a license that the

right or title to the property sought to be removed should have been derived from the licensor. The license to enter on the land and remove the property is a license coupled with an interest, and so assignable and irrevocable, if the licensee's right to the possession of the property is derived from another source, provided the party granting the license has assented to the contract or other condition of things whereby the licensee gains the title or the right to the possession of the property. And such assent may be inferred from the duty of the licensor to recognize the contract or circumstances from which the other party's right is derived. A person cannot justify entering the close of another to take his own property, without showing the circumstances under which it came there, even though he alleges he did not do any unnecessary damage, — *Anthony v. Haneys*, 8 Bing. 186; 2 Selw. N. P. 1342; — “but,” says Baron Parke, “all the old authorities say that where a party places upon his own close the goods of another he gives to the owner of them an implied license to enter for the purpose of recaption.” *Patrick v. Colerick*, 3 M. & W. 483; *Mussey v. Scott*, 32 Vt. 84.

Here, Gilchrist gained his title to the possession and control of the property from the United States. To that possession, right, and control the plaintiff expressly assented. And so Gilchrist acquired a license coupled with an interest, although the interest and title were not derived from the plaintiff. And as instances of the effect of a license, Vaughan, C. J., in *Thomas v. Sorrell*, Vaughan Rep. 331, says, — “A dispensation or license properly passeth no interest, nor alters nor transfers property in anything, but only makes an action lawful which, without it, had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away deer killed to his own use; to cut down a tree in a man's ground, and carry it away the next day after to his own use, — are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So, as in some cases by consequent, and not directly and as its effect, a dispensation or license may destroy and alter my property.”

And Baron Alderson, in *Wood v. Leadbitter*, 13 M. & W. 843, says, “A mere license is revocable; but that which is called a license is

often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot, in general, revoke it so as to defeat his grant, to which it was incident."

In *Wood v. Manley*, 11 Ad. & E. 34, it appeared that goods which were upon the plaintiff's land were sold to the defendant, and that by the conditions of the sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods. It was held that after the sale, the plaintiff could not countermand the license. And the defendant having entered to take and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injuria*, — it was held that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter; and the defendant had broken down the gates, and entered to take the goods, "the plaintiff," as was said by Williams, J., "having assented to the terms of the contract, put himself into a situation from which he could not withdraw."

It is not necessary, as before remarked, that an authority in law to enter into the post-office and take the public property, by an agent of the government duly authorized for that purpose, should be shown, or presumed, from the circumstances of the case, although perhaps such authority and right, and the means of exercising it, would be a fair legal conclusion. The assent, license, and permission to enter and take the goods is express in this case; and if the authority of a purchaser of goods from the vendor, having license to enter and remove them, becomes an authority coupled with an interest irrevocable and assignable, *a fortiori*, it would seem that a license freely given by the party who never had any property in the goods, and whose right to the possession had been terminated by his removal from office, — a license given to his successor in office, entitled by law to the possession of the property, — could not be regarded as a license of more restricted character. Under the defendant's plea, he may prove a license in law or in fact express or implied. 4 Bouv. Inst. 57.

Moreover, the pleas allege no revocation, in terms nor by implication, of the license to Gilchrist; and we have seen that such license, by necessary consequence, implies a license to employ such agents, servants and assistance as may be requisite to make the license effectual. * * *

Another important consideration is suggested by the pleadings. It is shown that "when the defendant arrived at said post-office building as aforesaid, and during all the time when he was in and

about said building and room, as is hereinafter set forth, said Gilchrist was in and about said building and room for the purpose, and was engaged in the work and business of taking away and removing said furniture, articles, and things as aforesaid."

So that it would seem that when the defendant entered the building, the plaintiff, regardless as well of his duty as his license, had abandoned the possession and control of the goods to Gilchrist, and that the license therefore had been substantially executed; and a license executed is not countermandable. *Liggins v. Ince*, 7 Bing. 682. * * *

III. Assignability of license.

BLAISDELL *v.* RAILROAD.

51 NEW HAMPSHIRE, 483. — 1871.

TRESPASS *quare clausum fregit* against the Portsmouth, Great Falls & Conway Railroad, for building a railroad across plaintiff's land and using same to date of writ. Defendant pleaded a license from one Brackett, deceased, whose estate plaintiff now has, to the predecessor of the defendant company. Demurrer. Finding of law reserved for this court.

SARGENT, J. — The argument of the plaintiff, that no consent to enter upon land for the purpose of building a railroad could be effectual, or of any avail, unless the right to enter by strict compliance with all the requirements of the statute had been acquired is not well founded.

One man can give to another permission or license to make a railroad or dig a canal on his land, just as well as to make a private way or dig a ditch.

And it matters not whether the party wishing to build or to dig has a charter, or an act of incorporation, or any other authority to do it, or whether he have pursued one course or another previously to obtaining the land-owner's consent or license.

The license which he thus obtains of the land-owner is a sufficient authority for all acts done upon said land within the scope of the license, and will so continue until it is revoked; and nothing more is needed as a license to justify the building of a railroad on land of another than to build a barn or fence.

The demurrer to this plea of license and the joinder in demurrer raise the question whether the facts set forth in this plea in bar amount to a justification of the alleged trespass complained of.

The plea does not claim any title to the land, or any interest or easement in the soil. The defendants only claim a license from Brackett. But a license does not convey any right or estate in the land, and amounts to nothing more than an excuse for an act which would otherwise be a trespass. *Cook v. Stearns*, 11 Mass. 537, 538.

If any right or easement in the soil were claimed, then the law requiring that such right must be by deed, the defendants should have pleaded their deed or other conveyance, so that the court might see whether it was a lawful conveyance of the right or not. *Id.* 536, 537.

Where no deed is averred, or other instrument in writing, which would convey an interest in land, it is to be presumed that the authority relied on is only by parol, a mere permission or license.

Such parol licenses may be in writing, or verbal; but there is no distinction between the two, if the writing has not the legal requisites to make it a deed or grant of real estate. *Dodge v. McClintock*, 47 N. H. 383, was a case of a license in writing, but not amounting to a deed or grant, was held to be merely by parol. So in this case it makes no difference whether the license was verbal or written, — it is pleaded as a license, and not as a deed; and therefore we inquire whether, from the facts stated in the plea, such license is an answer to the plaintiff's case? If the license had been given by this plaintiff to these defendants directly, it would be a good answer to this action of trespass if it had not been revoked, and standing on demurrer would be well enough. But in this case the plea admits that Brackett, who is alleged to have given the license, is dead, and that the plaintiff holds his estate; and no license is alleged from the plaintiff.

The plea also admits that the party or company, to whom the original license was given, has sold out to these defendants since the alleged license was given, and no license to these defendants, directly, is claimed to have been given by any one. When the title in the land passed from Brackett to this plaintiff, the license which is here pleaded was revoked and terminated, and the assignment of the railroad to these defendants, by those to whom the license was first granted, also terminated the license, as it was a mere personal privilege, and incapable of assignment. *Cowles v. Kidder*, 24 N. H. 379, 380.

There can be no prescription or adverse possession in this case; whatever is held under a license cannot be held adversely. *Dodge v. McClintock*, *ante*; see also *Carleton v. Redington*, 21 N. H. 291, *Marston v. Gale*, 24 N. H. 176; *Houston v. Laffee*, 46 N. H. 507.

Demurrer sustained.

IV. Revocation of license.¹

1. WHEN IRREVOCABLE.

*a. An executed license.²**b. An executed license to interfere with or obstruct an easement.³*PECKHAM, J., IN *WHITE v. MANHATTAN RAILWAY CO.*

139 NEW YORK, 19. — 1893.

THE plaintiffs insist that the paper was of no more effect than a parol license to do work on the land of the licensor would have been, and that it was revocable at the pleasure of the licensor, and that a revocation was effected by the conveyance of the land, and by the commencement of this action by the devisees of the former owner, James H. White.

There is no finding or proof that the plaintiffs have any title to any portion of the street or square upon which their building fronts, but there is a finding that they acquired with their title to the premises the right to have Chatham square kept open as a public street, "and to have a free and unobstructed right of way, access and passage to and from said premises, and over and upon said street, together with all the use and benefit of the light and air coming in and upon said lot and premises through and from said street, free and unobstructed."

I think the proof shows without contradiction that all the rights in the street they had were what has been termed property rights in the nature of easements of light, air and access. *Story Case*, 90 N. Y. 122; *Kane Case*, 125 Id. 164, and cases cited.

The defendants, therefore, insist that as the plaintiffs or their predecessors had no title to any portion of the street, the consent of their predecessors, while in the possession and ownership of the abutting land, that the defendants might construct and operate the railroad in the square in front of their land, was more than a mere license to do an act on the land of the licensor, and that it amounted in law and in fact to an abandonment of their rights or easements in

¹ There are two distinct cases involved under this heading: (1) After the licensee has done the act or series of acts for which the permission was given, may the licensor revoke the license so as to hold the licensee for trespass on account of such acts? (2) Has the licensor a right to forbid the continued maintenance of a condition which resulted from the doing of the act or series of acts? The customary treatment of the subject has been followed here, but the student should observe that some of the cases come under one query some under the other. — ED.

² See cases generally under this chapter. — ED.

³ *Pope v. O'Hara*, 48 N. Y. 446. — ED.

the street so far as was necessary for the construction and operation of the railroad, and that the consent to such construction having been acted on and large amounts of money expended on the faith thereof, the plaintiffs as the successors of those who gave the consent are themselves estopped from making any claim for damages arising from such construction and operation. It has been the law in this State for a number of years, that an easement to do some act of a permanent nature on the land of another can be created only by a deed or conveyance in writing, operating as a grant, and that a consent in writing on the part of the landowner is no more valid than if it were by parol.

Thus a parol agreement by the owner of the land that a person may abut and erect a dam on such land, not for a temporary purpose, but for a permanent use such as the creation of a water power for the use of mills, is void, and the agreement being a mere license may be revoked even after it has been acted upon by the other party. Also a permanent easement to drain through the land of another is not created by a license so to do, even when in writing and made upon a good consideration. *Mumford v. Whitney*, 15 Wend. 381; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 Id. 323; *Babcock v. Utter*, 1 Abb. Ct. of App. Dec. 27, and cases cited; *Eckerson v. Crippen*, 110 N. Y. 585.

The question of the establishment of an easement by adverse user, which may authorize the presumption of a grant, is not involved, nor is the ability to thus prove its existence denied. *Hammond v. Zehner*, 21 N. Y. 118. It is, however, held, what would otherwise seem to be plain enough, that there can be no adverse user where the right to use exists and is exercised under a license. 84 N. Y. 31, *supra*.

The reasoning upon which these decisions as to the insufficiency of a license are based, is that the right which is claimed under a license amounts to an interest in land and that such interest cannot be created and cannot pass to another without a proper conveyance or grant of such interest in writing and under seal as required by our statute. It is said that a license is a mere authority to enter upon the land, and is a sufficient protection to the licensee while it lasts, but that it may be revoked at any time, and after its revocation it cannot be used as a protection for any future acts. It is held there can be no equitable estoppel which will operate to prevent the revocation of the license, grounded upon the fact that the licensee has entered upon the land of the licensor and expended thereon labor and money upon the faith of the license, because it must be held that the licensee knew that the license gave him no interest in the land,

and that he must rely only upon the indulgence of the licensor, and if that be withdrawn he must himself withdraw from the land. Otherwise, it is said, the statute in regard to the creation and conveyance of interest in land would be in great part abrogated. The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses. *Kane Case*, 125 N. Y., *supra*. Whatever the means by which the easements were created they are in their nature the same as if they had been created by grant. The owners thereof cannot be divested of them without their consent unless they are compensated therefor. Although it may generally be said, under the authority of the cases already cited, that an easement in the nature of an interest in the land of another can only be created by a grant, yet after it has been created and while it is in existence, it may be abandoned and thus extinguished by acts showing an intention to abandon and extinguish the same. This has been many times decided and by many different courts. A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release without reference to time. *Snell v. Levitt*, 110 N. Y. 595, and cases cited in opinion of Earl, J., at page 603. The intention to abandon is the material question and it may be proved by an infinite variety of acts. If a third party interested in the servient estate has acted upon such abandonment, and in regard to whom it would operate unjustly if the exercise of the easement should be resumed in favor of the dominant estate, added force is given to the claim of abandonment. *Id.*

The railroad company having procured the consent of the authorities of the city to the construction of the railroad in the street or square in question upon the terms agreed upon, such company obtained an interest in and to a certain extent a title to the street for the purposes of the construction and operation of its railroad, which was in the nature of property, and which was sufficient to enable it to treat with abutting property owners in the character of one who had an interest in the servient estate. *People v. O'Brien*, 111 N. Y. 1

The case before us is, therefore, different from those cases where an easement has been claimed to have been created in the land of a third person, by reason of his mere license to enter upon his land and do some act of a permanent nature which would amount, if the right should continue, to an interest in the land of such person. This interest in land, the cases hold, requires a grant. In this case the owners of the abutting land had no title to the street. They had an easement in it only, and their consent purported to carry no title to land. There can be no question that they had the right to release, abandon or otherwise extinguish that easement, and upon such terms as they should think fit. The question before us is, whether they have done so and to what extent by the execution of the paper proved upon the trial.

c. A license subsidiary to an interest or valid grant.¹

STERLING *v.* WARDEN.

51 NEW HAMPSHIRE, 217. — 1871.

[*Reported herein at p. 789.*]

d. By equitable estoppel when the licensee has incurred expense in consequence of the fraud of the licensor.²

JACKSON & SHARP COMPANY *v.* THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

4 DELAWARE CHANCERY, 180. — 1871.

THE CHANCELLOR. — The claim made on the part of the complainants to the perpetual use of the side track in controversy as a legal right is based upon two grounds. One of these is, that the right was acquired by contract between their predecessors, — Jackson & Sharp, and the Railroad Company, — the other, that even were there, in the first instance, no contract, but only a permissive use of the track under a license, still, that the license, having been acted upon in the expenditure of large sums of money on the faith of its

¹ In these cases there can be no revocation until the entire purpose of the license has been fulfilled and that whether the license be partly executed or wholly executory at the time the revocation is attempted. — ED.

² In this case and under *c* below the result of the rule is to give the licensee an interest in the land in most instances as it permits him to maintain permanently any works or structures which he may have erected. — ED.

indefinite continuance, has become irrevocable under the doctrine of equitable estoppel. * * * Let us then proceed to consider the case in the aspect of a license.

On this branch of the case there are several material points upon which no controversy was raised in the argument. One of these is, that the right claimed for the complainant is to an easement or interest in the land of the Railroad Company, the claim being to the perpetual use of the side track as a right appurtenant to the car works, transmissible with the title to them, and binding the land of the company into whosoever hands it may come, at least so long as it shall be used for the purposes of a railroad. *Pitkin v. The Long Island Railroad Company*, 2 Barb. Ch. R. 221, is a case very similar. Further, it is agreed that at law an estate or interest in land can be created only by deed or grant under seal, or by prescription, or in this country by twenty years adverse possession or user; in equity such an interest may additionally be acquired by contract, which, however, must, under the statute of frauds, be in writing, subject to an exception of the equity arising out of part performance of a verbal contract. Again, it must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor does it matter whether the license be by parol or in writing, so long as it remains a mere license, not converted into a conveyance, grant or contract, nor rendered irrevocable by estoppel, as under some circumstances, to be presently noticed, it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land. In England the leading cases are *Fentiman v. Smith*, 4 East, 107; *Rex v. Herndon on the Hill*, 4 M. & S. 565; *Hewlins v. Shippman*, 5 B. & C. 221, (11 E. C. L. 207); *Bryan v. Whistler*, 8 B. & C. 288 (15 E. C. L. 149); *Cocker v. Cowper*, 1 C. M. & R. 418, and *Wood v. Leadbitter*, 13 M. & W. 838, in which last case the prior course of decisions is very fully reviewed. In this country the same rule was adjudged, as early as 1814, by C. J. Parsons, in *Cook v. Stevens*, 11 Mass. 533. He has been followed in many of the States. *Mumford v. Whitney*, 15 Wend. 384; *Foot v. The N. H. & Northampton Railroad Company*, 23 Conn. 214; *Foster v. Browning*, 4 R. I. 47; *Den v. Baldwin*, 1 Zabriskie, 390; *Hays v. Richardson*, 1 G. & F. 38; *Carter v. Harlan*, 6 Md. 20; *Bridges v. Purcell*, 1 Dev. & Bat. 492.

But it was earnestly urged that although a license is revocable so long as it is executory and the parties remain in *statu quo*, it ceases to be so, under the doctrine of equitable estoppel, after it has been executed, the licensee having expended money or otherwise involved himself so that he cannot recede without prejudice; that in this case Jackson & Sharp having made large expenditures in erecting and afterwards enlarging their car works upon the faith of their enjoying the continued use of this side track, the railroad company are equitably estopped from revoking the license.

Were this a case in a court of law, the answer would be that at law a license can under no circumstances become irrevocable by estoppel when the effect would be to create an interest in land. The doctrine of equitable estoppel, although largely adopted in courts of law and frequently so applied as to render licenses irrevocable, has been held not to apply to licenses, which, if rendered perpetual, would amount to an easement in lands. The reason is a plain and necessarily conclusive one, viz.: that courts of law do not recognize mere equities, such as arise out of an equitable estoppel enforced against the legal owner of lands; but they deal only with legal estates, such as are acquired through legal forms of conveyance, or their equivalent under the statute of limitations, an adverse possession, of twenty years, or at least by writing under the statute of frauds. Hence, a mere license affecting lands is at law always revocable, even though granted for a valuable consideration, as in *Fentiman v. Smith*, 4 East, 107, and *Wood v. Leadbitter*, 3 M. & W. 833, and although the licensee may have expended money under it, which was a feature of many of the cases before cited.

It is true, however, that in this court, equities in land though not created by any deed, grant or writing whatever, but springing out of the acts and relations of the parties, are largely enforced, and among these a large class are those which arise under the doctrine of equitable estoppel applied to prevent constructive fraud, — as where one having title to land is knowingly silent in the presence of an innocent purchaser from a third person, or where one knowing his title to land silently permits another ignorantly to build on it, — in these, and in like cases, this court, in order to prevent fraud, will raise out of the transaction an equity in favor of the party misled, binding the conscience of the owner and restraining the exercise of his legal rights against such party. No reason is perceived why, in a proper case, the same principle should not in equity restrain the revocation of a privilege affecting the use of land. But it must be carefully observed that this principle of equitable estoppel proceeds upon the ground of preventing fraud. Its effect, when applied, is

to restrain a party from exercising his legal right, and this even a court of equity cannot do unless there have been on his part some conduct, declaration or improper concealment, misleading an innocent person to his prejudice and rendering the assertion of the legal right as against such person an act of bad faith, amounting to constructive fraud. Moreover, it may be well added that to warrant the interference of the court with the legal right or title of a party, the case relied on to work the estoppel must be clear, beyond doubt, upon the facts. And the more stringently do these rules apply in a case such as this, where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege, temporary and revocable, into an easement in the licensor's land, perpetually binding it as transmissible from the licensee.

It is a fatal infirmity in this branch of the complainant's case that there was nothing in all the communications had between the officers of the Company and Jackson & Sharp, or in the conduct of these officers, to justify Jackson & Sharp in assuming that the company, by granting the accommodation applied for intended to relinquish any right of property in the soil. It is agreed that no stipulation or promise to that effect was expressed. * * * Looking to all the circumstances of the case, it is my conviction that although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent, yet that no stipulation to that effect was asked or given, or supposed by either party to have been given; but that the arrangement was tacitly left to rest upon the general understanding with respect to such accommodation, Jackson & Sharp either not anticipating the contingency which has now happened, or trusting to the mutual interest and good will of the parties as a sufficient guarantee for the permanence of the connection, without securing it as a legal right according to prescribed forms of law. Their disappointment certainly involves them in no little hardship. But hardship is not a ground for equitable relief, except in favor of one who, without any negligence in securing his rights by the appropriate legal modes, has been misled to his prejudice through some fraud or laches of the party against whom the relief is sought, or by such conduct of the latter as renders it an act of bad faith to take advantage of the mistake.

The injunction must be dissolved and the bill dismissed.

[LAW OF PROP IN LAND. — 51.]

e. Rule in cases where licensee has paid consideration, or has incurred expense in executing the license and there is no positive fraud?

CROSDALE *v.* LANIGAN.

129 NEW YORK, 604. — 1892.

ANDREWS, J. — This case presents a question of importance from the principle involved, although the particular interest affected by the decision is not large.

The action was brought to obtain equitable relief by injunction to restrain the defendant from tearing down a stone wall erected on the defendant's land by the plaintiff, under an alleged parol license from the defendant, and in the erection of which the plaintiff expended in labor and materials a sum exceeding one hundred dollars. The parties are the owners of adjoining lots fronting upon a public street. The plaintiff's lot is west of the lot of the defendant. The land in its natural state descended toward the east. In 1886 the plaintiff graded his lot, and in so doing, raised an embankment several feet high along his eastern line, adjacent to the lot of the defendant, and erected a house on his lot. In 1887 the defendant graded his lot and excavated the earth up to his west line, adjacent to the embankment on the plaintiff's lot, to the depth of four or more feet, thereby removing the natural support to the lot of the plaintiff as it was in its original state. Before the defendant had completed his excavation, the parties had an interview and the question of the support of the plaintiff's embankment arose. The plaintiff claimed that the defendant was bound to build a wall where his excavation was. The defendant denied his obligation to do so and referred to the fact that the plaintiff had raised his land several feet higher than it was in its natural state. The plaintiff wanted the defendant to sell him two feet of his land to build a wall upon, which the defendant declined to do. * * *

Some days after the interview * * * the defendant addressed a letter to the plaintiff, in which * * * he said: * * * "I have thought the matter over seriously, put myself in your place, so to speak, and decided to give you two feet asked for to build your wall on." * * *

This case was tried and decided upon the theory that the plaintiff had a license from the defendant to build the wall on his land, which, when executed, became in equity irrevocable. It was not claimed on the trial, nor is it now claimed, that there was any contract on the part of the defendant to sell the land occupied by the wall to the plaintiff, which, by reason of part performance, equity

will enforce. The claim and the finding is that the license to enter upon the defendant's land, when acted upon by the plaintiff, conferred upon him a right in equity, in the nature of an easement, to maintain the wall on the defendant's lot. If this claim is well founded, there has been created, without deed and in violation of the statute of frauds, an interest in the plaintiff and his assigns in the land of the defendant, impairing the absolute title which he theretofore enjoyed, and subjecting his land to a servitude in favor of the adjacent property. It is quite immaterial in result that this interest claimed, if it exists, is equitable and not legal. An encumbrance has been created upon the defendant's lot, and his ownership, to the extent of such interest, has been divested.

We are of opinion that this judgment is opposed to the rule of law established in this State. There has been much contrariety of decision in the courts of different States and jurisdictions. But the courts in this State have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land, is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case. There are several circumstances in the present case which render the enforcement of such a jurisdiction a dangerous precedent. The only license claimed is contained in the letter of April 13th. The language is: "I have decided to give you the two feet you asked for to build your wall on." How far the wall was to extend, its character, or how it was to be built, is not stated. Referring to the previous interview to which the letter alludes, the evidence of the plaintiff of what was said at the interview leaves the whole matter indefinite and uncertain.

He testifies that neither the description, dimensions and character of the proposed wall were spoken of. The testimony of the defendant is to the contrary, but perhaps it is to be assumed that the trial judge adopted the testimony of the plaintiff.

Upon the case made by the plaintiff upon the letter and the prior conversations, if it was a contract, it is difficult to see how it could be enforced in equity. The cases are decisive that equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts. The extent of the injury which will be suffered unless equity intervenes is also an element to be considered when its extraordinary jurisdiction is invoked. Here the amount expended by the plaintiff in reliance upon the license was comparatively small. The most reasonable inference is that the plaintiff confided in the good faith of the defendant as his security that the wall would be permitted to remain. It does not appear that anything was said as to the time it should be maintained. It is claimed that the wall was built for the benefit of both parties. This is founded on the assumption that the defendant's excavation removed the natural support of the plaintiff's land, and subjected him to liability. But this would not take the case out of the statute nor authorize the interference of equity to enforce the license as a grant in equity. The same element of common benefit is found in the case of *Cronkhite v. Cronkhite*, 94 N. Y. 323.

The trial judge refused to find the facts as to the effect which would have followed from the defendant's excavation in case the plaintiff's land had continued in its natural state. He tried and decided the case on the theory that the license when executed became irrevocable. In this we think he erred. The cases of *Mumford v. Whitney*, 15 Wend. 380; *Wiseman v. Lucksinger*, 84 N. Y. 31; and *Cronkhite v. Cronkhite*, *supra*, are, we think, decisive of this action.

Judgment reversed.

FERGUSON v. SPENCER.

127 INDIANA, 66. — 1890.

MITCHELL, J. — The nature of the action, as disclosed by the pleadings, is not very well defined. It may be regarded as a suit to recover damages caused by interrupting the flow of an artificial stream through, or diverting it from, a tile drain through which water was supplied to the plaintiff's animals on her farm.

The merits of the case may be determined upon the following facts returned to the court in a special verdict. In 1884 the plaintiff,

Mrs. Spencer, and the appellant, William Ferguson, were adjoining landowners in Warren county, their farms being separated by a public highway running east and west on the division line. Their farms occupied such a relation that surface and spring water collected on and issuing from the defendant's land was discharged over and through a depression, with more or less defined banks, through a similar depression over and upon the plaintiff's land. In the year above mentioned the parties mutually agreed to construct a covered tile drain, of specified dimensions, to be laid at a given depth, each to construct the distance required, on his or her own land. In pursuance of this agreement the plaintiff, commencing at the highway separating her farm from that of the defendant, constructed a drain of the dimensions agreed upon of the length of forty rods, at a cost of over sixty dollars. The defendant at the same time constructed a similar drain on his land, connecting it with that built by the plaintiff at one end, and with an existing tile drain on his land at the other, thereby making a continuous drain over the lands of both, through which water flowed constantly. The drain thus constructed was beneficial to the plaintiff's farm, enhancing its value by affording her more perfect drainage than before, and by furnishing a constant supply of living water for stock on her farm, she having utilized the water by constructing a convenient watering place. In 1887 the defendant refused to continue the arrangement, and dug up some of the tiling on his own land, so as to disrupt the drain and diminish the supply of water, to the damage of the plaintiff.

The question is whether or not, after money had been expended in constructing the drain in reliance upon the agreement, either of the parties, without the consent of the other, could terminate the arrangement without becoming liable for any damage which might result?

The effect of the agreement, when acted upon by the parties, was to create mutual or cross-licenses in favor of each in the land of the other. Each was given a license from the other to make use of the other's land for the purpose of conducting water over it for a purpose supposed beneficial to his own land.

A license is defined to be an authority given to do some act, or a series of acts, on the land of another without possessing an estate therein. *Cook v. Stearns*, 11 Mass. 533, 13 Am. & Eng. Encyc. of Law, 539.

By means of the arrangement entered into the plaintiff obtained a license to connect the covered tile drain which she constructed with a similar drain constructed by the defendant, thereby affording her the means of draining or conducting water from springs and other

sources on the defendant's land for the benefit of her farm. This is found to have been a valuable privilege, to obtain which the plaintiff expended money in reliance upon a mutual agreement entered into with the defendant. It is everywhere settled that a parol license to use the land of another is revocable at the pleasure of the licensor, unless the license has been given upon a valuable consideration, or money has been expended on the faith that it was to be perpetual or continuous. Where a license has been executed by an expenditure of money, or has been given upon a consideration paid, it is either irrevocable altogether, or cannot be revoked without remuneration, the reason being that to permit a revocation without placing the other party *in statu quo*, would be fraudulent and unconscionable. *Nowlin v. Whipple*, 120 Ind. 596; *Robinson v. Thraikill*, 110 Ind. 117; *Snowden v. Wilas*, 19 Ind. 10; *Clark v. Glidden*, 60 Vt. 702.

Where a license is coupled with an interest, or the licensee has done acts in pursuance of the license which create an equity in his favor, it cannot be revoked. *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248.

The present case is closely analogous to *Clark v. Glidden*, *supra*, where it was held that an executed license to lay pipes to conduct water from one farm to another, for the benefit of the owner of the latter, was irrevocable, and the licensor was enjoined, upon terms, from interfering with the water-pipes laid in pursuance of the license.

The present case is not distinguishable in principle. It may be conceded that the adjudications upon the subject of the right to revoke parol licenses are not uniform, and that they cannot be successfully classified, or arranged into harmonious groups; but it is the settled law of this State, as it is of many others, that where a license, involving the expenditure of money, has been so far executed that its withdrawal would operate as a fraud upon the person who expended money in reliance upon it, no revocation can take place without making compensation to the person injured by the withdrawal. *Simons v. Morehouse*, 88 Ind. 391, and cases cited; *Rogers v. Cox*, 96 Ind. 157. Thus in *Rerick v. Kern*, 14 Serg. & Rawle, 267, 16 Am. Dec. 497, and note, a leading case on the subject, it is held that an executed license, the execution of which involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and that it is, therefore, irrevocable, although given merely by parol and relating to the use and occupation of real estate. This doctrine is so thoroughly settled by the decisions of this court that we do not deem it profitable to elaborate the subject further. See 5 Lawson, Rights and Remedies, § 2675; *Woodbury v. Parshley*, 7 N. H. 237. The rule is, of

course, different where nothing but a mere naked license is involved. *Parish v. Kaspere*, 109 Ind. 586.¹

It may be conceded that a different rule prevails in the State of New York, as well as in some other States. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192. * * *

Judgment affirmed.²

f. In all other cases revocable.

McCREA v. MARSH.

12 GRAY, 211. — 1858.

METCALF, J. — It was correctly ruled, at the trial, that the plaintiff could not maintain this action, and that his remedy, if any, was by an action of contract. We therefore need not express an opinion concerning any of the other rulings.

Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle in the Howard Athenæum, in his own person, and occupy a place there during the exhibition, yet it was "only an executory contract." It was a license legally revocable, and was revoked before it was in any part executed. After it was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry.

According to the decision in *Wood v. Leadbitter*, 13 M. & W. 838, even if the plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it, at any time during the exhibition, and, upon his refusal, might have removed him, using no unnecessary force. The doctrine of revocable licenses was there thoroughly discussed, and the authorities analyzed by Mr. Baron Alderson, and the case of *Taylor v. Waters*, 7 Taunt. 374, and 2 Marsh. 551, was overruled. See also *Adams v. Andrews*, 15 Ad. & El. N. R. 296; *Roffey v. Henderson*, 17 Ad. & El. N. R. 574; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Foot v. New Haven & North Hampton Co.*, 23 Conn. 214; *Jamieson v. Millemann*, 3 Duer, 255.

¹ See also *Huff v. McCauley*, *supra*, p. 76 — ED.

² In *Clark v. Glidden*, *supra*, the decree provided that "the injunction remain in force so long as the present aqueduct lasts, with the right in the oratrix and her heirs and assigns, during that time, of repairing the same as may be necessary to keep it usable, but not with the right of making any repairs that shall in any just sense amount to a renewal of the aqueduct itself." — ED.

The plaintiff is doubtless entitled to recover, in an action of contract, the money paid by him for the ticket, and all legal damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket.

Exceptions overruled.¹

HIRTH *v.* GRAHAM.

50 OHIO STATE, 57. — 1893.

[Reported herein at p. 34.]²

¹ Action of tort for forcibly excluding plaintiff from a theatre in Boston. Plaintiff was a colored person and was excluded on that ground. See for the statute in New York as to civil rights, Penal Code, § 383. See also the "Civil Rights Cases," 109 U. S. 42. See *Collister v. Hayman*, 71 App. Div. (N. Y.) 316, on the main question. In *Drew v. Peer*, 93 Pa. St. 234, it is intimated that the interest of a ticket-holder may be that of a lessee. The ticket in that case was for a reserved seat. This dictum seems to have been made the basis of a decision at *nisi prius* in the case of *Ferguson v. Chase*, 28 Washington Law Reporter, 797. — ED.

² See also *Pierrepont v. Barnard*, 6 N. Y. 279. — ED.

CHAPTER IV.

INCORPOREAL INTERESTS IN LAND.

I. Nature and kinds.

1. IN GENERAL.¹

2. AN INCORPOREAL INTEREST MAY BE AS FOR A FEE, OR FOR LIFE
OR A LEASEHOLD.²

II. Easements.³

1. NATURE IN GENERAL.

a. Continuous and discontinuous. Illustrations.

GILMORE *v.* DRISCOLL.

122 MASSACHUSETTS, 199. — 1877.

[*Reported herein at p. 826.*]

WALKER *v.* PIERCE.

38 VERMONT, 94. — 1865.

[*Reported herein at p. 822.*]

¹ In our American law "an incorporeal hereditament is a right issuing out of a thing corporate" *real*, "or concerning or annexed to, or exercisable within, the same," and "transmissible to heirs, according to the law regulating the inheritance of land." See 2 Black. Com. 20; 2 Broom & Hadley, 20. See also note 8, in Hammond's Edition, 2 Black. Com. Blackstone enumerates ten sorts of incorporeal hereditaments: "Advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents." Many of these are obsolete and some of them would not come within our definition as given above.

Future interests in lands are sometimes classed as incorporeal hereditaments. The contingent right to re-enter in case a condition should be broken has some claim to be treated here, but see p. 527, *supra*, and under future estates, *infra*. — ED.

² See *Huff v. McCauley*, *supra*, p. 76, at p. 78. — ED.

³ From the point of view of the servient tenement these are often called servitudes. — ED.

*b. Appendant or appurtenant, or in gross.*¹BOATMAN *v.* LASLEY.

23 OHIO STATE, 614. — 1873.

McILVAINE, J. — Is a private right of way over the lands of another, in gross, such an interest or estate in land, as may be cast by descent, or may be assigned by the grantee to one who has no interest in the land? These are the only questions in this case. If such a right be inheritable or assignable, the Court of Common Pleas erred in its charge; otherwise there is no error in the record.

The terms of the deed from Lasley to Logue plainly import an intention to make the right of way therein granted appendant and appurtenant to other lands, but the record does not disclose either the facts or the law given to the jury, whereby it could determine whether or not that intention was accomplished. It simply shows that the jury was instructed that if the right of way granted did not and could not, under the circumstances, become appurtenant to lands other than those over which it was granted, then it was a mere personal right in the grantee, which could not be inherited from him, or transferred by him to a stranger.

The correctness of this instruction does not depend upon a construction of the deed by which it was granted, for the terms of the grant are "to Alexander Logue, his heirs and assigns." The real question is, whether or not a private right of way in gross is, in law, capable of being transferred or transmitted.

It is strongly insisted upon, in argument, that a right of way, in gross, may be conveyed to the grantee "and to his heirs and assigns forever," because an owner in fee may carve out of his estate any interest less than the whole and dispose of the less estate absolutely; and this because the power to dispose of the whole estate includes a power to dispose of any part of it.

This argument assumes the affirmative of the very question in controversy, to-wit, that such a right of way is an interest or estate in the land.

A mere naked right to pass and repass over the land of another a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such a right be an inheritable estate, how will the heirs take?

¹ See supplementary note, *infra*. — ED.

In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the land to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of *profit à prendre*; such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest. *Post v. Pearsall*, 22 Wend. 432.

Both upon principle and authority, we think there was no error in the charge of the court below. Mr. Washburn in his work on Easements, page 8, par. 11, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right not assignable or inheritable; nor can it be made so by any terms in the grant, any more than a collateral and independent contract can be made to run with the land." See also *Ackroyd v. Smith*, 10 C. B. 164; *Garrison v. Budd*, 19 Ill. 558; *Post v. Pearsall*, 22 Wend. 432; Woolrych on Ways, 20; 2 Black. Com. 35; 3 Kent's Com. 420, 512.

Leave refused.

2. HOW CREATED.

a. By grant or reservation.

(1.) EXPRESS.

WALKER v. PIERCE.

38 VERMONT, 94. — 1865.

[Reported herein at p. 822.]

(2.) IMPLIED.

*(a.) Implied in consequence of a restrictive covenant.*BLAKEMORE *v.* STANLEY.

159 MASSACHUSETTS, 6. — 1893.

[Reported herein at p. 387.]

ROWLAND *v.* MILLER.

139 NEW YORK, 93. — 1893.

[Reported herein at p. 388.]

*(b.) Implied where owner, granting premises, sells or retains a parcel for which he has created special advantages to the detriment of the rest.*CURTISS *v.* AYRAULT.

47 NEW YORK, 73. — 1871.

[Reported herein at p. 126.]

*(c.) Implied by reference in deed to a way or a map showing a way.*GROVER, J., IN COX *v.* JAMES.

45 NEW YORK, 557. — 1871.

THE question whether the lot conveyed to the plaintiff was bounded by north side of or center of the alley, is not material to the right claimed by the plaintiff in the action, which was a right of way over the alley, and the correctness of the legal conclusion of the referee upon this point will not be examined. The judgment declaring the plaintiff entitled to a right of way over the alley cannot be sustained upon the ground that he acquired the right as a way from necessity, for the reason that access might be had from the land conveyed to public streets; nor can it be sustained upon the ground that the alley had been dedicated to the public as a highway, for the reason that it had never in any way been accepted or used as such by the public. The only ground upon which the judgment can be sustained, is that the plaintiff acquired a right of private way over the alley as appurtenant to the lands conveyed to him by the Maxwells. This right had not become appurtenant to the lands in consequence of a previous user in connection therewith, the alley never having been so

¹ The interests arising under (a) are often called "equitable easements." — ED.

used. The substantial facts proved and found by the referee, are that the Maxwells, prior to their conveyance to the plaintiff, were the owners of a parcel of land, embracing the lands conveyed to the plaintiff, South alley and other lands; that they caused the said parcel to be surveyed and subdivided into lots, of suitable size for building purposes, and a map thereof to be made, upon which the lots were designated by numbers, and South alley designated as an alley, and afterward conveyed lots forty-eight, forty-nine and fifty to the plaintiff, describing lot fifty as all that certain lot situate in the village of Saratoga Springs, known and distinguished as lot number fifty on a map of village lots owned by the parties of the first part, referring particularly to the said map, and specifying the boundaries of the lot as laid down thereon, referring as follows to South alley; thence to a stake in north line of South alley; thence along the north line of South alley, etc. South alley was laid down on the map as an alley running along the boundary of the lot, sixteen feet in width, continuing along past the rear of lot fifty, and along other lots owned by the Maxwells. This conveyance of the lot, so made in reference to the map designating the strip as an alley, gave the plaintiff a right of way over the alley to the rear of his lot, as against his grantors and their subsequent grantee of the alley. *In re Mayor*, 2 Wend. 472; *Smyles v. Hastings*, 22 N. Y. 217; *Badeau v. Mead*, 14 Barb. 328. The question whether the plaintiff had not an adequate legal remedy for the disturbance of this right of way does not arise, as it was not insisted upon in the answer. *Roy v. Platt*, 4 Paige, 77; *Truscott v. King*, 2 Seld. 147. The rights of the parties were established by the conveyances. This renders an examination of the exceptions taken by the defendant to other evidence introduced by the plaintiff unnecessary.

b. By operation of law.

KUHLMAN *v.* HECHT.

77 ILLINOIS, 570. — 1875.

[*Reported herein at p. 819.*]

HOLMES *v.* SEELEY.

19 WENDELL (N. Y.), 507. — 1838.

[*Reported herein at p. 817.*]

*c. By prescription.*KUHLMAN *v.* HECHT.

77 ILLINOIS, 570. — 1875.

[Reported herein at p. 819.]

3. TRANSFER OF AN EASEMENT.¹

4. DESTRUCTION OF AN EASEMENT.

*a. Effect of release, abandonment, non-user; merger.*SNELL *v.* LEVITT.

110 NEW YORK, 595. — 1888.

EARL, J. — * * * This easement having been acquired by Mrs. Higgins by grant could not be lost by mere nonuser for any length of time. It could be lost by adverse user or possession by the owner of the servient tenement, and the easement could be lost and extinguished by abandonment in some of the modes or by some of the means recognized in the law. Nonuser for a period of twenty years, under such circumstances as show an intention to abandon and give up the easement, is sufficient to extinguish it; and even an abandonment for a shorter period, under such circumstances as show an intention to give up and release an easement, which is acted upon by the owner of the servient tenement so that it would work harm to him if the easement were thereafter asserted would operate to extinguish the easement.

Here there is no doubt of the actual intention of Mrs. Higgins to abandon the easement acquired by her from Edwin Snell. She expressly agreed to relinquish it for the consideration of \$75 in money and the right to draw water from other logs for an indefinite time; and that agreement was acted upon for more than twenty years. During that time, the defendant, and others through whom he claims, purchased the servient tenement by warranty deeds without any notice whatever of any claim of an existing easement under the deed to Mrs. Higgins in the premises conveyed. These facts are undisputed and upon them the trial court should have held and ruled, as matter of law, that the easement was abandoned and extinguished. *Vogler v. Geiss*, 51 Md. 407; *Steere v. Tiffany*, 13 R. I. 568; *Dyer v. Sanford*, 9 Met. 395; *Curtis v. Noonan*, 10 Allen, 406; *Morse v. Copeland*, 2 Gray, 302; *Pope v. Devereux*, 5 Gray, 409;

¹ See *Kuhlman v. Hecht*, *infra*, p. 819. — ED.

King v. Murphy, 140 Mass. 254; *Queen v. Chorley*, 12 Ad. & El. N. S. 515; *Crossley v. Lightowler*, L. R. 2 Ch. App. 478, 482; *Cartwright v. Maplesden*, 53 N. Y. 622; *White's Bank v. Nichols*, 64 Id. 65. In Washburn on Easements, 3d ed., at page 661 and subsequent pages, the author says: "The owner of an easement may destroy his right to the same by actually abandoning the right as well as the enjoyment, especially if a third party become interested in the servient estate after such act of abandonment; and it would operate unjustly upon him if the exercise of the easement were resumed in favor of the dominant estate. It is not easy to define, in all cases, what would be such act of abandonment as would destroy a right of easement, and each case seems to be a matter for a jury to determine. But nothing short of an intention so to abandon the right would operate to that effect, unless other persons have been led by such acts to treat the servient estate as if free of the servitude, and the same could not be resumed without doing an injury to their rights in respect to the same. And in this it is not intended to embrace questions which may arise from a mere nonuser of an easement." "The question of abandonment is one of intention, depending upon the facts of the particular case. But time is not a necessary element in a question of abandonment. A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release, without reference to time." "Although an abandonment is sometimes inferred from a nonuser for twenty years, it seems to depend less upon the duration of the time than the acts which accompany the ceasing to use the easement for its effect upon the right. The length of time that this is continued is one of the elements from which the intention to abandon or retain the right is inferred. . . . The cesser to use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as a release, without any reference to the time during which such cesser has continued." And the text of the learned author is well supported by the authorities he cites.

Here, after an abandonment by Mrs. Higgins, Edwin Snell conveyed the water from this spring to two houses upon his own premises, and, with the water running from the spring through the pipes to those houses, the premises have several times been bought and sold. There was a nonuser of the easement for upwards of twenty years, and a substituted easement was used during a large portion of that time.

Under such circumstances, we think, there was not even a question of fact for the jury; but that it was the duty of the court to rule, as a matter of law, that the easement was extinguished.

MORTON, J., IN BUTTERFIELD *v.* REED.

160 MASSACHUSETTS, 361. — 1893.

THE plaintiff contends, in the next place, that the grantors were disseised by her at the time when they made and delivered the deed to the defendant. But the nature of the defendant's right, being a right of flowage, was such that its continued existence was consistent with the use and occupation of the premises by the plaintiff. There was nothing in the nature of the acts done by the plaintiff upon the premises that was an interference with or adverse to the right of the defendant or his predecessors in title. So long as the defendant and his predecessors in title did not exercise the right of flowage, the plaintiff and her predecessors in title were at liberty to use the land. Doubtless the plaintiff and those who preceded her could have used the premises in so adverse and exclusive a manner that the lapse of twenty years would have barred the right of the defendant and those under whom he claims. But the use in the present case consisted in cutting hay, digging out muck, enlarging and using springs, and occupying a portion of it for a hen-house and hen-yard. There was nothing in all this that was adverse to, or infringed upon, the defendant's right. *Arnold v. Stevens*, 24 Pick. 106; *Barnes v. Lloyd*, 112 Mass. 224. The jury, under instructions not objected to as to what would constitute an adverse use, have found that the right of flowage has not been lost by adverse use on the part of the plaintiff and those under whom she claims. We think there was evidence warranting such a finding.

The plaintiff also contends that the right of flowage has been lost by abandonment. The right rests upon an actual grant. It is well settled that an estate or easement derived from an actual grant is not lost by mere nonuse. *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106; *Owen v. Field*, 102 Mass. 90, 114; *Barnes v. Lloyd*, 112 Mass. 224. There was evidence in the case that the right had not been abandoned. It was for the jury to say what weight should be given to the filling of the raceway. It could not be said that the consenting to it by the owner of the privilege was a conclusive act of abandonment, nor that the putting of the wheel into the wasteway was not a user of the easement. The jury, under instructions not otherwise objected to, have found that the right was not abandoned, and we think there was evidence justifying the finding.

b. Effect of license to owner of the servient estate, or one acting under him, to interfere with easement.

PECKHAM, J., IN WHITE v. MANHATTAN RAILWAY CO.

139 NEW YORK, 19. — 1893.

[*Reported herein at p. 795.*]

5. SPECIFIC EASEMENTS.

a. Ways.

(1.) DISTINGUISH WAYS IN GROSS AND HIGHWAYS.

BOATMAN v. LASLEY.

23 OHIO STATE, 614. — 1873.

[*Reported herein at p. 810.*]

(2.) WAYS OF NECESSITY.

NELSON, CH. J., IN HOLMES v. SEELY.

19 WENDELL (N. Y.), 507. — 1838.

It is probable from the facts in the case, that the defendant is entitled to a private way across the eighty-acre lot, from the Bedford road to his small lot, for agricultural purposes as a way of necessity. Lewis McDonald formerly owned both of these lots, and in 1792 sold the small one to Smith, from whom the defendant derives his title. McDonald died in 1797, and the eighty-acre lot fell to his brother James, from whom the plaintiff claims. The son of James, who was a witness, testified that there was no other way to the defendant's lot than over the *locus in quo*. If this was the situation of the lot at the time of the conveyance to Smith, and has thus continued ever since, a right of way followed as an incident to the grant. 1 Wms. Saund. 323, n. 6, to the case of *Pompel v. Ricroft*; 8 T. R. 56; 4 Maule & Selw. 393; Cro. Jac. 170; Siderf. 39; 5 Taunt. 311; Woolrych on Ways, 20, 22, 291. This way should be a convenient one over the adjoining close of the grantor, due regard being had to the interest of both parties. Woolrych, 23, and cases there cited. Subject to this rule it would seem reasonable that the grantor should be allowed to assign such way as he could best spare. Id. 2 Roll. Abr. 60. If he decline or omit, the grantee must select for himself, and the court would no doubt extend a liberal indulgence to the exercise of

his discretion. Nothing short of evident abuse ought to invalidate the one thus designated and used, as the grantor or those under him would be in fault for not assigning a way themselves. But under this right, the party cannot set up a claim to the use of several ways over the adjoining close; it cannot be carried beyond the necessity. This was strongly exemplified in the case of *Holmes v. Garing*, 2 Bing. 76, where it was decided that a way of necessity became extinguished because the party could conveniently reach his lot by means of a close of his own, subsequently purchased.

In respect to a public way, if there be an obstruction so as to make the ordinary track dangerous, the traveler may go *extra viam* passing as near to the original way as possible. *Henn's Case*, Sir Wm. Jones, 297; 3 Salk. 182; 2 Show. 28. This rule, generally, is not applicable to a private way which becomes foundrious or impassable, (Doug. 745, 4 Maule & Sel. 387,) as where a specific way is prescribed for, no implication of a right arises to go to the right or left; or in the language of Lord Ellenborough, "to break out of it at random over the whole surface of the close." Highways are for the public service and if the usual track be impassable, the general good requires that there should be an outlet, so that the people may at all times have a passage. The better opinion, however, seems to be, that in the case of a private way of necessity, a passage *extra viam* may be justified where the usual track is obstructed. *Woolrych*, 51 Doug. 749. There is a distinction between private way by grant and one of necessity, resting upon the ground that the one is a grant of specific track over the close, while the other is a general right to a way over it; the one an express specific grant, the other a more general implied one. If the outlet in case of obstruction exist at all in the case of a way of necessity, it is clear that it does not where it could be avoided by reasonable repairs; and this duty devolves upon the defendant. Doug. 749. The burthen falls upon the party enjoying the benefit.

The proof fell altogether short of establishing a way by prescription, for although there is some evidence of a user for twenty years, it is not confined to any particular or specific track. The right proved, if it amount to anything in this respect, is a right to several cross roads over the greater part of the eighty-acre lot, for the proof of user applies about equally to all of them. I have found no authority for a right of way by prescription to travel at random over another's close, nor that such user is evidence of a prescriptive right of way over any particular part of it; on the contrary it rather negatives such conclusion. Indeed, after the judge required the defendant to make his election and confine his defense to one of the tracks

used as a way, I do not perceive how the jury could have arrived at the conclusion that no trespass was committed upon the plaintiff. The defendant elected the way through the ridge lot, which may be called the middle route, and by so doing would seem to have left confessedly undefended the travel over all the others.

If right in the foregoing view of this case, a new trial must be granted, because, 1. Assuming that a right of way of necessity exists, the defendant did not confine himself to it in passing and repassing to and from his lot; and 2. There was no right by prescription established to justify the several ways over the eighty-acre lot proved to have been used.

KUHLMAN *v.* HECHT.

77 ILLINOIS, 570. — 1875.

ACTION of trespass by Hecht against Kuhlman.

MR. JUSTICE WALKER delivered the opinion of the court: —

It appears that the parties to this suit own adjoining farms; that both farms, at one time, belonged to Samuel Whiteside. The tract on which appellant resides, and of which he is the owner, was improved, about thirty-five years since, by a son of Samuel Whiteside, and he lived upon the same until he sold to appellant, in 1855. His father did not convey the land to him until in 1854, and, on the same day, Samuel Whiteside conveyed to his son-in-law, Henderson, the farm on which he resided, and which is now owned by appellee.

From the time Ray Whiteside went upon the farm now owned by appellant, until a short time before this suit was brought, there has always been an open lane to the public highway, from appellant's farm, over the land of appellee. Appellant could not, at any time, get from his farm to a public road without passing over the land of some other person. He had used this way from the time he purchased, until appellee obstructed it by placing a gate across it, a short time previous to the commencement of this suit. Ray Whiteside had used it, to get out from his farm, from the time he settled upon and improved it. Previous to that time, and afterwards for a time, neighbors passed over it, in going to Collinsville. The way was then only fenced on one side, and was open on the other, but it became a lane perhaps soon after, and so continues. Witnesses testify that it had been used by the neighborhood more than fifty years, but only had been used exclusively by the parties to this suit, and their friends, for the last fifteen or sixteen years. It was always used by Ray Whiteside, of whom appellant purchased, from the time

he went on the place until he sold to appellant; thus showing a continuous user by appellant and his grantor for full thirty-five years, and nearly nineteen years after the same was conveyed to Ray Whiteside by his father, before it was obstructed by appellee.

After appellee obstructed the lane, by erecting a gate across it, appellant demanded of him that he remove the obstruction, which was refused. Thereupon, appellant broke down and removed the gate, and appellee sued him before a justice of the peace. On a trial before him, plaintiff recovered a judgment for \$3.00. An appeal was prosecuted to the County Court, where a trial was had, with a similar result. Defendant thereupon appealed to the Circuit Court. On the trial in that court, on a bill of exceptions, the judgment of the County Court was affirmed, and the defendant brings the case to this court by appeal, and asks a reversal.

There was not twenty years' adverse use of this way, by appellant and his grantor, before this suit was brought. Ray Whiteside used and occupied the farm, under his father, until the twenty-fifth of November, 1854, when he acquired title from his father. Up to that time, both places were held and owned by the father, and Ray used this way by the consent, expressed or implied, of the father. There is no evidence that he used it in his own right, or under any independent claim of his own. It also appears that the father and his family used it the same as Ray did. There is nothing appearing in the evidence from which it can be inferred that its use by Ray was adverse until he received the conveyance from his father; and after that, the adverse enjoyment, without being interrupted, was until in July, 1873. Thus, it will be seen that the adverse use of the way was less than nineteen years.

This, then, did not show a prescriptive right. Such a prescription cannot be acquired short of twenty years' continuous, uninterrupted adverse enjoyment. Where the use has been for that length of time, and it has been peaceable, the law presumes a grant; but if it lack in time, in peaceable enjoyment, or is founded on a lease, it will not be good, even if a greater length of time has elapsed. It must be founded in wrong. If one person enters as the tenant of another, and holds under him, a prescription cannot be acquired whilst the tenant thus holds; nor will any portion of the time he thus holds be counted in making out the prescriptive right.

It then follows that, as Ray Whiteside was in under his father, any use he may have made of this way, whilst he so held, was as tenant, and was in nowise adverse. It was a privilege he enjoyed as his father's tenant, at will or otherwise, for the more commodious enjoyment of the farm he was occupying under his father. No

portion of the time he thus used this way can be counted, as he did not use it adversely, but subserviently to his father's title. There was, therefore, no prescriptive right shown.

It is, however, urged that the use of this way was, and had been since Ray Whiteside commenced to occupy the farm, appurtenant to it, and, as such, passed to Ray by the conveyance from his father. Had this way been appurtenant to the farm of the appellant, at the time he purchased, then it would have passed by the grant to him. A way held by grant or prescription will, no doubt, pass by a conveyance of the land with which it is used and enjoyed as an appurtenance; but a mere license to use a way, which has not ripened into a right, but may be revoked, is not an appurtenance, and will not so pass to a grantee of the land. Until there was twenty years' adverse enjoyment, Samuel Whiteside, as the owner of both farms, could have revoked the license expressly or impliedly given, and could rightfully have closed the lane before he sold the land over which it ran. Hence, this way was not appurtenant to, and did not pass by, the conveyance from the father to his son, Ray Whiteside.

It is also urged that Ray Whiteside, after he purchased, had a way, of necessity, over this land, and that appellant, by purchasing from Ray, acquired the same right, and hence, appellee purchased of Samuel Whiteside subject to this right of way from necessity; that when Samuel Whiteside conveyed to his son, there was an implied grant to him of a way over the grantor's land to the farm granted, that he might have ingress, for its enjoyment; and that we should presume it was intended that the way should be the same that had been used for the purpose for perhaps almost forty years. A way from necessity is said to arise where the owner sells land to another, which is wholly surrounded by the land of the grantor, and the purchaser has the right of way over the grantor's land, to arrive at his own. 3 Kent's Com. 420. This is the rule as generally stated by text-writers, and used in adjudicated cases.

From the evidence in this case, it is manifest that appellant's lands were not so situated. It was not in the midst of, or surrounded by, the land of Samuel Whiteside, when he sold to the grantor of appellant. His farm adjoined the land of Samuel Whiteside, but was not surrounded by it. It is true that Samuel Whiteside still owned land between that and a public road, and over which this lane passed; but other persons also owned lands adjoining the tract owned by appellant, so that the facts in the case by no means bring it within the rule as stated by Kent and other text-writers.

But the case of *Hawton v. Freeman*, 8 T. R. 50, is referred to as establishing a broader rule, and one, it is claimed, which will

embrace this case. On turning to that case, we find that it is based on the general rule, and by no means enlarges it. Lord Kenyon says, in delivering the opinion of the court, that he found it impossible to distinguish that, from the general rule, where a man grants a close, surrounded by his own land, in which case the grantee has a way to it, of necessity, over the land of the grantor, merely because the grantor conveyed to the defendant in the character of trustee, as it could not be intended that he meant to make a void grant. He says, there being no other way to the land granted but over the lands of one of the persons who granted to him, he was entitled to a way of necessity, upon the authority of all the cases, that a grant must be taken most strongly against the grantor. This in nowise enlarges the rule itself, but only extends its application to a grantor who was a mere trustee.

We, after a careful consideration of the entire case, are of opinion that appellant has failed to show that he has a prescriptive right to the way, or that he acquired a right of way, as appurtenant to his farm, when he purchased of Ray Whiteside, or that he acquired or has a way from necessity. He, therefore, failed to establish a defense, and the judgment of the court below must be affirmed.

Judgment affirmed.

(3.) REPAIR OF WAY.

WALKER *v.* PIERCE.

38 VERMONT, 94. — 1865.

PECK, J.—The deed from the defendant to the orator, conveying the easterly portion of the building, grants to the orator “the right” to use the common passway “at the west end of the building, also a right to a passway therefrom to the rear of the portion of the building hereby conveyed, to be forever so fenced and provided with a gateway as to give said Walker, his heirs and assigns, room to pass of the width of a common cartway for all necessary and ordinary household purposes, to the rear of the building herein conveyed.” This is the language of the grant. The common passway, mentioned in the grant, passes from the street down to the rear of the building; and the other passway granted passes from the common passway along in the rear of the defendant’s part of the building to the rear of the orator’s portion of the building. The two passways, if they can be so called, are nearly at right angles with each other at the point of intersection. It might with more propriety be said to be one entire passway, turning its course near

the middle of it, at an angle or sharp curve, about ninety degrees. * * *

The only remaining question is, whose duty is it to grade down that way. When a party grants a private way, he is not bound by implication to construct or keep in repair the way granted. That duty rests on the grantee if he wishes to enjoy the way, and he takes by the grant the right to do so. But it appears in this case that the defendant has filled up and raised this common way from the street to the rear of his building since the date of his deed to the orator, thereby causing, to some extent, the abrupt descent which embarrasses the orator in approaching the rear of his house through the way in question. As it does not appear affirmatively that the master's report and decree of the court of chancery require the defendant to grade down that way more than he has raised it since the execution of his deed to the orator, we find no error in this part of the decree. The defendant objects to this portion of the decree on the ground that Anderson owns this common way in common with the parties to this suit, and that the defendant, by complying with the decree, will trespass upon Anderson. But it is right, as between the orator and the defendant, that the latter should undo what, to the prejudice of the orator, he has improperly done; and the defendant has a right, as between him and Anderson, to make necessary and proper repairs. Under these circumstances this decree may properly be made against the defendant without making Anderson a party. The view we take of the case destroys the main basis on which the master awards damage to the orator. No substantial damage worth the cost of estimating has been sustained, and none is allowed.

The decree of the court of chancery is reversed, and the cause remanded with directions to that court to enter a decree for the orator only requiring the defendant to grade the common passway as required by the original decree, and as the orator fails in the main portion of his bill, neither party should recover costs.

(4.) EXCESSIVE USE OF WAY.

EASTMAN, J., IN *FRENCH v. MARSTIN*.

32 NEW HAMPSHIRE, 316. — 1855.

THERE is one ground, however, which appears to us to settle the present action, whatever might be the finding of the jury or the conclusions of the court upon the other points.

There is no pretence of any right of way of any kind having been acquired by anyone beyond and east of lot 54; the Bean lot, the

Brown lot and Sheafe lots lying east and south of 54, and adjoining thereto, were acquired by the plaintiff in 1847 and 1848, and this suit was commenced in 1849.

It is well settled that if a person have a right of way over another's land to a particular close, he cannot enlarge it and extend it to other closes. Com. Dig., Title Chimin, D. 5; Woolrych on Ways, 34; *Senhouse v. Christian*, 1 Term, 569; *Howell v. King*, 1 Mod. 190; Bac. Abr., Highway, C.; *Davenport v. Lamson*, 21 Pick. 72; *Comstock v. Van Deusen*, 5 Pick. 166.

In *Davenport v. Lamson*, the plaintiff brought trespass against the defendant for breaking and entering his closes, called the eight-acre lot, and the Brown lot, and the defendant justified under a right of way across the lots to a three-acre lot belonging to him. It appeared that the defendant owned the three-acre lot, and also a nine-acre lot purchased by him subsequently to his becoming tenant of the former, and that he had a right of way to the three-acre lot. At the time of the trespass these two lots, the three-acre and the nine-acre, were not separated by any fence, and were one mowing field; and the defendant, taking a load of hay, which was made up partly from each lot, proceeded from the three-acre lot across the plaintiff's close; and it was held that the defendant was liable for the trespass; that he had no right to use the way as a way from the nine-acre lot, although in so doing he passed last from the three-acre lot upon the plaintiff's close, and a part of the load was taken from the three-acre lot.

The doctrine of the books upon this question is undoubtedly sound. If a right of way to one lot can be extended at will, by the tenant, to another lot that may adjoin it, then may it be extended to a third, and so on to any limits that the tenant may choose.

Admitting, then, for the purposes of this decision, and for that only, that the plaintiff had a right of way to lot 54, to the extent and in the manner claimed by him, and still he cannot sustain this action, for he was undoubtedly in the wrong in attempting to cross the defendant's close to go upon the Brown or Sheafe lot.

The case finds that, at the time of the alleged assault, the plaintiff was going to what he called his "Mountain pasture," which consisted of the three lots, the Bean, the Sheafe and the Brown lots, to salt his sheep, and that he actually went and called his sheep together in the South pasture, which, in that year, was formed by a part of the Bean lot and the Sheafe lot, there being no fence between these lots; it appearing, also, that the sheep generally ran in the Brown and Sheafe lots.

Now, what was the plaintiff using the way for, when the defend-

ant stopped him? Not to go to the quarter acre; not to go to the Bean lot, and salt his sheep there; but to go to the "Mountain pasture," wherever he might find his sheep. That was his purpose, and that purpose he carried into effect. It cannot be said that his intent was only to go to the quarter acre or to the Bean lot, because the fact is stated in the case to be otherwise. The case finds that the fracas occurred while the plaintiff was passing over the way in question, on the land of the defendant, to salt his sheep in his Mountain pasture. He claimed the unrestricted right to go to the Mountain pasture. It was with that intent that he entered upon the way; to go to any part of the pasture; and he was in the exercise of a right which did not exist in him when the defendant interfered; the right to go to the Mountain pasture, the whole pasture, wherever the sheep might be.

We do not see how this case can be distinguished in principle from that of *Davenport v. Lamson*, nor indeed from the general doctrine upon the subject; and sufficient matters are stated in the case as facts to settle this question without submitting it to the jury.

It does not relieve the plaintiff that the defendant did not resist his passing, on the ground that he was going to lots beyond the Bean lot. No doubt both parties understood the object of the plaintiff, but the defendant was not obliged to state the reasons why he objected. If he was in the wrong, he was answerable; and if in the right, he was not called upon to show his reason. It was quite as incumbent on the plaintiff to state that he was not going to the Mountain pasture, as for the defendant to object to his using the way on that ground.

The fact, also, that the defendant had permitted the sheep to be driven over the way to the pasture about a week before, and that he had been paid for it, does not aid the plaintiff. His going there under those circumstances gave him no right to pass over the way on the day of the trespass, nor had this fact any tendency to show a right.

When the plaintiff was on the way, using it for an unauthorized purpose — the purpose of going to the Mountain pasture to salt his sheep, wherever they might be — the defendant had the right to stop him.

The court ordered a verdict for the defendant; and upon the question which we have considered, we think they were right, and there must be

Judgment on the verdict.

b. Lateral and subjacent support.

(1.) LATERAL SUPPORT.

GILMORE *v.* DRISCOLL.

122 MASSACHUSETTS, 199. — 1877.

GRAY, C. J. — The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. In the case of running water, the owner of each estate by which it flows has only the right to the use of the water for reasonable purposes, qualified by a like right in every other owner of land above or below him on the same stream. But in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence.

But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.

In 2 Rol. Ab. 564, it is stated that in *Wilde v. Minsterley*, in 15 Car. 1, it was decided in the King's Bench, after a verdict for the plaintiff, that "if A. be seised in fee of copyhold land next adjoining to the land of B., and A. erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of B., and B. afterwards digs his land so near to the foundation of A.'s house, but no part of A.'s land, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A. against B., because it was A.'s own fault that he built his house so near the land of B., for he by his act cannot hinder B. from making the best use of his own land that he can.

But it seems that a man who has land next adjoining to my land cannot dig his land so near my land that thereby my land shall go into his pit; and, therefore, if the action had been brought for this, it would lie."

In the same court, in 15 Car. 11, Justices Twisden and Windham said that it had been adjudged that, "If I, being seised of land, lease forty feet thereof to A. to build a house thereon, and other forty feet to B. to build a house, and one of them builds a house, and then the other digs a cellar in his land, whereby the wall of the first house adjoining falls, no action lies for that, because each one may make the best advantage of his digging," "but it seemed to them that the law is otherwise, if it was an ancient wall or house that falls by such digging." *Palmer v. Fleshees*, 1 Sid. 167. In another report, the corresponding statement is that "it was adjudged that two having ground adjoining, the one built *de novo*, and the other in his ground digged so near, that the other fell, and no remedy, the house being new." *Palmer v. Flessier*, 1 Keb. 625. * * *

There are indeed two or three early cases, in which actions appear to have been sustained for undermining houses by digging on adjoining land. *Slingsby v. Barnard*, 14 Jac. 1, 1 Rol. R. 430; *Smith v. Martin*, 23 Car. 11, 2 Saund. 400; *Barwell v. Kensey*, 35 Car. 11, 3 Lev. 171; s. c. 1 Mod. Entr. 195. But in *Slingsby v. Barnard*, and in *Smith v. Martin*, the objections made were not to the right to maintain the action, but only to particulars in the form of the declaration; and in *Barwell v. Kensey* the declaration, as construed by the majority of the court, alleged not merely digging near the plaintiff's foundation, but digging that foundation itself.

In *Tenant v. Goldwin*, 2 Ld. Raym. 1089-1094, Lord Holt and Justice Powell are reported to have "held that a man cannot build so near another man's house as to throw it down." But the only point adjudged was the same as in *Ball v. Nye*, 99 Mass. 582, that a man is bound, of common right, to keep a vault upon his own land in repair, so that the filth shall not flow upon his neighbor's land, "for he whose dirt it is must keep it that it may not trespass." s. c. 1 Salk. 360, 361; 6 Mod. 311; 1 Salk. 21; Holt, 500. And upon a comparison of the various reports it is evident that the digging so near another's wall as to weaken it was not spoken of as giving a right of action to the owner of the wall, but as limiting his liability for the escape of filth caused by the new digging.

The latest and the most authoritative statement of the law of England upon this point before the American Revolution is that of Chief Baron Comyns, who, citing Rolle's Abridgment and Siderfin's Reports, *ubi supra*, says that an action upon the case lies for a

nuisance, "if a man dig a pit in his land, so near that my land falls into the pit," but does not lie, "if a man build an house, and makes cellars upon his soil, whereby an house newly built in an adjoining soil falls down." Com. Dig. Action upon the case for a Nuisance, A. C.

In *Thurston v. Hancock*, 12 Mass. 220, which was decided in 1815, and is the leading American case on this subject, the plaintiff in 1802 bought a parcel of land upon Beacon Hill in Boston, bounded on the west by land of the town of Boston; and in 1804 built a brick dwelling-house thereon, with its rear two feet from this boundary, and its foundation fifteen feet below the ancient surface of the land. The defendants, in 1811, took a deed of the adjoining land from the town, and began to dig and remove the earth therefrom, and, though notified by the plaintiff that his house was endangered, continued to do so to the depth of forty-five feet, and within six feet of the rear of the plaintiff's house, and thereby caused part of the earth on the surface of the plaintiff's land to fall away and slide upon the defendant's land, and rendered the foundations of the plaintiff's house insecure, and the occupation thereof dangerous, so that he was obliged to abandon it.

The court, after advisement, and upon a review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil merely, and not for the damage to the house; and Chief Justice Parker, in delivering judgment, said: "It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas*." "But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired." 12 Mass. 224. "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor." "The plaintiff built his house within two feet of the western line of the lot, knowing that the town,

or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him." "It is, in fact, *damnum absque injuria*." 12 Mass. 229.

Upon the facts of that case, it was questionable whether the acts of the defendant would not have caused the falling away of the plaintiff's land if no house had been built thereon; and yet the court held the plaintiff not to be entitled to recover any damages for the fall of his house, without regard to the question whether the weight of the house did or did not contribute to the fall of his soil into the pit digged by the defendant. No claim for like damages was made in this commonwealth until more than forty years afterwards, when the decision in *Thurston v. Hancock* was followed and confirmed. *Foley v. Wyeth*, 2 Allen, 131.

In *Foley v. Wyeth*, the court, after stating that the right of support from adjoining soil for land in its natural state stands on natural justice, and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose, said: "It is a necessary consequence from this principle, that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." 2 Allen, 133. And it was accordingly adjudged that, if the defendant in that case, by excavating and carrying away earth on her own land, caused the plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff; but that, in the

absence of any proof of negligence in the execution of the work, the jury could not take into consideration, as an element of damage for which compensation could be recovered, the fact that the foundation of the plaintiff's house had been made to crack and settle, although the weight of his house did not contribute to the sliding or crumbling away of the soil. * * *

Upon a question of this kind, affecting all the lands in the commonwealth, it would be unjustifiable and mischievous for the court to change a rule of law which has been established and acted upon here for sixty years. Even in England, it is held that for digging upon neighboring land, and thereby causing the plaintiff's land to sink and his building to fall, although the jury find that the land would have sunk if there had been no building upon it, yet no action will lie, if no appreciable damage is proved to the land without the building. *Smith v. Thackerah*, L. R. 1 C. P. 564.

The weight of American authority is in accordance with the decisions of this court. It has generally been considered that for an excavation causing an injury to the soil in its natural state an action would lie; but that, without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon. *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169; *Hay v. Cohoes Co.*, 2 Comst. 159, 162; *McGuire v. Grant*, 1 Dutcher, 356; *Richart v. Scott*, 7 Watts, 460; *Richardson v. Vermont Central Railroad*, 25 Vt. 465; *Beard v. Murphy*, 37 Vt. 99, 102; *Shrieve v. Stokes*, 8 B. Mon. 453; *Charless v. Rankin*, 22 Mo. 566.

It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon land has no use of that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country. *Hide v. Thornborough*, 2 Car. & K. 250, 255, and *Stansell v. Jollard*, there cited; *Solomon v. Vintners' Co.*, 4 H. & N. 585, 599, 602; *Chasemore v. Richards*, 7 H. L. Cas. 349, 385, 386; *Greenleaf v. Francis*, 18 Pick. 117, 122; *Keats v. Hugo*, 115 Mass. 204, 215; *Richart v. Scott*, 7 Watts, 460, 462; *Napier v. Bulwinkle*, 5 Rich. 311, 324. But this case does not require us to determine that question, because there is no evidence that the structures and improvements upon the plaintiff's land have been there for twenty years.

Nor is it necessary to consider whether negligence on the part of the defendant could enlarge the measure of his liability; because the case stated does not find that he was negligent, nor set out any facts from which actual negligence can be inferred. The cause of action is that the plaintiff has an absolute right to have her soil stand in its natural condition, and that any one who injures that right is a wrongdoer, independently of any question of negligence. *Foley v. Wyeth*, 2 Allen, 131, 133; *Hay v. Cohoes Co.*, 2 Comst. 159, 162; *Richardson v. Vermont Central Railroad*, 25 Vt. 465, 471; *Humphries v. Brodgen*, 12 Q. B. 739.

The fact that the defendant was not the owner of the adjoining land affords him no exemption. It was never considered necessary, in an action of this kind to allege that the defendant owned or occupied the land on which the digging was done that injured the plaintiff's soil. *Smith v. Martin*, 2 Saund. 400, and note; *Nicklin v. Williams*, 10 Exch. 259. Even an agent of the owner of the adjoining land would be liable for his own negligence and positive wrongs; for his principal could not confer upon him any authority to commit a tort upon the property or the rights of another. *Bell v. Josselyn*, 3 Gray, 309; Story on Agency, § 311. And, upon the case stated, the defendant appears not to have been an agent of the owner of the land, but to have removed the soil therefrom for his own benefit, by permission of Gillighan, who had a like agreement with and license from the owner; and it is at least doubtful whether the owner of the land could be held responsible for the defendant's acts. *Gayford v. Nicholls*, 9 Exch. 702; *Hilliard v. Richardson*, 3 Gray, 349.

The case finds that the defendant ceased his work towards the end of October, and left the bank in such a shape that by the effect of rains and frost it was rendered insufficient to hold the soil of the plaintiff in its natural condition, and began to give way at once, although the plaintiff's soil was not actually disturbed till the month of March following. The necessary inference is that by the operation of natural and ordinary causes upon the land as it was left by the excavations of the defendant, and which he took no precaution to guard against, part of the soil of the plaintiff's land slid and fell off; and for the injury so caused to her soil this action may be maintained. But she cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon. * * *

Judgment for plaintiff.

(2.) SUBJACENT SUPPORT.

MARVIN *v.* BREWSTER IRON MINING CO.

55 NEW YORK, 538. — 1874.

FOLGER, J. — The ultimate principles upon which the decision of this case should rest, are not undetermined nor obscure. The relative rights and duties of owners of superjacent lands, and of subjacent minerals, have been much discussed and passed upon. Then, too, the position of adjacent owners of land is an analogous one, and the rules which have been laid down, as to them, and often enforced, throw light upon the questions arising here. * * *

A reserve of minerals and mining rights, is construed as is an actual grant thereof. It differs not, whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface. *Shep. Touch.* 100; *Dand v. Kingscote*, 6 M. & W. 174; *Williams v. Bagnall*, 15 Week. R. 272; see *Wickham v. Hawker*, 7 M. & W. 78; and comment thereon in *Proud v. Bates*, 34 L. J. Chanc. —, 406; s. c. 5 Am. Law Reg. N. S. 171-174. A reservation of minerals and mining rights from a grant of this estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had first been granted to him, with a reservation of the surface. *Arnold v. Stevens*, 24 Pick. 106. Though a reservation is to be construed most strictly against the grantor, still there will be retained in him all that it was the clear meaning and intention of the parties to reserve from the conveyance. *Harris v. Ryding*, 5 M. & W. 60; per Parke, B. p. 70. These observations are made necessary, by positions taken and urged on the argument by the learned counsel for the plaintiff. And here is a fit place to notice *Hilton v. Ld. Granville*, 5 Q. B., 48 E. C. L. R. 701, much relied upon by him, in that it held that there cannot be reserved in a grant that which will deprive the grantee of the enjoyment of the whole thing granted, and that a clause to that effect must be rejected as absurd and repugnant, has in that respect been from time to time much questioned, and finally in effect overruled. *Rowbotham v. Wilson*, 8 H. of L. Cases, 348; *Duke of B. v. Wakefield*, L. Rep. 4 H. of L. 377; and see *Hext v. Gill*, *supra*, 700-716. * * *

The plaintiff acquired, as a right of property, that there should be left of the minerals, in their place under the land, sufficient to support the surface in its natural state. This was the extent of his right to subjacent support, there being no buildings upon the land when Parks conveyed to Downs, nor the erection of any, one of the

purposes in their contemplation. *Cal. R. W. Co. v. Sprot, supra*. The defendant lays stress upon the small consideration given for the land. The right to support is without regard to the comparative value of the strata. *Humphries v. Brogden*, 12 Q. B. 739. This right to sufficient subjacent support is likened sometimes to that to have lateral support to land. In that case, all which can be claimed is, that the adjacent owner shall not so dig upon his land as that of his neighbor shall fall into his pit. If the weight of the buildings, of late erected by his neighbor on his land, causes it to slide, when of its own weight it would not, there is no claim for redress. *Lasala v. Holbrook*, 4 Paige, 169. Is it not the same rule, that whatever an adjacent owner can do upon or in his own land, confined within that, and necessary for the convenient and beneficial enjoyment of it, which works no physical injury to his neighbor's possession in its natural state, he may do without liability to his neighbor, although it may work physical injury to a building lately erected thereon by his neighbor? For in *Humphries v. Brogden, supra*, the reason is given, that an owner cannot by putting an additional weight upon his own land, and so increasing the lateral pressure upon his neighbor's land, render unlawful any operation thereon which before would have caused no damage. Is this exemption from liability confined to a case of lateral pressure? If he may so dig as that the building shall topple down, and not be liable so long as that but for the building, the earth would not have fallen in; may he not so blast in digging as that the building shall shake, crack and crumble, without giving cause of action, so long as that the surface of his neighbor's ground is not injured or disturbed, though it be shaken? He is not bound to support the building, so long as he affords a support sufficient for the soil without the building. He is not bound to refrain from digging in his own land, so soon as he comes near the limit of support for his neighbor's building, not an ancient one. He is not bound to be circumspect in his means of digging, so long as they do not affect badly his neighbor's land. Is he bound to refrain from the use of the means which do not injure his neighbor's land, for that they badly affect a modern house thereon? In our judgment he is not. See *Smith v. Thackerah*, Law Rep. 1 C. P. 564. Whatever it is necessary for him to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no effect to the adjacent surface in its natural state, that he may do though it harm erections lately put thereon. As the rights and relations of adjacent owners and those of superjacent and subjacent owners are alike, so may the subjacent owner do beneath the surface what the adjacent owner may do beside it. And where, as

in *Harris v. Ryding*, *supra*, learned judges speak of the subjacent owner not being entitled to let down the surface or injure the enjoyment of it, they mean the surface in its natural state, and not with additions to it in buildings not ancient. And see *Partridge v. Scott*, 3 M. & W. 220.

c. Party-walls.

BROOKS *v.* CURTIS.

50 NEW YORK, 639. — 1872.

RAPALLO, J. — The deed from Everard Peck to the plaintiff states that the wall in controversy was, at the time of the conveyance, being erected by Peck, as the west wall of a block of stores. The centre line of the wall is, by the deed, made the easterly boundary of the land conveyed, which includes the land on which the westerly half of the wall stands. It appears that Peck's stores were afterward completed, and the plaintiff erected a building upon his own lot, using the wall as a party-wall, and inserting in it the joists of his building. Peck afterward conveyed to the defendant, who made the addition to the height of the wall.

We think that the language of the deed and the acts of the parties show that it was their intention that the wall should be a party-wall for the common use of both lots. The deed states that Peck was at the time erecting the wall, half of which was conveyed, and that it was to be the west wall of his block. This implies that the wall was not then completed, and that Peck was to have the right to complete it and use it as the west wall of his block. If the deed is to be treated as an absolute conveyance, free from any reservation, easement or privilege in the co-owner of the wall, Peck would have had no right to proceed to complete it, or, at least, that part which was beyond his line, after the conveyance. It cannot be supposed that any such was the intention of the parties. Subsequently to this conveyance the wall had been used for more than twenty years as a party-wall.

Although land covered by a party-wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled; and an important question in this case is whether such easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall or to the property of the adjacent owner.

This question, in the absence of statutory regulations upon the

subject, does not seem to have been distinctly settled by authority; but the fact appears in several of the cases relating to party-walls that the height has been increased, and there is no intimation that such increase was unlawful. *Watt v. Hawkins*, 5 Taunton, 20, was an action of trespass. The plaintiff had added to the height of a party-wall, and the defendant tore down the addition, for which injury the plaintiff brought trespass. The only point decided was that the parties were not tenants in common of the land, and therefore the action of trespass could be maintained. In *Campbell v. Mesier*, 4 Johns. Ch. 334, a party-wall, standing equally on two lots, having become ruinous, the owner on one side, against the will and in spite of the prohibition of the adjacent owner, pulled down the wall and rebuilt it higher than it was originally. It was held that the adjacent owner was bound to contribute to the expense of the new wall, but not to the extra expense of making it higher than the old. There is no intimation in the case that the increase of height was wrongful. In *Partridge v. Gilbert*, 15 N. Y. 601, the new wall built by the defendant was not only higher, but its foundations were deeper, than the old wall which it replaced. The right to make these additions was not, however, discussed in the case, and perhaps there was no occasion to discuss it; the action being brought by the tenant of the adjacent lot, whose goods were injured in making the repair, and not by the owner.

In *Eno v. Del Vecchio*, 4 Duer, 53, it was held that the owner on one side of a party-wall might, for the purpose of improving his own premises, underpin the foundation of the wall and sink it deeper if he could do so without injury to the building on the adjoining lot; also, that he might increase, within the limits of his own lot, the thickness, length or height of the wall, if he could do so without injury to the building on the adjoining lot. Whether he could raise the whole party-wall higher or whether any additional elevation must be wholly within the limits of his own lot, the court expressly declined to decide.

We think that the right of either of the adjacent owners to increase the height of a party-wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement. No adjudication adverse to that right has been referred to by counsel nor found by us. The party making the addition does it at his peril; and if injury results he is liable for all damages. He must insure the safety of the operation. But when safe it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenants. In *Hendricks v. Stark*, 37 N. Y. 106, it is

held that a party-wall is in no sense a legal encumbrance upon either property; that the mutual easements of adjoining proprietors in such walls are a mutual benefit to each, and not a burden, but a valuable appurtenant which passes with the title to the property. This is undoubtedly correct, provided each party is allowed to derive from the wall all the benefit which it is capable of affording without detriment to the other. But if, though of sufficient strength, it cannot be used by either party in increasing the height of his building, it may prove a serious injury to the property of one desiring to make that improvement; an improvement which is very usual and often very necessary in crowded cities. The fairer view, and the one generally adopted in legislative provisions on the subject in this and other countries, is to treat a party-wall as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require, either by deepening the foundation or increasing the height, so far as it can be done without injury to the other. The party making the change, when not required for purposes of repair, is absolutely responsible for any damage which it occasions (*Eno v. Del Vecchio*, 6 Duer, 17); but in so far as he can use the wall in the improvement of his own property, without injury to the wall or the adjoining property, there is no good reason why he should not be permitted to do so.¹

d. Easements in water.

GARWOOD *v.* N. Y. CENT. & HUD. R. R. CO.

83 NEW YORK, 400. — 1881.

[Reported herein at p. 116.]

SHEPLEY, J., *IN* HEATH *v.* WILLIAMS.

25 MAINE, 209. — 1845.

[Reported herein at p. 120.]

CORNING *v.* TROY IRON & NAIL FACTORY.

40 NEW YORK, 191. — 1869.

[Reported herein at p. 121.]²

¹ Division or "line" fences resemble "party walls" in some respects. Their construction and maintenance are usually regulated by statute, however. For the New York statutes, see "The Town Law," §§ 100-108. — ED.

² See also *Curtis v. Ayrault*, *supra*, p. 126; *Ocean Grove Ass'n. v. Asbury Park*, *supra*, p. 130; *Delhi v. Youmans*, *supra*, p. 133. — ED.

*e. Rights to flow lands.*¹ANDREWS, J., IN *BARKLEY v. WILCOX*.

86 NEW YORK, 140. — 1881.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such, that surface water from rains and melting snows would descend from different directions, and accumulate in the street in front of the plaintiff's lot, in varying quantities according to the nature of the seasons, sometimes extending quite back upon the plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink river; that when the amount of water was small, it would soak away in the ground; that in 1871, the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it, about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875, there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant or usual, but occasional only. There was no channel or stream, in the usual sense of those terms. In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water-courses. Whether, when the premises of adjoining owners are so situated that the surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the

¹ Read cases at pp. 1 and 141, *supra*. — ED.

respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by Denio, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule, that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. The Mayor*, 76 id. 60. The question has been considered by courts in other States, and has been decided in different ways. * * *

Upon this state of the authorities we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by Denio, Ch. J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy, while at the same time, it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream, by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to

which, in civilized society, the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual, of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between coterminous proprietors, in determining the right of mere surface drainage. But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with the surface water falling or collecting on his land and his right in the water of a natural water-course. In such water, before it leaves his land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it, by drains or ditches, upon the land of his neighbor; and he may do this although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners, or other proprietors on the stream. So also he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Acton v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N. Y. 39. Now, in these cases, there is an interference with natural laws. But those laws are to be construed in connection with social laws and the laws of property. The interference in these cases with natural law is justified, because the general law of society is, that the owner of land has full dominion over what is above, upon, or below the surface, and the owner in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Penn. St. 154. But it does not follow, we think, that the owner of land which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has

an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. * * *

Judgment affirmed.

f. Easements of light and air.

HUBBARD *v.* TOWN.

33 VERMONT, 295. — 1860.

PIERPOINT, J. — This action is brought to recover the damage claimed to have been sustained by the plaintiff in consequence of the defendant's obstructing his lights. It appears from the case that the building, which has been owned and occupied by the plaintiff and his tenants for more than twenty-five years prior to the acts complained of, stands upon the line between his premises and the premises of the defendant, and that the defendant has owned and occupied his premises during the aforesaid period; that the windows in the plaintiff's building opened out toward the premises of the defendant, admitting light from that direction, and that they have so remained without obstruction and without question on the part of the defendant, for the period of twenty-five years or more; that in 1859 the defendant erected a building on his own premises immediately adjoining that of the plaintiff, so as to exclude the light from two of the plaintiff's windows.

The only question involved in this case is, whether the plaintiff by such long and uninterrupted use of his windows, and the light passing through them, has thereby acquired the right so to continue his windows and thus to have the light pass through them, so that any act of the defendant which shall materially obstruct such light will make him a wrongdoer, and liable for any damage to the defendant that may ensue therefrom.

The rule seems now, to be well settled in England, that such long and uninterrupted use of light gives the right to continue its use, and to insist upon its remaining unobstructed by the adjoining proprietor for all time. The courts place this upon the same ground as rights of way, and other rights acquired in and over the premises of another by long and undisturbed use; presuming from the long exercise of the privilege by the one, and an acquiescence therein by the other, that the right had its origin in a grant.

While the general doctrine has been universally adopted in this country, its application to cases of this kind has not been generally recognized, and in many of the States has been expressly denied.

Our statute of limitations cannot be brought in aid of the plaintiff's

claim. The statute in terms only deprives the aggrieved party of the right of action after the limited period from the time the cause of action accrues, and although our courts have held that the exercise of the right by one party, and an acquiescence therein by the other, for such period, vests in the party so exercising it an absolute right, still in determining the question whether such right has in fact become an absolute one, the time that the one has so exercised it is to be computed from the period when a cause of action therefor first accrued to the other, which he has omitted to enforce; so that no right can be lost or acquired by virtue of the statute where there has been no act done by the one for which the law gives a remedy by action to the other; and it is conceded in the case that the defendant had no right of action against the plaintiff for any act of his in erecting his building and opening and continuing his windows on the side adjoining to and overlooking the defendant's premises.

This reason would seem to imply with equal force against the plaintiff's right to recover on the ground that a grant will be presumed from lapse of time to sustain his claim.

The principle upon which a grant is presumed is, that in no other way can the acts of the parties be rationally accounted for. Such presumption is required to account for the exercise of the right by the one, and the acquiescence therein by the other, for so long a period.

The right must be exercised adversely or under a claim of a right so to exercise it by the one, and it must be acquiesced in by the other.

This of itself presupposes that the exercise of the right by the one, without a grant, is a violation of some right of the other; otherwise it could not be adverse, within the meaning of the rule; neither could the other acquiesce, for that presupposes a legal right to object and resist.

If, then, there is no violation of the rights of another, no presumption of a grant by such other arises; there is no occasion for it. There is no right exercised or claimed by the one, that belongs to the other, or which he could grant, if he should attempt it.

How, then, can this doctrine of presumption apply to a case like the present? The erection of the building by the plaintiff on the line between him and the defendant was no violation of any right of the defendant; he could not complain of or prevent it, and his assent or dissent could in no manner affect the transaction. The legal right to do the act was perfect in the plaintiff. His right to erect his building on the division line is not controverted; the wisdom of the act is more questionable. He might have made his walls solid, thus entirely excluding the light from that direction; he chose

to leave apertures therein, thereby allowing the light to remain unaffected to that extent; but how can it be said that by excluding the greater part, he acquires any better right to the remainder, than he would have had to the whole of it if he had not excluded any? He has not done any act which has had any effect to control or influence the light, except to exclude it. He did not draw or cause the light to pass in upon his premises in any other than its natural manner; it remained upon and over the defendant's premises as it had always been. As there was no interference with the rights of the defendant, it is difficult to see upon what the presumption of a grant can be based. Lapse of time and the presumption arising therefrom are resorted to only to justify in one that which would otherwise be a usurpation of the rights of another.

If a man can acquire, by use, a right to an uninterrupted enjoyment of light under circumstances like the present, why not acquire a right to a like enjoyment of the prospect from the same windows, or to a free access of the air to the outside of his building to prevent decay, and many other rights of a similar and no more ethereal character?

The result of which would be, if allowed, an utter destruction of the value of the adjoining land for building purposes. Windows are often of more importance for the prospect they afford than for the light they admit. The light may be obtained from other directions, the prospect cannot. A pleasant prospect from the windows of a dwelling always contributes more or less to the enjoyment of the occupants, and often enters largely into its pecuniary estimate. But to admit that a mere enjoyment of such prospect for fifteen years gives him the right to insist that it shall remain uninterrupted for all future time, would be to recognize a principle at variance with well established rules, and one that could not be tolerated in this country.

No such right can be acquired by use, for the same reason that its exercise by one is no infringement of the rights of another, for which the law gives an action. Le Blanc, J., in *Chandler v. Thompson*, 3 Camp. 82, says: "That although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action to be maintained, and he had heard it laid down by Eyre, Ch. J., that such an action did not lie."

We think the English courts, in applying the doctrine of the presumption of grants from long use and acquiescence to this class of cases, clearly departed from the ancient common-law rule as laid down in *Berry v. Pope*, Cro. Eliz. 118, and the error, as it seems to

us, consists in placing cases like the present upon the same footing and making them subject to the same rules that govern another class of cases, to which they really have no analogy. In *Lewis v. Price*, 2 Saund. 175 a., Wilmot, J., said: "That when a house had been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as where they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties and . . . that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to an easement belonging to the house." As we have already seen, no presumption of an agreement arises, as none was necessary to justify the act. The man who occupies his own house for twenty years has no better title to it at the end of that time than he had in the outset. Does he acquire any greater right to the light by the occupation than to the house? Clearly not; having usurped no right, he can acquire none by lapse of time. The error in the reasoning is in saying that because the man who takes possession of his neighbor's house and holds it adversely for twenty years (his neighbor acquiescing therein) acquires a title to it, therefore, the man who opens windows in his own house that in no way interfere with the rights of his neighbor, and of which such neighbor has no legal right to complain, and keeps them open for twenty years, thereby acquires a right to insist that no act shall be done by his neighbor on his own land that in any respect interferes with or obstructs the light to those windows. In the one case there is an infringement of the rights of another for which the law gives a remedy by action; in the other there is not. This constitutes a radical difference between the two cases, and that, too, in respect to the very point upon which the whole doctrine of presumption in cases like those under consideration depends.

It might be urged with much force that a man who conveys a house with the privileges, etc., would not have a right to make an erection on his own land adjoining that would shut out the light from the windows in the house so conveyed, and it may be said that he who has occupied another's house for such a length of time and under such circumstances that a grant will be presumed, stands upon the same footing as an ordinary grantee. However that may be, this case involves no such question. In those cases the question turns upon the fact that the title to the premises was derived by deed, actual or presumed, from the party who seeks to deprive his grantee of the enjoyment of the right he has conveyed. The right

does not depend upon the lapse of time, but is as perfect in the grantee the moment the deed is executed as it can ever be. Here the title to the premises of the plaintiff was never in the defendant, but has been in the plaintiff through the whole period.

This question was fully considered in New York, in the case of *Packer v. Foote*, 19 Wendell, 309. Bronson, J., says: "Upon what principle courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass upon the land of another, under a claim of right to pass over, or feed his cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, in these and the like cases long-continued acquiescence affords strong presumption of right. But in the case of lights there is no adverse user, nor, indeed, any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner." And again he says: "There is no principle, I think, upon which the modern English doctrine of ancient lights can be supported."

The same doctrine was held in *Pierre v. Fernald*, 26 Maine, 436, and in *Napier v. Bulwinkle*, 5 Richardson (S. C.), 312, in both of which cases the subject was fully discussed.

We see no reason growing out of the nature or necessities of this class of cases that require us to extend the doctrine of the presumption of grants to them; but, on the other hand, the establishment of a rule that would require a man to erect a building or wall that he did not need on his own premises, for the sole purpose of excluding the light from his neighbor's windows, would lead to continual strife and bitterness of feeling between neighbors, and result in great mischief. The judgment of the County Court is affirmed.¹

6. PUBLIC (QUASI) EASEMENTS — HIGHWAYS.²

a. Rights of the public.

PARKER, J., IN *NUDD v. HOBBS*.

17 NEW HAMPSHIRE, 524. — 1845.

THE first special plea of the defendant sets forth a right of way in all the inhabitants of the town of Hampton across the plaintiff's

¹ As to easements of light, air, etc., in a street in favor of an abutting owner when the fee is in the municipality, see *White v. Manhattan Ry. Co.*, p. 795, *supra*; *Story v. Elevated R. R. Co.*, 90 N. Y. 122; *Kane v. N. Y. Elevated R. R. Co.*, 125 N. Y. 164. — ED.

² In some cases the public own the fee in the highway. For special easements of abutting owners in such case, see note 1, *supra*. — ED.

close; and we are of opinion that this is a sufficient plea for the matters attempted to be justified by it. 7 N. H. 236, *Perley v. Langley*, and authorities there cited. It is not necessary to show an open public highway. There may be a way across the land of an individual, over and along which all persons have a right to pass, with a right in the owner of the soil to keep up gates and bars across it, for the protection of his field. So there may be other limitations or restrictions upon a public easement, — as that it shall be used by persons on foot only, or by those, and persons riding on horseback. And in such cases a plea in justification must qualify the right accordingly. Chitty on Pl. 1116, note y, 9th Am. ed.

A right of way also may exist in particular persons holding certain estates. There can, therefore, be no objection to a way limited to the inhabitants of a particular territory, and Chitty, in the page just cited, note w., refers to Lutw. 1507, for a precedent of a right of way by the inhabitants of a town. It is not necessary in pleading to set out the abutments of such a way, or to state its *termini*. 1 H. Bl. 351; 8 T. R. 608; 2 Chitty Pl. 1116.

MAKEPEACE v. WORDEN.

1 NEW HAMPSHIRE, 16. — 1816.

Per Curiam. — In highways laid out through the lands of individuals in pursuance of statutes, the public has only an easement, a right of passage; the soil and freehold remain in the individual, whose lands have been taken for that purpose. *Perley v. Chandler*, 6 Mass. 454. Towns whose duty it is to make roads and keep them in repair have a right to cut trees growing in highways so far as is necessary to the performance of that duty. It is therefore clear, that the defendants are entitled to judgment on the first count in this case. Whether towns have a right to use trees thus cut, in the construction of the road, is a question not necessary to be settled in this case. The plaintiff complains, not that his trees have been thus used, but that they have been converted to the private use of the defendants. This complaint in our opinion is well founded and the plaintiff is entitled to judgment on his second count for the value of the wood.

Judgment for the plaintiff.¹

¹ Defendant was in the employ of the town but converted the trees to his own use. See also *Robert v. Sadler*, *infra*, p. , 104 N. Y. 229; *Platt v. Oneonta*, 88 App. Div. (N. Y.) 192, and N. Y. Highway Law, § 156. — Ed.

*b. Rights of the owner of the fee.*CODMAN *v.* EVANS.

5 ALLEN (Mass.), 308. — 1862.

CHAPMAN, J. — The parties are owners of adjoining lands, and the defendant's house stands on or near the line. The construction of his deed was settled in the former case between the same parties. 1 Allen, 443. He has erected a bay-window which extends beyond the line, over the plaintiff's land, and maintains it there. The justification which he sets up in this action is, that there is a highway over the plaintiff's land, extending to the line, and that his structure does not interfere with the use of the way. But this furnishes no legal defense. Nothing is better settled than that a highway leaves the title of the owner unaffected as to everything except the right of the public to make and repair it and use it as a way, and for some other public purposes, such as drainage and the laying of aqueducts; and that an adjoining proprietor has no more right to erect and maintain a permanent structure over the land than if no highway was there. A mere easement has passed to the public, leaving the fee in the owner. An adjoining proprietor may have occasion to use the way in connection with his lands, in a different manner from other people. In *O' Linda v. Lothrop*, 21 Pick. 292, it was held that he might swing his gate or door over the way, suffer his horses or carriages to stand upon it, lay building materials upon it designed to be used on his land, and throw earth upon it as he removed the earth from his cellar. But these are all temporary acts, and are connected with the use of the way. He may spread earth upon it to make it more level and his access to it from his premises more convenient; but this is merely fitting it more perfectly to be used as a way. In *Underwood v. Carney*, 1 Cush. 285, the uses of the way which were held to be legal were of the same character as those in *O' Linda v. Lothrop*. They did not constitute permanent occupation; nor do those cases justify any occupation except for a reasonable time, and as connected with its use as a way. Here the occupation has been permanent, and having no connection with the use of the way. The evidence of the alleged custom was rightly rejected. If there be a custom in Boston to erect bay-windows, balconies and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be a custom to erect them over the land of other people, such a custom is illegal; and the defendant cannot justify himself in occupying his neighbor's

property as a part of his dwelling-house on the ground that such trespasses are customary in Boston. *Homer v. Dorr*, 10 Mass. 26; *Waters v. Lilley*, 4 Pick. 145. In some of our ancient highways the fee has always been in the town. Probably this is the case as to many of the streets of Boston. It does not follow from the decision of this case that the public could maintain an action like the present. There are also many cases where land adjoining the highway has been so conveyed that, by our established construction of deeds, the fee of the land from the side line to the center of the highway remains in the grantor, though both parties actually supposed it was conveyed. It is now too late to discuss the question whether it would have been better to hold that all deeds bounding on the highway conveyed all the rights of the grantor as far as the middle of the way, as deeds bounding on streams extend to the thread. But in such cases, where there are no covenants such as are contained in the deed of Amory to Apthorp respecting the way, and defining the rights of the parties (see 1 Allen, 444), and where the grantor has no other land adjoining the highway to be affected by building a structure over the way, and can have no possible use of his fee so long as the highway exists, it does not follow from the decision in this case that he can maintain an action for the erection of such a structure. For in the present case the plaintiff not only has a right to have the whole space occupied by the street open, from the soil upwards, for the free admission of light and air, and the prospect unobstructed from every point, but it is a right of appreciable value in reference to himself and his grantees, who are proprietors of the other land adjoining the way. If the defendant may obstruct the light and air and prospect by means of a bay-window, he may by a much larger structure, and thereby greatly injure the property bounding on the street.

These views make it unnecessary to decide the questions argued as to the actual existence of the highway; because, if it does exist, that fact does not constitute a defense to the action.

III. Common or profits à prendre.¹

VAN RENSSELAER v. RADCLIFF.

10 WENDELL (N. Y.), 639. — 1833.

[Reported herein at p. 475.]

¹ These rights were anciently common of pasture, piscary, turbary and estovers. They are rarely to be found at present. — ED.

HUFF *v.* McCAULEY.

53 PENNSYLVANIA STATE, 206. — 1886.

[*Reported herein at p. 76.*]CALDWELL *v.* FULTON.

31 PENNSYLVANIA STATE, 475. — 1858.

[*Reported herein at p. 102.*]

IV. Rents.

VAN RENSSELAER *v.* HAYS.

19 NEW YORK, 68. — 1859.

[*Reported herein at p. 81.*]INGERSOLL *v.* SERGEANT.

1 WHARTON (PA.), 336. — 1836.

[*Reported herein at p. 86.*]MARSHALL *v.* MOSELEY.

21 NEW YORK, 280. — 1860.

[*Reported herein at p. 412.*]

V. Franchises.

JOHNS *v.* JOHNS.

1 OHIO STATE, 350. — 1853.

[*Reported herein at p. 14.*]SYRACUSE WATER CO. *v.* CITY OF SYRACUSE.

116 NEW YORK, 167. — 1889,

SUIT to restrain the city of Syracuse from granting to the Central City Water-works Co. the right to place pipes, etc., in the city of Syracuse, with a view to supply it with water. A second case, argued herewith, was brought to restrain that company and the city from proceeding under a resolution which the common council had passed. Judgment for the defendants. Plaintiffs appeal.

BRADLEY, J. — * * * The company evidently was created solely for the purpose of supplying water to the city for the use of it and its inhabitants; and, so far as appears, the city then had no means for such supply other than such as had been possessed by Teall and his associates, and such as it may have been contemplated the plaintiff would provide. It must be assumed that the Legislature was advised of the situation, and that the franchise was granted for all the purposes within the provisions of the charter. The question now under consideration is the legislative intent. And for the purpose of ascertaining the powers and privileges which were granted to the plaintiff, other than those incidental to the powers expressly given and necessary to carry them into effect, reference can be had only to the terms of the grant. 2 Kent's Com. 298; 1 R. S. 600, § 3; *Halstead v. Mayor, etc.*, 3 N. Y. 433.

The construction and effect to be given to the contract between the State and the grantee of a franchise, have been the subject of much discussion, and the view of Chancellor Kent at one time was that, although "the creation of the franchise be not declared exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry, bridge or turnpike or railroad, that the government will not either directly or indirectly interfere with it so as to destroy or materially impair its value. All grants of franchises ought to be so construed as to give them due effect by excluding all contiguous competition which would be injurious and operate fraudulently upon the grant." 3 Kent's Com. 469; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101.

Whatever support that rule may seemingly have in reason or propriety, it is not now available to that extent for the beneficial protection of the grantee in the exercise of his franchise, but, on the contrary, public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purposes of their creation.

The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the State in imparting to its citizens or corporations powers and privileges of public character. And, therefore, except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be, to those taken by the prior grantee.

The important leading case to that effect in this country was *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, where was sustained the grant of the right to erect a bridge over the Charles river, near one which had been constructed over the same river pur-

suant to prior grant from the State of Massachusetts, although it produced a competition practically destructive of the value to the grantee of such prior franchise. And this was put upon the ground, resulting from the declared rule of construction of such grants, that they should be strictly construed as against the grantee, and that nothing should be taken by inference or presumption to enlarge their import. The court held that the State had relinquished its sovereignty so far only as the purpose to do so was expressed in the prior grant, and, therefore, as it had not by it made the franchise exclusive in that locality, or denied to itself the power to grant similar privileges to others, there was no violation of the legal rights of the prior grantee produced by the subsequent one complained of. Although that case was determined by a divided court, and it does not very clearly appear, by the report of it, upon precisely what ground all the members of the majority placed their concurrence in the result, the doctrine there announced by Mr. Chief Justice Taney has since then been treated by that court as established. *Lehigh Water Co. v. Easton*, 121 U. S. 391. It has also been adopted and is the settled rule in this State. *Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige, 554; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Thompson v. N. Y. & H. R. R. Co.*, 3 Sand. Ch. 625; *Auburn, etc., Plank Road Co. v. Douglass*, 9 N. Y. 444, 452; *Fort Plain Bridge Co. v. Smith*, 30 Id. 44, 61; *Power v. Village of Athens*, 99 Id. 592; *Dermott v. State*, Id. 107. * * *

The inquiry which presents more important considerations has relation to the franchise granted to the plaintiff, and represented by its charter. By it the plaintiff was given corporate existence and vested with powers and privileges to enable it to exercise its functions. This incorporeal hereditament was its property, and whatever other or corporeal property it had or acquired, having relation to its legitimate powers, and for the purposes of their exercise, became, and while applicable to such purpose was inseparably united with the franchise. The corporate rights and the corporeal means of their exercise, therefore, constitute, as it were, a single body consisting of property corporeal and incorporeal. Both the power and the means of exercising it are essentially united, and upon such union is dependent the enjoyment, as well as the practical value of the franchise. *Gue v. Tide Water Canal Co.*, 24 How. U. S. 257; *People v. O'Brien*, 111 N. Y. 2.

When its charter was granted it was in contemplation that the plaintiff would be called upon to assume its corporate duties and exercise its powers in furnishing water to the city of Syracuse; and that for such purpose it would take and acquire the means of doing

so. And in that behalf the company did take, by conveyance, certain property, then in use for that service, and thereafter acquired and applied other property to such use, and for nearly forty years has continued to furnish water for the city and its inhabitants. So far as appears, until the year 1885, no means of supply have been sought for otherwise than through the plaintiff. Then, pursuant to the general act authorizing it, Laws 1880, chap. 85, The Central City Water-Works Company was incorporated, and the objects of its creation, as expressed in its articles of incorporation, were "To supply the city of Syracuse, N. Y., and adjacent villages, with pure and wholesome water for domestic use, for fire protection and other public purposes, and for the purpose of accumulating, storing, selling, furnishing and supplying water in said city and adjacent villages for domestic, manufacturing, municipal and agricultural purposes." Shortly thereafter the Common Council of the city adopted a resolution to the effect that The Central City Water-Works Company, subject to the conditions therein mentioned, were authorized to construct, maintain, own and operate water-works in the city of Syracuse, for the purpose of supplying it with pure and wholesome water, etc., specifying the sources from which the water should be taken, how its quality should be approved, the pressure which it should have at the hydrants, the number, character and generally the distribution of the hydrants to be furnished; and that on the completion of the works, which was to be accomplished within three years after acceptance by it of the proposition, the city agreed to rent from the company, for the period of twenty years, the right to use the water to be supplied by it at five hundred and twenty hydrants, and such additional number as might be ordered, and to pay therefor at the rate of fifty dollars per hydrant annually. The right was reserved to rescind the grant on failure of the company to comply with its terms; also the right after five years to acquire the works and property of the company in the manner there mentioned. This agreement and proposition, and all the terms expressed in the resolution, were formally accepted by the defendant company in April, 1885. The purpose of these actions was to prevent the contemplated agreement between the defendants, and, as made between them, from being carried into effect, upon the ground and for the alleged reason that the plaintiff had the exclusive right or franchise to supply the city and its inhabitants with water. And although the charter of the plaintiff does not, in terms, declare such power to be exclusive or deny to the State the right to create a rival franchise in another, it is contended that the grant to the plaintiff, in its nature, necessarily gave to the plaintiff the exclusive right to supply the city

with water, because a franchise to do so can embrace no less than the whole city and the entire supply of water within its boundaries, and, therefore, the proposed grant to the defendant is an invasion of the plaintiff's franchise.

It may be assumed that what is embraced within the terms of the grant to the plaintiff is exclusive in such sense that it cannot be covered by grant to another. That is to say, a grant from the State to a company to construct and operate a bridge, ferry or telegraph, gives to it the exclusive right to operate such ferry, bridge or telegraph, and no right can be given or taken to occupy the same space as the one so constructed or operated under the grant. The property in the company, to that extent and for such purpose exclusively, belongs to it, but a similar franchise may not infringe such right although it may have the effect to impair its operative value. In such case that would be the incidental consequence of the lawful competition and not an invasion of the prior grant. *Lehigh Water Company's Appeal*, 102 Penn. St. 515. By reference to the plaintiff's charter, it will be observed that the provisions directly bearing upon the subject of furnishing water are that, "for the purpose of supplying the said city of Syracuse with pure and wholesome water, said company may purchase, etc., real estate necessary for the purpose." § 8. "And said company shall, when requested, furnish water to the Common Council of the city of Syracuse for extinguishing fires and other purposes." § 16.

After careful consideration of the able and forcible argument of the plaintiff's counsel on this subject, we are unable, in view of the governing rule of construction in such cases, to adopt its reasoning to the effect that the language or nature of the grant is such as to cut off all competition in furnishing water to the city and its inhabitants, and to vest in the plaintiff the exclusive franchise in that respect.

The effect of rival means for the supply of water to the city upon the value of the plaintiff's franchise, is not properly the subject of consideration upon this inquiry, unless it bear upon the question of construction of its charter, for which purpose it does not seem important. The plaintiff's structures belong to it conclusively, and it is its exclusive right to take water from its reservoirs, convey it through its mains and pipes and to use its apparatus for the distribution and supply of water to the city and its inhabitants. The franchise of the plaintiff and all its property remain subject to its control and management. By force of the grant to it, the plaintiff took and has the right to maintain its structures, the privilege of supplying all the water the city or its inhabitants may take from it,

but not the right to supply them with all the water they may be permitted to use. It may be that the demand upon it for supply will be lessened by the addition of other means which may be provided to bring water into the city.

The supply embraced within the franchise of the plaintiff did not, by the terms of the grant or by necessary implication, shut out all other means of obtaining supply there. And, in view of the demand of the rule of construction before referred to, such exclusive right in the grant of a public franchise cannot rest upon inference, presumption or doubtful construction. *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 93; 3 Wall. 75. It would hardly be claimed that a grant to a ferry company of the franchise to supply the means of travel and transportation across the East river, between New York and Brooklyn, would confer the exclusive right on such company to control such transportation, by ferry, on that river between the two cities, although it would have the exclusive right to operate its boats and enter its slips. Such exclusive right would necessarily result from the nature of the grant as vested by it, because the property and means provided for the exercise of the franchise belong to the grantee, and can be occupied or used by no other party.¹ * * *

¹ This case was taken to the Supreme Court of the United States, where the doctrine of the New York Court was sustained, 154 U. S. 519. See also, *Matter of City of Brooklyn*, 143 N. Y. 596, 166 U. S. 696; *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154; 184 U. S. 362. See further for franchise cases, the Supplementary Cases, *infra*. — ED.

CHAPTER V.

EQUITABLE ESTATES AND INTERESTS IN LAND.¹

JAKES *v.* TRUSTEES OF M. E. CHURCH.

17 JOHNSON (N. Y.), 548. — 1820.

[Reported herein at p. 93.]

KENNEDY, J., IN PULLEN *v.* RIANHARD.

1 WHARTON (PA.), 514. — 1836.

[Reported herein at p. 95.]

¹ **Uses Before the Statute of Uses.** — “Our early jurists regarded the legal estate in fee simple, and the conterminous use, as being two separate things, commonly found together, and *prima facie* presumed to be united in the legal tenant; but capable of separation, and having definite characteristics when separated. When such separation took place, the use conferred the right both to take the profits of the lands, and also to call upon the person having the legal estate to make such conveyances thereof as the person having the use should think fit. * * * Regarded as a descendible entity, the descent of the use followed the descent of the thing of which it was the use. So that the use of lands which were subject to no peculiar local custom, held for an interest analogous to a common-law fee simple, descended to the heir general [of the *cestui que use*] * * * The person entitled to the use (*cestui que use*) might alienate the use by conveyance *inter vivos*. So also he might devise the use before the Statute of Wills, although the use of lands which were not themselves devisable.” Challis’ Law of Real Property (2d ed), pp. 351-2. Such use of lands might be a (*quasi*) fee, or for life, or for years. The *cestui que use* having, in equity, the right to the possession and full control of the lands, a use was certainly an “equitable estate.” Of course, at law, the *cestui que use* in possession was regarded as no more than the tenant at will of the holder of the legal title.

Uses Under the Statute of Uses. — In 1535 (27 Hen. VIII., c. 10, see Bolles’ Important Eng. Statutes, p. 32), was passed the Statute of Uses, the purpose of which was to convert the use into a legal estate and make it fully subject to the law governing such estates. Had this statute really brought about that result we should probably have heard no more of “equitable estates.” For the operation and effect of this statute in conveyancing, see below under “Title.” The New York Statute of Uses will be found in §§ 72 and 73 of the N. Y. Real Property Law.

The Modern "Trusts." — The uses which survive the statute, as equitable rights or interests, are now called "trusts." The following are the more important:

(1) *Active Trusts*. — The statute was held not to execute the use when the legal holder of the land had duties to perform with reference thereto, or for the beneficiary, which required that he should retain the possession or control thereof. The interest of the beneficiary in these "active trusts" is rather an equitable chose in action than an "estate." See N. Y. R. P. L., §§ 76, 77 for trusts of this kind permitted in New York. See also pp. 583-604, *supra*, for "spendthrift trusts."

(2) *Chattel Interests Limited to Uses*. — "The term seized, used in describing its [the Statute of Uses'] operation, means invested with the legal possession for an estate of freehold, excluding possession for a term of years or a chattel interest. Therefore, a use declared or raised upon a term of years is not executed by the statute and remains cognizable in equity only." 1 Leake, Law of Property in Land, 118. A gift then to A. for ten years to the use of B. does not give B. the legal interest, but only an "equitable estate for years." But see N. Y. R. P. L., § 72.

(3) *A Use upon a Use*. — The courts have decided that the statute does not execute a use limited upon a use; that is to say, upon a feoffment to A. and his heirs to the use of B. and his heirs, to the use of, or in trust for C., the statute executes the use in B. vesting him with a legal title, but is then exhausted and the use limited to C. becomes an equitable estate if the trust was passive; an equitable chose in action if the trust was active. But see N. Y. R. P. L., § 72.

(4) *Trusts for the Separate Use of a Married Woman*. — These are held not to be executed by the statute and remain "equitable estates" unless, of course they are in the form of active trusts. See *Pullen v. Rianhard*, p. 95, *supra*.

(5) *Trusts Created by Operation of Law*. — These are (a) resulting trusts, as in cases where the grantor disposes of the legal title only, where the express object of the trust fails in whole or in part, and where a conveyance is taken in the name of another than the one paying the consideration (see as to this last N. Y. R. P. L., § 74); (b) constructive trusts, where a title is acquired by fraud and a court of equity, converts the wrongdoer into a trustee for the one defrauded. In these cases the statute does not execute the use, and the interest of the beneficiary may in some jurisdictions still be an "equitable estate."

Future Uses. — These are *executed* when and as they arise unless their nature is such that they become trusts.

Powers of Appointment. — These provide a special mode of creating future uses. The use is executed when the appointment under the power takes effect. They are regulated in detail in New York by statute. N. Y. R. P. L. §§ 110-162 — ED.

CHAPTER VI.

FUTURE ESTATES AND INTERESTS IN LAND.

L. Kinds of future estates, the characteristics of each and the mode of their creation.

I. REVERSIONS; INTERESTS AND POSSIBILITIES ANALOGOUS THERETO.

a. Reversions.¹

BATES v. SHRAEDER.

13 JOHNSON (N. Y.), 260. — 1816.

[Reported herein at p. 460]

¹“An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.” 2 Bl. Com. 175. See also N. Y. R. P. L., § 29, “A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.” “If there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law; and so also the reversion after an estate for life, years, or at will, continues in the lessor. * * * A reversion is never, therefore, created by deed or writing, but arises from construction of law.” 2 Bl. Com. 175. *Bates v. Shraeder*, *supra*, p. 460. Since the creation of an “estate” for years or at will leaves the lessor still “seised,” his interest is not a true “reversion.” It seems, however, to have been called by that name ever since those “estates” passed over from mere contract rights into interests in the land.

Reversions are always vested rights. In *Floyd v. Carow*, 88 N. Y. 560, occurs the following language: “The estates devised to the unborn issue of the life tenants were contingent remainders in fee, depending upon a double contingency, viz.: the birth of issue and their survivorship. There was left in the testator a contingent reversion in fee, expectant upon the determination of the life estates, and the failure of issue of the life tenants. * * * The life tenants died, after the death of the testator, without issue. Upon their death, the contingent reversion of the testator in the lands devised to them and their issue was changed into an absolute fee, which, not having been specifically devised, descended to the plaintiff as heir-at-law, unless it passed to the appointees of the testator’s wife under the sixth clause of the will.” See also Chaplin’s Suspension of the Power of Alienation, § 129. It is submitted that the condition here is subsequent as to the reversion and not precedent and that the reversion is vested. See Gray’s Rule Against Perpetuities, §§ 11 and 113.

*b. Equitable reversions.*LORING *v.* ELIOT.

16 GRAY (MASS.), 568. — 1860.

HOAR, J. — The construction of the deed of trust made by Elizabeth Fleet Eliot¹ to her father was settled by this court in the case of *Hildreth v. Eliot*, 8 Pick. 293, so far as it was necessary to determine the questions which that case presented. It was there held, and we have no doubt, correctly, that the trustee took the entire legal estate, and that the equitable estate of Mrs. Hildreth was only for life, so that her children, if she should leave any at her decease, would take a remainder as purchasers. The grant was to the trustee and his heirs forever. It was in trust to sell the whole or any part and apply the proceeds to her support as she should judge necessary; and the estate of the trustee must be co-extensive with the trust.

The only question which remains to be considered is whether any equitable estate was created in Mrs. Hildreth by force of the provision that, in case of her death leaving no children, the trustee should convey the estate to her heirs-at-law, and this must depend upon the consideration whether the words "heirs-at-law" in this conveyance are to be construed as words of limitation or of purchase.

In *Shelley's Case*, 1 Co. 103, the rule was stated, "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." This rule was abolished by the St. of 1791, c. 60, § 3, as to wills; but it remained in force as to deeds until the Rev. Sts. c. 59, § 9, terminated its application to deeds as well as wills. As this deed was executed in 1817, the rule in *Shelley's Case* was therefore in force, and is to be regarded in its construction.

The equitable estate of Mrs. Hildreth was, from the time of her marriage, an estate for life, with a contingent remainder in fee to her children, in case she should leave any at her decease; and a farther limitation, which, if made to any person by name, would have been a contingent remainder, collateral to the first remainder in fee, and therefore good in law. 4 Kent's Com. (6th ed.) 200; 2 Doug.

Reversions may arise by the creation of a less estate out of a fee of any quality, or out of an estate for life. The residue of a term of years remaining in one who has given a sub-lease is also termed a "reversion." — ED.

¹ Miss Eliot married Hildreth. The deed in question was a marriage settlement. — ED.

505, note, and cases there cited. But as the second limitation is to her heirs-at-law, it seems to fall precisely within the rule in *Shelley's Case*, to wit, that the ancestor taking an estate for life, and in the same conveyance an estate being limited mediately (that is to say, with an estate interposed between the two) to the heirs, this remainder shall attach in the ancestor, and shall not be in abeyance. 2 Rol. Abr. 417; Remainder, H. pl. 3. And by an application of the same principle, a conveyance in fee, with a limitation of an ultimate use to the heirs of the grantor, is construed as retaining a reversion in him; "for the ancestor during his life beareth in his body (in judgment of law) all his heirs." "And if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion of the fee had been in him, because the use of the fee continued ever in him." Co. Lit. 22 b.

Trusts are subject to the same rules of descent, and are deemed capable of the same limitations, as legal estates. 4 Kent Com. 302. As was said by Lord Mansfield in *Burgess v. Wheate*, 1 W. Bl. 160, "whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate." *Parker v. Converse*, 5 Gray, 339; *Newhall v. Wheeler*, 7 Mass. 189.

But a distinction has prevailed to some extent in regard to the construction of trust estates, especially as to those which are executory, and to those created by marriage settlements; they are to be construed with a much greater deference to the manifest intention, to be deduced from the whole instrument of conveyance, than in construing the like limitations in legal estates. 1 Fearn Cont. Rem. (10th ed.) 90; *Neves v. Scott*, 9 How. 196. It is therefore proper to inquire, whether there is anything in the objects of this deed of trust, which would lead to the conclusion that it was intended to alter the usual rule of construction, and to use the word "heirs" as a word of purchase.

The recital preceding the grant to the trustee states that "whereas she, the said Elizabeth Fleet Eliot, is desirous of securing the said estate, both real and personal, in the event of her marriage, to her sole use and benefit; and for this purpose it hath been agreed that all the estate and property aforesaid shall be granted" to a trustee, "to be held in trust for the separate and sole use and benefit of her, the said Elizabeth, and her heirs (notwithstanding any such coverture), upon the terms and conditions, for the uses, intents and purposes, under the limitations, and for and during the time, as hereinafter expressed." The estate for life is limited until the marriage to the sole use and behoof of the said Elizabeth and her

heirs, and then "to the sole use and separate benefit of her, the said Elizabeth, without being liable to the debts, incumbrances or control of any husband she may have during the existence and continuance of said trust." The income, with such portion of the principal as the trustee shall judge necessary for her convenience and support, is to be paid to her, or to such persons as she shall in writing, without the signature or interference of any husband, appoint. At her death, the trustee is to convey and transfer all that remains to her children, if she shall leave any, to them and their heirs and assigns forever; and in case she should die without issue, to her heirs-at-law.

It would seem to be apparent from these clauses in the deed, that its whole purpose was to secure the estate to the separate use of the wife during her life, free from any control of her husband; and to secure what should remain of it to her children, if she should leave any. So far from anything in the deed showing a purpose to give a different meaning to the word "heirs" from its usual legal import as a word of limitation, it is noticeable that in the covenants of the trustee none is inserted for any disposition of the estate beyond the remainder to the children. It has been suggested at the argument that this omission was accidental; but it is an accident which would not have been likely to occur if the purpose had been to make an express provision for collateral relatives. By limiting the estate in the first instance to the wife for life, with a contingent remainder in fee to the children, if she should leave any, the children would take, if at all, as purchasers; and, therefore, although the husband is entitled to curtesy in his wife's equitable estate of inheritance, the condition of an estate by the curtesy, that there should be issue of the marriage which could inherit the estate, would not exist. *Roberts v. Dixwell*, 1 Atk. 607; 1 Fearn Cont. Rem. 90; 1 Cruise Dig. tit. 5, c. 1, § 22; *Barker v. Barker*, 2 Sim. 249. As far, therefore, as the protection of the estate of the wife and of the children against the control of the husband or any incumbrance arising from the coverture, was the object, that object was secured.

We are, therefore, of opinion that Mrs. Hildreth had an equitable reversion, which she could lawfully devise, and that the claimants under her will are entitled to a conveyance from the trustee.

Decree accordingly.

c. Possibilities analogous to reversions.

(1.) THE FEUDAL ESCHEAT.

(a.) *On failure of heirs to a fee.*¹(b.) *On the dissolution of a corporation seised of real estate.*HOLMAN, J., IN STATE BANK OF INDIANA *v.* STATE OF INDIANA.

• I BLACKFORD (IND.), 267. — 1823.

THE president and directors of the corporation become the agents of the stockholder, and if they violate the conditions on which he enjoys this privilege [the corporate franchise], his privilege is immediately subject to forfeiture by this act of his agents. Nor will the regard which the Constitution has for private property, secure such property from annihilation by a dissolution of the corporation. So that we see nothing in the Constitution to prevent the seizure of those franchises, let the effect upon private property be what it may. And there can be no doubt but that this judgment so far as it authorizes a seizure of the franchises into the hands and custody of the State, is warranted by law. When it appears that the liberty has been once granted, and is forfeited by misuser or nonuser, the judgment shall be that it be seised into the King's hands. Year-book, 15 Ed. 4, cited in 2 Kyd on Cor. 407. And such appears to be the law at present. Thus far everything appears to be regular. But when we proceed to that part of the judgment that authorizes a seizure into the hands of the State of all the goods and chattels, rights, credits and effects, together with all and singular the lands, tenements and hereditaments of the corporation, we are compelled to pause and minutely examine the ground on which this part of the judgment has been founded. * * *

The most of the cases to be found in the books against corporations are where the corporations have been created for the purposes of government, and calculated for perpetuity, and where the property of the corporation, whether real or personal, has formed a very inconsiderable feature in the case. Of course, the effect of the

¹ The feudal escheat in these cases was to the grantor — the creator of the fee in question. Since the statute *quia emptores* all conveyances in fee are theoretically transfers of a fee already in existence and not the creation of a new fee, and the escheat is to the grantor's lord. Where tenure is abolished there can be no technical escheat, but there is usually a statutory escheat, on failure of heirs, to the State. See N. Y. State Const., art. I, § 10. — ED.

judgment on the property of corporations has been but seldom a question, and is much less explained than the effect of the judgment on the franchises. There is a tedious labyrinth of cases through which we have to travel on this subject, and many of the landmarks are so dim and uncertain that we are frequently at a loss to know whether we are on safe and tenable ground. It is certain, however, that the dissolution of a corporation is effected by a seizure of its franchises, although the franchises themselves are not thereby destroyed, for they exist in the hands of the State, and may be afterwards granted to the same or other individuals, in the same manner in which they were originally granted. But the existence of the corporation is terminated. Its being is so completely lost that it can have no power over, nor connection with, anything in existence; of course, it can no longer be considered as the owner or possessor of lands or goods, rights or credits. But it does not follow that those lands and goods, rights and credits, necessarily fall into the hands of the State, much less that they are proper objects to be included in the terms of the judgment. There are but two grounds on which it can be contended the corporate effects fall into the hands of the State: 1st, as a forfeiture for abusing the franchises; or 2d, for the want of an owner by the dissolution of the corporation. When we examine the first of these grounds, we find nothing in the books to support an idea that the abuse of corporate franchises occasions a forfeiture of lands or goods, rights or credits, or, in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted, was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit the franchises. That which comes out of the hands of the King is the proper subject of forfeiture; the King, by the seizure, resuming what originally flowed from his bounty. Authorities leading to this conclusion are numerous. See the cases cited in 2 Bac. 32, and in *The King v. Amery*, 2 T. R. 515. For the forfeiture is the same for nonuser, when no property has been held or rights exercised, as for misuser or abuser, after the possession of much property and the exercise of extensive rights and credits; and the judgment is the same in both cases. Consequently, the judgment could not direct a seizure of the corporate possessions, as a forfeiture for the violation of the charter. Nor is the second ground — that the property falls to the State for the want of an owner, on the dissolution of the corporation — more tenable as a foundation on which to sustain this judgment. For the ownership of the corporation does not cease until its dissolution. And whether it is dis-

solved by the judgment of seizure, or not until the State has execution on that judgment, is not here very material. For if the corporation is dissolved by the judgment, the judgment must be regularly entered, and have its full effect before the dissolution takes place; and it is not till then that the property can be said to be without an owner. The loss of the property to the corporation is a consequence of the judgment; and it is a contradiction of the first principles of reason — a complete reversal of effect and cause — to make such loss of property a part of the judgment. That which cannot exist until after the judgment, can never be the subject-matter on which the judgment is given. But the better opinion seems to be, that the corporation is not dissolved by the judgment of seizure, but that it exists until the franchises are seized by the execution on that judgment. See 2 Kyd on Cor. 409, 410, and the authorities there cited. Consequently, the last shadow of a support for this judgment, on this ground, must vanish.

We have thus far examined the judgment which directs a seizure of the goods and chattels, rights and credits, lands and tenements, of the corporation, on the assumed position that they will necessarily fall to the State on the dissolution of the corporation. We shall now inquire into the correctness of this position. In order to elucidate the subject, we shall examine it in detail; and in the 1st place inquire, what becomes of the lands and tenements — 2d, what becomes of the goods and chattels — and 3d, what becomes of the rights and credits, of the corporation; and we shall find that each of these three items is governed by different principles. 1st. As to the lands and tenements. — “When a corporation is dissolved,” says Sir William Blackstone, “the lands and tenements revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again. The grant is only during the life of the corporation, which may endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.” B. Com. 484. This is the doctrine advanced by Lord Coke. Co. Litt. 13 b. See also, 2 Kyd on Cor. 516; 2 Bac. 32; 2 Cruise, 493; and *Colchester v. Seaber*, 3 Burr. 1866. We see but little in the books that contradicts or questions those authorities, and the cases that look a different way, maintain that the lands would escheat. 2 Bac. 32. If either of those principles be correct, we feel warranted in determining that the corporate lands and tenements cannot be seized into the hands of the State, and certainly not in the manner contemplated by this judgment. 2d. As to the goods

and chattels. — On this subject the books are almost silent. In the argument of *Colchester v. Seaber* it is said by Sir Fletcher Norton, on the authority of 1 Ro. Ab. 816, that the goods and chattels go to the crown. An English writer, who has collected together most of the cases on corporations, concludes his remarks on the effect of a dissolution in these words: "What becomes of the personal estate is, perhaps, not decided; but probably it vests in the crown." 2 Kyd on Cor. 516. We do not feel under the necessity of resolving any doubts which may rest on the subject; for if the law were conclusive, that the goods and chattels in this case would vest in the State on the dissolution of the corporation, yet we have already seen that this would not be as a forfeiture, but because they were without an owner, and that the claim of the State could not exist until after judgment; consequently it is impossible to include them in the terms of the judgment. 3d. As to the rights and credits of the corporation. — These, as applying to debts, etc., due to the corporation are supposed to be of considerable amount, and have formed a principal feature in every view of this case. But the importance of the case, arising from the amount in controversy, cannot affect the principles by which it is governed; and when those principles are fixed, they must be declared, let the consequence to individuals or the community be what it may. That the debts are necessarily lost to the corporation naturally follows from the principles we have examined. For when dissolved they have no existence, and can have no claim to, nor control over, anything whatever. They not only die, but leave no representative behind them. This, in every respect, is the case with aggregate corporations. Sole corporations depend, in this respect, upon principles somewhat different; but with them we have no concern. But although the debts fall out of the lifeless hands of the corporation, at the same time with their real and personal estate, yet when thus out of their hands, they are very different in their natures from the real and personal estate. Lands and goods have a necessary existence, although they may be without an owner in being or in expectancy. They continue in being, and may be made the subject of possession by occupancy. But this is not the case with respect to debts. They have no necessary existence, and are so conclusively personal, that they cannot exist without an obligor and obligee in being, or in expectancy. And on the death of the obligor or obligee, without the possibility of a representative, the obligation ceases. Such appears to be the case on the dissolution of a corporation aggregate. Blackstone says, "the debts of a corporation, either to or from it, are totally

extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities. 1 Bl. Com. 484. 2 Kyd on Cor. 516, uses the same language. 2 Bac. 32, advances nearly the same doctrine, on the authority of Lev. 237; Owen, 73; and 2 And. 107. And this doctrine is either directly or indirectly supported in a variety of cases. See the before-mentioned case of *Colchester v. Seaber*. Also *Rex v. Pasmore*, 3 T. R. 199; *The Mayor, etc., of Scarborough v. Butler*, 3 Lev. 237; 4 Com. Dig. 273. If this doctrine be correct, and we find it uncontradicted, the seizure of the rights and credits of the corporation is impossible in the nature of things; because their existence ceases as the claim of the State commences. But even if they could be seized into the hands of the State they would be unavailing. The debts due to the corporation could not, on any common-law principle, be collected by the State, or its agent; there being no privity of contract, either in fact or law, between the State and the debtor to the corporation. It is true, that when the powers of the corporation have lain dormant for many years, and have afterwards been revived by a new charter, they have been considered capable of collecting debts formerly due to them. This was the case in *Colchester v. Seaber*. And even when the name of the corporation has been changed by letters patent, they have collected debts due them by their former name. This was done in *The Mayor, etc., of Scarborough v. Butler*. But these cases were decided on the principle that the corporation that sued was, virtually and substantially, the same body that made the contract, and to whom the obligation was properly due. But such is not the case with the State. It has no connection with the obligor or the obligation, and cannot recover the debt by suit. Nor does the act of Assembly, authorizing the collection of the corporation debts by commissioners to be appointed for that purpose, make any alteration in the case. This act was not intended to make a new law to regulate those debts or to alter the principles that governed the corporation contracts; but seems founded on the supposition that the debts would become due to the State by the seizure of the corporate franchises, and therefore make provision for having them collected by commissioners. There is nothing in the act calculated to give those debts a continued existence after the dissolution of the corporation. The act only presumes they would by law have such an existence, and therefore makes a disposition of them. The debts must, therefore, be considered, on common-law principles, unaffected by the act; and therefore subject to extinguishment by a dissolution of the corporation.

Thus, in no view of the case, can that part of the judgment which directs a seizure, into the hands of the State, of the goods and chattels, rights, credits, and effects, lands, tenements, and hereditaments of the corporation, be supported.¹

RAPALLO, J., IN *HEATH v. BARMORE*.

50 NEW YORK, 302, (305). — 1872.

IN so far as the plaintiff's right to recover in this action is sought to be sustained, on the ground that at common law real estate held by a corporation at the time of its dissolution reverts to the grantor, it cannot be supported for two reasons: First, because the plank-road company has not been dissolved; and secondly, because the rule of law invoked by the plaintiff does not prevail in this State in respect to stock corporations. Under the provisions of 1 R. L. 248, and 1 R. S. 600, §§ 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property, unless some other custodian is appointed, for the purpose of paying the debts of the corporation and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. *Owen, Receiver, v. Smith*, 31 Barb. 641; 2 Kent Com. 307 and 308; notes 371 and 372 of 11 ed.; Angell and Ames on Corporations, § 799, at 5th ed.; 46 Barb. 365. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor.

The conveyances to the plank-road company in this case appear to have been absolute conveyances — no condition or limitation of the estate seems to have been contained in them, and they therefore passed the whole estate of the grantor. 2 R. S., 748, § 1.

(2.) FEUDAL FORFEITURES.

(a.) *For denying tenure.*

(b.) *For felony.*

¹ See the *dicta* in *Nicoll v. R. R. Co.*, p. 527, *supra*. See also *Wentworth v. Payne*, 74 N. Y. 196 (200). This supposed rule that land undisposed of by a corporation returns to the grantor when the corporation is dissolved is usually regarded as a part of the feudal doctrine of escheats. For a discussion of the origin and validity of the rule, see Gray's Rule Against Perpetuities, §§ 44-51. — *Ed.*

(3.) THE POSSIBILITY OF REVERTER IN CASE OF A FEE UPON SPECIAL LIMITATION.

LEONARD *v.* BURR.

18 NEW YORK, 96. — 1858.

[*Reported herein at p. 521.*]

ALLEN, J., IN FIRST UNIVERSALIST SOCIETY *v.* BOLAND.

155 MASSACHUSETTS, 171. — 1892.

[*Reported herein at p. 525.*]

(4.) THE CONTINGENT RIGHT OF RE-ENTRY IN CASE THERE SHOULD BE A BREACH OF A CONDITION SUBSEQUENT.¹

NICOLL *v.* NEW YORK AND ERIE R. R. CO.

12 NEW YORK, 121. — 1854.

[*Reported herein at p. 527.*]

UPINGTON *v.* CORRIGAN.

151 NEW YORK, 143. — 1896.

[*Reported herein at p. 533.*]

2. REMAINDERS.²

a. Vested remainders.

GREEN *v.* HEWITT.

97 ILLINOIS, 113. — 1880.

BILL for a partition. William Thompson died seised of the lands in controversy, leaving him surviving his widow, Elizabeth, and his daughter, Mary. He left a will of which the material portion is set

¹ This also is sometimes called, but improperly, a "right of reverter." — ED.

² "A remainder is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it." 4 Kent's Com. 197. This definition of a common-law remainder involves the following essential features, usually stated separately: (1) That a remainder is created by express limitation, — cannot arise by operation of law. (2) That a remainder must depend on a particular estate created

out in the opinion. Mary married Henry Abbott and died, leaving her husband and one child her surviving; the child died later under age, leaving its father its only heir-at-law. Elizabeth married as her second husband, Benjamin Green, and is now deceased, leaving Green and her three sisters her surviving. One of the sisters brings this suit, claiming that Elizabeth died seised of a fee.

MULKEY, J. — The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows: "Second. After the payment of such debts and funeral expenses, I

by the same livery, deed or will. (3) That a remainder must not be so limited as to cut short the particular estate before its natural termination. (4) That a remainder must be ready to take effect in possession immediately upon the termination of the particular estate upon which it depends.

From (3), above, it follows that a remainder cannot be limited after an estate at will or by sufferance, nor after an estate in fee unless such estate be a fee-tail. A remainder (so called) limited after an estate for years is but a *quasi*-remainder, for the seisin is in the "remainderman," the possession of the tenant is that of the "remainderman" in this respect. As will be seen, an estate for years will not support a contingent remainder.

An estate for years, being but a chattel, could not at common law be divided up into a particular estate and a remainder limited thereon. But see § 40, N. Y. R. P. L.

Modern statutes have modified many of these rules. (1) The New York Revised Statutes of 1830 broadened the scope of the term remainder. "Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name." R. P. L., § 28. "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation." § 43, R. P. L. Thus it will be seen that shifting executory estates (see below) have become in New York one class of "remainders." (It is to be observed here that the N. Y. Real Property Law of 1896 (ch. 547) is a re-enactment of that portion of the Revised Statutes relating to real property, with few material changes, and that the N. Y. R. S. on these topics were substantially re-enacted in Michigan, Minnesota and Wisconsin, and have influenced the legislation of many other States.) In Georgia it appears that any future estate, even a springing use or springing executory devise, is a "remainder." Code, 1895, § 3098. (2) A "remainder" may be so limited as to cut short the preceding estate (§ 43, N. Y. R. P. L.) and may, therefore, be limited after a fee on condition. (3) A "remainder," to be valid, need not be ready to take effect in possession immediately upon the determination of the particular estate. See §§ 47, 48.

While reversions have everywhere been preserved unchanged it would seem that other estates in expectancy are to be classed in most of the States as either "remainders" or "estates limited to commence in possession at a future day without the intervention of any precedent estate," in other words "springing" future estates. For the New York classification, see the R. P. L., §§ 25, 29, 43. — ED.

give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the northeast quarter of the southwest quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson." [*The court held that the limitation of the estate during widowhood applied to the real as well as the personal property and that the expression "whatever remains" is of no vital significance, and proceeds as follows:*]

It is further claimed by plaintiffs in error that the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely, when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage.

A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly fatal to their right of recovery; for, if the daughter took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee simple title under the will.

We are, in any view, clearly of opinion that the decree of the Circuit Court was right, and it is therefore affirmed.

Decree affirmed.¹

*b. Contingent remainders.**

HENNESSY *v.* PATTERSON.

85 NEW YORK, 91. — 1881.

EJECTMENT to recover the possession of certain premises in Brooklyn. The rights of the parties depend upon the construction of a will the material parts of which are as follows:

" *First.* After all my lawful debts are paid and discharged, I give

¹ See also *Jackson ex dem. Wells v. Wells*, p. 513, *supra*. — ED.

² The theory of the common-law future estates (reversions and remainders) is based on the idea that there must always be some one seised of an estate of

and bequeath to my dear wife, Catherine Healey, the house and lot in which I now reside, and which house and lot I now own and which house and lot is situated on the northerly side of Luqueer street, in the twelfth ward, in the city of Brooklyn, aforesaid. The said described property is to be held by my said wife, after my death, to and for the chief purpose of keeping and protecting the same for her own and my daughter's benefit; provided, however, that my said wife shall prudently use the rents and benefits, if any there may be, of said property for the maintenance and support of herself and said daughter; and also, that my said wife shall be and act as the sole guardian and protector of my said daughter as long as she remains unmarried; but if she, my said wife, should get married, or otherwise commit acts contrary to the wishes of my executors herein named, then my executors shall have the power to have the control of said property taken from my said wife, and also the guardianship of my said daughter. This use and privilege of my said property to my said wife is in lieu of her dower right.

"*Second.* I also wish and will that if my said daughter Margaret should get married, or die without leaving any children, and that her husband should live after her death, he shall not inherit the said property or any part thereof; but if there are any children born of my daughter, and living after her death, the property shall be theirs, share and share alike, and managed accordingly by my executors.

"*Third.* I wish and will, that should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley."

freehold in the land, and upon the fact that a freehold estate to commence *in futuro* could be created only in connection with a present livery, for a present freehold interest, to a person other than the one in whom the future interest is to "vest." Estates less than freehold have no true relation to the system of future estates, except as the "possession" of the leasehold tenant constitutes one element in the "seisin" of the landlord.

Interests of freehold succeeding one another in time must, therefore, as they come into possession vest or clothe (*vestire*) their holders with successive portions of the seisin of the fee. But he who has a present fixed right to a future freehold is said to have an estate vested in interest, or vested simply. A remainder is "contingent" if it is subject to some condition precedent (which may or may not happen, either at all or before a specified event) other than the natural determination of the precedent particular estate; "vested" if it is subject to no other condition precedent than that just indicated. A remainder then may be contingent because the person who is to take it is not yet ascertained, or because, the person being known, his right to the future enjoyment of the estate is dependent upon a contingent event. Either a vested or a contingent remainder may be defeasible by reason of a condition subsequent, but this does not alter its original character. — ED.

The testator's widow died in 1874. His daughter Margaret thereafter married the plaintiff. Foley died in 1876, and Margaret died in 1878, leaving no issue surviving. Margaret, prior to her death, conveyed the premises to one Battersberry, who conveyed to plaintiff. In an action of partition between the heirs of John Foley, defendant was appointed receiver.

FINCH, J. — The general intention of the testator, in this case, is very plain. Having a wife, and an unmarried daughter, he desired to secure to them during their lives the full benefit of the use and income of his property; but dreading the influence and possible selfishness of a husband of either, he aimed at a disposition which would make it impossible for such husband to obtain any interest in, or control over, the estate devised. To effect this purpose, he took from the widow, in the event of her remarriage, the management of the property and also the guardianship of his daughter and vested both in his executors. In the event of the daughter's marriage, he provided that her husband should not inherit the property, nor any part thereof, and, as a mode of securing that result, he gave no estate to the daughter in express terms, but directed that upon her death it should go to her issue then living, or, in default of such issue, then to the testator's nephew, John Foley. The will was evidently intended to bar the possible interest of a successor, or son-in-law, and keep from the hands of strangers, not of the testator's blood, the property gained by his care and labor. Whatever else may be true of the case, this purpose and intention is distinct and plain, and must have its proper weight in determining the construction of the will. The claim of the plaintiff, if sustained, overrides that intention, and renders nugatory and useless the precautions of the testator; for it is the husband of the daughter who now claims the absolute ownership of the estate and seeks to wrest it from the possession of the children of the nephew.

As to the proper construction of the will the parties differ widely. The theory of the plaintiff is, that the widow had a life estate, and the daughter, Margaret, took the fee by descent, such fee subject, however, to be determined by the presence of issue living at her death, or in default of such issue living at that date, subject to the right of Foley to take the fee if he should be living at the death of Margaret; but that in case both of the prescribed failure of issue, and the survivorship of Foley at the happening of that contingency, the fee inherited by Margaret lost its base or determinable quality, and became a fee simple absolute, which, through Margaret's deed in her lifetime, passed as such to her husband. In this view of the

will the devise to Foley is deemed a contingent remainder, vesting neither in interest nor possession until the happening of two uncertain events, viz., the death of Margaret without issue living, and the survival of Foley at the date of such death. This construction bars utterly the heirs of Foley, and reduces his right to a mere possibility of acquiring an estate, which lapsed by his death in the lifetime of Margaret.

The theory of the defendant is that the widow took a life estate, then Margaret a life estate, with remainder in fee to John Foley, vesting in interest at the death of the testator, and in possession at the death of Margaret without issue living, but liable to be divested by the existence of such issue living at her death. The estate of Foley is claimed to be a vested remainder, affected in no manner by his death before Margaret, but in that event descending to his heirs who thereby took the entire estate.

The argument on both sides draws largely upon the provisions of the common law, as explanatory of the changes effected by the Revised Statutes, and some brief consideration of what would have been the operation of the former upon the devise in question may aid us in the application of the modified enactments.

The first difficulty in the defendant's position, as affected by the language of the will, would have arisen in the absence of a precedent estate to support the remainder to Foley. The general rule was that no remainder could be created without a particular estate to support it, and must have been so limited as to take effect on the regular and natural determination of the precedent estate. 2 Washb. R. E. 503. That rule would be fatal in the present case to the remainder of Foley, if the sole estate preceding it was the life estate of the widow, for that estate might end, and in fact did end, before the daughter, Margaret, died, and, therefore, before the contingency upon which Foley's estate depended had occurred. If to meet this difficulty resort is had to the plaintiff's theory, that besides the life estate of the widow, there was in Margaret a qualified, base or determinable fee, coming to her by descent, we are baffled by another rule of the common law that a remainder could not be limited on a base or determinable fee which had vested in interest. Lalor, 65. It is possible, however, that a just construction of the will would give to Margaret a life estate by implication. The use of the property, until her death, was probably intended for her as well as her mother. While the widow lived she was to have the use of the property for the joint benefit of herself and her daughter, unless she remarried. In that event the executors were to have the control of the estate. This provision was evidently aimed at the protection

of Margaret, and indicates a purpose to secure her maintenance out of the income. It may be possible, therefore, to say, as the respondent contends, that after the death of the widow, the right of Margaret to the income and profits of the estate for her support and maintenance remained. In that event, the difficulty we have mentioned would disappear, because a precedent life estate in Margaret would have remained until her death, and sustained the remainder to her issue or to Foley. If it be then objected that such devise to the daughter for life, with remainder to her issue is, at common law, turned into a fee in the daughter by the operation of the rule in *Shelley's Case*, upon the ground that the word issue is used as the equivalent of heirs, and is here a word of limitation and not of purchase *In re Sanders*, 4 Paige, 293; 2 Washb. on Real Prop. 569, the answer is that the rule applied only to the case of the first taker, and not to the use of the word in a case like the present. *Cushney v. Henry*, 4 Paige, 345, citing Finch's Ch. 280, and Coke's, 263, note 15.

If the difficulties of the common law seem thus far obviated, they become more serious as we approach a consideration of the nature and character of the devise over to Foley. Alternative estates, or contingencies with a double aspect, as they are sometimes called, were permissible and recognized before the Revised Statutes expressly authorized their creation. They were unobjectionable, because only one could vest, and the happening of the contingency merely substituted one for the other, and in no respect prolonged any restraint upon alienation. *Luddington v. Kime*, 1 Ld. Raymond, 203; *Doe v. Holme*, 2 Black. 777. If, therefore, Foley had been alive at the death of Margaret, it seems possible to put a construction upon the will which would have given him, at that date, even at common law, a vested remainder which would, of course, have descended to his heirs. But he died before Margaret, and whether, for that reason, his estate lapsed, or was of such character that it descended to his heirs, so that they took upon the happening of the contingency as succeeding to all his rights, becomes a very important question. Before the Revised Statutes, his estate would have been a contingent remainder, or, at least, good by way of executory devise; for, even if Margaret had not a life estate, but a base or determinable fee, so that a remainder in fee could not be limited upon it, the limitation to Foley would have been good as an executory devise. *Jackson v. Staats*, 11 Johns. 348; *Sherman v. Sherman*, 3 Barb. 385; *Maurice v. Graham*, 8 Paige, 486. Viewed in either aspect, his estate was descendible, unless his survivorship of Margaret was an element of the contingency upon which his estate was

limited. *Pinbury v. Elkin*, 1 Peere Williams, 563; *Moor v. Hawkins*, 2 Eden's Ch. 341; *Winslow v. Goodwin*, 48 Mass. 374. Of contingent remainders, a very accurate writer says (Washburn on Real Property, 549) that at common law, before the contingency happens, they cannot be conveyed, except by way of estoppel; but, where the person who is to take the remainder if it becomes vested, is ascertained, and he dies, it will pass to his heirs and may be devised by him. And, as to the interest of an executory devisee, the same writer says that contingent and executory estates, and possibilities accompanied with an interest, are descendible to the heir or transmissible to the representative. *Ibid.* 662. Of course, the rule cannot apply where the survivorship of the devisee at the happening of the contingency is itself a contingency upon which the devise is limited. That is claimed to be the situation here, and it becomes apparent that, even at common law, the one vital question in the case is whether, by the terms and intent of the will, Foley was only to take upon the contingency that he survived Margaret, in addition to the contingency that the latter should die without issue living at the date of her death.

If now we test the case by the simpler provisions and definitions of the Revised Statutes, we shall find that the same question confronts us as the pivotal point in the case. What has been said of the common-law rules shows, at least in some directions, the difficulties which the revisers sought to remove and the force and effect of the radical change which they wrought. A remainder no longer fails by reason of the determination of the precedent estate before the happening of the contingency upon which it is to vest, and a life estate in Margaret ceases to be necessary to support the remainder of Foley. A fee may be limited on a fee upon a contingency which, if it should occur, must happen within the limits of the prescribed period, so that even if Margaret took a base or determinable fee by descent the limitation over to Foley was possible. Alternative estates, where upon the failure of one to vest, the next in succession shall vest, are expressly recognized; and all future estates are made in terms descendible, devisable and alienable, like estates in possession. Not only are difficulties thus removed and doubts solved, but future estates, like that devised to Foley, are expressly authorized and defined. Estates, in respect to the time of their enjoyment, are divided into estates in possession and estates in expectancy. The latter are declared to be those in which the right of possession is postponed to a future period, and are further divided into future estates and reversions. A future estate dependent on a precedent estate is termed a remainder, and that may be either vested or con-

tingent. It is vested, when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate and is contingent whilst the person to whom, or the event upon which it is limited to take effect remains uncertain. R. S. Part 2, chap. 1, tit. 2, art. 1.¹ Tested by these definitions the estate of Foley is to be deemed a contingent remainder, vesting as a right upon the death of the testator, and in interest and possession upon the death of Margaret without issue living, unless, indeed, the survivorship of Foley is made by the terms of the will an additional and further contingency. We are thus brought again to what we have already described as the pivotal question in the case, and it is necessary now to consider it. Reliance is placed upon the mention of Foley by name without allusion to his heirs. But the omission was not material. Without such words in a devise the fee would pass unless an intent should appear in the will by express terms or necessary implication, to pass a less estate. 4 Kent's Com. 7; 1 R. S. (Edm.) § 1, p. 699. Some stress is laid upon the language of the devise to Foley, which was in these words: "Should my daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley." The argument is that the word "should" implies a contingency, and the expression "should she die," standing alone, is inaccurate, since death at some time is certain and inevitable. Therefore, it is said, the contingency referred to must be that of time; death before Foley. This construction utterly overlooks the real contingency named in the will, and substitutes, or rather adds, one not there at all. The contingency named by the testator was, should she die without issue living at her death. That was the uncertainty to which he referred, and for which he meant to provide; and the word "then" plainly refers to the event; to the happening of that contingency; and not to the time at which Foley's right should commence. It is said that Foley was expected by the testator to survive Margaret, and the principal reason assigned is, that Foley was named as one of the executors, and the will provided that after the death of Margaret, leaving issue, the estate in them was to be "managed" by the executors. Nevertheless, the testator might easily have contemplated the death of one or both of them, and the substitution, if necessary, of administrators with the will annexed, or of trustees. The provision itself was awkward and probably would have proved ineffectual. But if such expectation existed, it was of little consequence in view of the testator's evident intention. He meant to keep the property in the line of his blood.

¹ N. Y. R. P. L. §§ 26-28, 30. — ED.

Preferring first his wife; then Margaret and her issue; he next casts the estate upon the nephew and his heirs, preferring them to possible husbands, or strangers to his blood.

We do not think, therefore, that, by the terms of the will, Foley's estate was limited upon the added contingency of his survival of Margaret. It follows that his right was descendible to his heirs, both at common law and under the statute, unless some other legal difficulty intervenes.

Such difficulties are suggested. The one founded upon the doctrine of the common law, that the heir of a primary devisee can never take by substitution unless the estate vests in such primary devisee, we do not think has a proper application to the case before us, but if it has, will find its answer in the changed provisions of our statutes, and also in the views presently to be taken of their effect upon contingent remainders.

But a further difficulty is founded upon the denial to the estate of Foley of any descendible quality, upon the ground that it never vested in him, and was nothing, in fact, but the possibility of acquiring an estate. The logic of this view is very forcibly presented in a case similar to and yet different from the one before us, by the dissenting opinion of Grover, J. *Moore v. Littel*, 41 N. Y. 66. The court did not concur in the reasoning, or the conclusion to which it led. Followed steadily to its logical consequences, it would apparently take out of the operation of the statute a large class of future estates, upon the ground that they are mere possibilities, and not estates at all. The collision at the bottom of that case was over the character of a contingent remainder limited to the heirs of a person then living. The majority of the court, founding their opinion upon the definitions of the Revised Statutes, and their express authority, held that the children of John Jackson had, during his life, and notwithstanding the uncertainty of their ever living to be his heirs, an expectant estate which could be aliened. The dissent went upon the ground that such children, during the life of the father, had no estate at all, but only the possibility of acquiring one, which, therefore, was not the subject of a conveyance. The case differed from the one under consideration in many respects, but at least settles the question that such a contingent right as was devised to John Foley is within the definition of expectant estates, and governed by the provisions of the Revised Statutes.

It is true that to allow of title by descent there must be something to descend; and what that is, in a case of contingent remainder, which may never vest either in interest or possession except a mere possibility of acquiring an estate, is a question

which the mandate of the statute sufficiently answers, but which may also be answered on principle. John Foley had something more than a mere possibility of acquiring an estate; he had the fixed, absolute right to have the estate if the contingency occurred. That right was conferred by the will of the testator, and vested in him at the instant of the latter's death. The devisee held it as a vested right, but such a right as the contingent and uncertain character of the devise created; nevertheless a fixed and vested right, which the Revised Statutes recognize as an estate, place in the category of expectant estates, and decree shall be descendible, and which, as we have already seen, was descendible even at common law. In his chapter on executory devises Washburn reminds us of the necessity of distinguishing "between the vesting of a right to a future estate of freehold, the vesting of a freehold estate in interest, and the vesting of the same in possession." 2 Washburn on Real Property, 664.

We do not agree, therefore, with the opinion of the General Term, while we concur in the result of their decision. They held, as the respondent claims, that Foley took a vested remainder, subject to be divested by the contingency of Margaret's death, leaving issue, such contingency operating as a condition subsequent. This construction drives us to give Margaret an estate for life by implication, upon a very doubtful and debatable state of facts, at the peril of holding that, after the death of the mother, the daughter had no interest in the property during the rest of her life, and was bound to surrender it and its income to Foley. We do not accuse the testator of any such unreasonable and unexplainable purpose.

Nor can we see that Foley took a vested remainder under the definition given by the Revised Statutes. The present capacity of taking effect in possession if the possession were to become vacant, was the test at common law. *Fearne on Rem.* (7th ed.) 216. When the person to whom a remainder after a life estate is limited is ascertained, and the event upon which it is to take effect is certain to happen, the remainder is vested. *Williamson v. Field*, 2 Sandf. Ch. 533. If, at the ceasing of the precedent estate, it would be uncertain who was entitled or whether the event upon which it was limited would happen, then the remainder is contingent. *Moore v. Littel*, *supra*, 79. Here the event upon which Foley was to take at all was uncertain. At the death of the widow, the termination of the precedent estate, it was still uncertain if Foley would ever take, and whether he should or not depended upon a contingency yet to happen. It is possible that, by giving to Margaret a life estate after the death of the widow, the case might be brought within the rule

stated in *Moore v. Littel* by Judge Woodruff, that where the same event — in this case the death of Margaret — at the same time, *eo instanti*, terminated the precedent estate, and settled the contingency, the remainder was vested. But that was said of a remainder to the heirs of one living, and we think does not fairly apply to the case before us. And, besides, the doctrine was not assented to by three of the judges, and the case was really decided upon the ground (which strongly sustains the conclusion we have reached) that the remainder was contingent, but nevertheless an expectant estate, as defined by the Revised Statutes, and as such alienable.

We conclude, therefore, in this case, that John Foley took a contingent remainder, which vested in him at the death of the testator as a right according to its character, and which descended to his heirs, so that, upon the death of Margaret, leaving no issue, the estate vested in the defendants. The objection to the allowance in addition to costs presents no question for our review.

Judgment affirmed.

WHITESIDES v. COOPER.

115 NORTH CAROLINA, 570. — 1894.

ACTION by plaintiffs to be let into possession as tenants in common with defendants of one-sixth undivided interest in the premises in dispute. Plaintiffs are the children of S. J. Whitesides, who, supposing himself the owner of a vested interest in the lands, had sold them to one Kimberly, and then, under a partition sale, they had passed to defendants. Further facts appear in the opinion.

SHEPHERD, C. J. — The numerous authorities cited in the elaborate brief of the defendant's counsel fail to convince us that we are warranted in so far departing from the plain and natural import of the language used in the limitation before us as to hold that the seven sons named in the will of their father took a vested remainder in the land therein devised. Fully appreciating, as we do, the public policy which induces the courts to favor the early vesting of estates, we are, nevertheless, of the opinion that it would be doing violence to the most liberal rules of construction were we to say that it was the intention of the deviser that the estates limited to his said sons should vest before the death of his widow, the life tenant. On the contrary, it was his evident purpose that the entire remainder in fee should be disposed of absolutely at a definite time, and that he did not intend that the remainder, as to any part of the property, should

become vested while the remainder in the residue was dependent upon a contingency.

After a limitation to the wife for life, the will proceeds as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons, namely, Henry Clay, James Hardy, Charles Lincoln, Frank Patton, Simpson Jarrett, William Ratliff, and John Bowman, *or such of them as may be living at their mother's death*, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case."

The words we have italicized very clearly do not divest, by way of condition or otherwise, any estate previously limited, but are manifestly used as a part of the description of the persons who are to take; and these persons are plainly such only of the sons as may survive the life tenant. In other words, the limitation, with a very slight transposition of the words, reads, "To such of my sons, Henry Clay, James Hardy, etc., as may be living at their mother's death, and to their heirs." If the language indicating survivorship were at all doubtful, the construction we have adopted would be well sustained by the fact that the words of inheritance do not immediately follow the names of the seven sons, but they follow the qualifying language, "*such of them as may be living at their mother's death.*"

Under the construction we have put upon the will, there can be no question that the limitations to the sons were contingent remainders, the contingency being that they should survive their mother, and failing in this, as to any one or more of them, the remainder to vest in his or their issue, as purchasers. This, as we have said in *Watson v. Smith*, 110 N. C. 6, is a limitation of several concurrent fees by way of substitutes or alternatives, one for the other, "the latter to take effect in case the prior one should fail to vest in interest, and is known as a remainder on a contingency with a double aspect." If one of these die before the mother, his remainder is at an end, and can never vest, and another remainder to the issue is substituted, who take nothing from their father, but directly from the deviser.

That the limitation, under the construction we have adopted, is a contingent remainder is apparent from the decisions of this court, and these decisions, it is believed, are in harmony with the principles of the common law as enunciated by the most approved authorities in other jurisdictions. In *Starnes v. Hill*, 112 N. C. 1, and *Clark v. Cox*, at this term, we quoted with approval the language of Mr. Gray in his excellent work on Perpetuities, "that the true test in

limitations of this character is that if the conditional element is incorporated into the description of the gift to the remainderman (as it is in the case under consideration), then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise (as in the present case) to A. for life, remainder to such of his children as survive him, the remainder is contingent."

In *Watson v. Watson*, 3 Jones, Eq. 400, the devise was to A. for life, and at his death to such of his children as might then be living, and the issue of such as might have died leaving issue. It was held that A. was tenant for life "with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children as may have died in his lifetime, leaving children. See, also, *Watson v. Smith*, 110 N. C. 6.

In *Williams v. Hassell*, 74 N. C. 434, the court said, "inasmuch as the lands are devised to the first takers for life only, with remainders to such of their children as should be living at their death, it cannot be ascertained *now* who are to take the remainder."

In *Young v. Young*, 97 N. C. 132, the court said: "The contingent remainders limited on the termination of the life estate are to such of her children as are then living and to the then living issue of such as have died leaving issue, so it is impossible to tell who will be entitled when the life tenant dies.

In *Miller, ex parte*, 90 N. C. 625, there was a devise of land to A. for life, with remainder to such children as she may leave her surviving, and it was held that the children took contingent remainders.

Without resorting to the text-books, these authorities abundantly show that the element of survivorship in our case fully characterizes the limitation as a contingent remainder.

In view of the construction we have placed upon the language of the will, and of the decisions of our own court, we do not deem it necessary to review the many English and other cases cited by counsel. None of them are directly in point, and even if they were, we would not be inclined to depart from our own decisions, which, as we have already remarked, are, in our opinion, well supported by principle as well as authority. If the will should read as we have construed it (and of this we think there can be but little doubt), it is clear that these remainders are contingent. The case most strongly pressed upon us in the argument is *Ex parte Dodd*, Phil. Eq. 97. The decision turned upon the construction placed upon the

language of the will, under which it seems that the limitation was general, that is, to all of the children of the life tenant, or the issue of such children. The element of survivorship as a condition to the vesting of the remainder was considered as absent, and it was held that the remainder was vested as to the children living, subject, of course, to open and let in after-born children, or the issue of such as should die before the life tenant. That this is the *ratio decidendi* of the case, is apparent from the opinion of the court in *Irvin v. Clark*, 98 N. C. 437. The limitation there was "to Margaret Irvin and her husband during their natural lives, and to descend to the children of the said Margaret equally." This was treated as a vested remainder, but the court was careful to say that, "if the devise had been to those children living at the death of the mother, there would have been a contingent and not a vested interest in either, for until that event occurred it could not be known who would take, and in such case the contingent interest could not be sold by a court of equity. But when the gift is general, not being confined to survivors, when to take effect, it is otherwise, and, by representation, those who may afterwards come into being are concluded by the action of the court upon those whose interests are vested, but whose possession is in the future. The distinction is pointed out by Battle, J., in delivering the opinion in *Ex parte Dodd*."

As we have seen, the remainders to the sons being limited only to such of them as survived their mother, and Simpson Jarrett Whitesides, one of the said sons, having died in 1874, before the death of the life tenant in 1887, it must follow that his children, the plaintiffs, acquired the interest in controversy as purchasers, and the only question which remains to be determined is whether they are precluded from asserting their title by the conveyance of their father, and the proceedings for partition under which the land was sold and purchased by one Davis, under whom the defendant claims.

2. If the view we have taken of this limitation is correct, it is hardly necessary to cite authority in support of his Honor's ruling that the plaintiffs are not rebutted by the conveyance and warranty of their father in 1867. The case of *Flynn v. Williams*, 1 Ired, 509, is not in point. It was there held that where one having an estate of inheritance in possession sells the same with general warranty, his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets or not. In the present case, no estate whatever vested in the ancestor, and his children who take as purchasers under the will, are, therefore, not bound by his warranty. Even had a life estate vested in him, his warranty would likewise

have been ineffectual by way of rebutter. The Code, § 1334; *Starnes v. Hill*, *supra*.

3. Were the plaintiffs bound by the sale for partition? It appears that in 1870 John Kimberly (who had purchased the interest of Simpson Jarrett Whitesides), together with the life tenant (Catherine) and the other contingent remaindermen, united in a petition for the sale of the land for partition. Under a decree rendered in this proceeding the land was sold and T. K. Davis became the purchaser. The defendant claims under the said Davis, and denies the claim of the plaintiffs that they are tenants in common with him to the extent of one-sixth interest in the said land. The life tenant (Catharine) having died in 1887, the plaintiffs' contention must be sustained, unless they are bound by the decree of sale. Neither these plaintiffs (if, indeed, they were in existence at that time) nor their father were parties to the proceeding, but it is insisted that they were represented by others of the same class, or at least by the life tenant. It is plain that the other parties could not represent these plaintiffs as a part of the same class, and upon this point it is only necessary to refer to *Irvin v. Clark*, *supra*, and the authorities therein cited. Equally untenable is the position that these contingent remaindermen were represented by the life tenant. This would be a very radical departure from well settled principles, and has received no countenance from this court. In *Overman v. Tate*, 114 N. C. 571, we quoted, with approval, the language of Lord Hardwicke in *Hopkins v. Hopkins*, 1 Atk. 590, that "if there were so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested, and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." In referring to the application of this principle in one or two jurisdictions, where the first remainder was only for life, we stated that we were not prepared to adopt such a view, and *a fortiori* would it be rejected in a case like the present, where the limitations are not in trust but purely legal? Under the peculiar circumstances of the case referred to, we applied the principle declared by Lord Hardwicke, the fact that the limitations were in trust not having been adverted to in a previous ruling. The decision was not based upon the idea that the child of Annie was of the same class as the issue of Caswell, but this was mentioned as a circumstance tending to show that but little prejudice would probably result by the application of the principle above stated, under the particular limitations then before us.

4. Neither is there any force in the contention that our case falls within the principle of *England v. Garner*, 90 N. C. 197, and other decisions in which the court has gone very far in sustaining judicial sales. It is not pretended that these plaintiffs, even if *in esse*, were represented by guardian or any one claiming to be their attorney. Indeed, they are not mentioned as parties in any stage of the proceeding, nor is there anything in the decree which purports to bind their contingent interests.

5. As to the statute of limitations, it is only necessary to say that it did not begin to run against these plaintiffs until the death of the life tenant in 1887. Their rights accrued only upon that event, and it is therefore clear that they are not barred.

After a careful consideration of the elaborate brief of counsel, we have been unable to discover any error in the rulings of his Honor.
Affirmed.

MORSE *v.* PROPER.

82 GEORGIA, 13. — 1888.

ONE L. S. Morse conveyed certain premises to his stepmother, Anna Morse, as her separate estate for life, and after the death of said Anna Morse gives "said property * * * to such of the children of said Anna Morse by her present husband as may be living at her death, and the representative of such as may be dead, in fee, the representative to take the share these deceased persons would have been entitled to, had he or she been alive; but if the said Anna Morse should die without child or children, or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse [her husband] in fee simple." Daniel Morse, the only child of Oliver and Anna, was living when the deed was made. Daniel died in 1868, and thereafter Oliver made a will giving all his property, present and expectant, to Anna. Oliver soon thereafter died, and Anna made a will giving all her property to her sister, Mrs. Proper. Anna having died, L. S. Morse brings this action to prevent Mrs. Proper from interfering with the property in question.

Decision below for Mrs. Proper. Morse appeals.

SIMMONS, J. — * * * The question for decision in this case is, whether Oliver Morse had such an interest in this property at the time of his death, in 1868, as he could transmit by will to his wife. If he did have such a devisable interest, having devised it to his wife, and his wife having devised it to her sister, the defendant in error here, the chancellor was right in refusing the injunction. It will be remem

bered that the deed from L. S. Morse to Anna Morse gave her this property for and during her natural life, and after her death it was to go to her children or the representatives of the children; and in case she died leaving no children or representatives of children, the property was to go to Oliver Morse, in fee. In our opinion, Oliver Morse, under this deed, took a remainder interest in this property. Was it vested or a contingent remainder? The plaintiff in error contended that it was a contingent remainder, and that the contingency was as to the person, and therefore Oliver Morse, under section 2266 of the code, had no such interest in the property as he could devise to his wife. Counsel for the defendant in error contended (1) that Oliver took a vested remainder, under the deed made in 1855, (2) but that if it was a contingent remainder, the contingency was as to the happening of an event, and not as to the person, and therefore he had a right to devise it. This case was ably argued by counsel on both sides, and we have given it a great deal of consideration, and we think that Oliver Morse had such an interest in this property as he could devise to his wife; and therefore the chancellor was right in refusing the injunction. We think that under the deed he took a contingent remainder, and the contingency was as to the event and not as to the person. The language of the code on this subject is as follows, § 2265: "Remainders are either vested or contingent. A vested remainder is one limited to a certain person at a certain time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen." § 2266: "If the remainderman dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person but as to the event." The deed in this case declares that "if the said Anna Morse should die without child or children or the representative of either, then the whole of the above named property, with the increase, I give unto the said Oliver Morse in fee simple." We think the contingency depended on the event of Anna Morse dying without children or the representative of children. The deed means, in our opinion, that in the event, or in that case, or when that particular thing should happen, Oliver Morse should take the property in fee. There was no uncertainty as to who should take if there were no children or representative of children, living at the time of her death. The person to take in that event was certain, and was fixed by deed. In case there were no children or representatives of children living at the time of Anna's death, the deed points unerringly to the person who would take, and declares

that he should take in fee simple, which, under our law, means not only himself but his heirs and assigns. If the deed had said that in case Mrs. Morse died without children or representative of children, then to the heirs or right heirs of Oliver Morse, the person to take in that event would have been uncertain; or if it had said, in case of Mrs. Morse dying without children or representative of children, to the heirs of John Smith, the persons to take would have been uncertain; but as we have said before, the deed does not leave it uncertain who is to take in the event she died without children or representative of children. It seems that in that case, Oliver Morse is to take in fee simple. Oliver Morse having a contingent remainder interest in this property, did he have a right to dispose of it by will to his wife? We think he did. The old doctrine was, that contingent remainders were not devisable by the person entitled thereto; but that doctrine was abandoned many years ago, and it is now held almost universally that a contingent remainder is devisable where the contingency is not as to the person but as to the event. Indeed, that is the principle announced in our code, § 2266. That section declares that if the remainderman dies before the time arrives for possessing his estate, his heirs are entitled to a contingent interest, when the contingency is not as to the person but as to the event. If the contingency be as to the person, and that person be not *in esse* at the time when the contingency happens, his heirs are not entitled. It is contended by counsel for the plaintiff in error that the latter part of this section controls the case; but we think we have shown that the contingency was not as to the person, but as to the event; and therefore the latter part of the section does not apply to this case.

Counsel for the defendant in error cited the case of *Loring v. Arnold*, 8 Atlantic Rep. 335, Supreme Court of Rhode Island, the facts of which case, we think, are exactly the same as in the case now under consideration. In that case, it appears that Thomas Whipple died in 1843, leaving a will by which he devised certain real estate to his son James, "for and during his natural life, and at his decease, if he should leave any lawful child or children, then to them, their heirs and assigns forever; but if he should die without leaving any lawful child or children, then my will is that the same shall descend and be divided equally among his brother T., his sisters G., M., S., A., and J. A. B., to them, their heirs and assigns forever." J. A. B. died in Illinois, in 1881, leaving by will all her estate in Rhode Island to C. E. B. James died in 1885, leaving no wife or children. It was held that J. A. B. had a contingent remainder; and that although this contingency was not determined until after the death of J. A. B., yet the person who was to take

being certain, the interest was descendible and devisable. So also in 2 Leading Cases in the American Law of Real Property, 374; *Buzby's Appeal*, 61 Pa. 111; *Chess's Appeal*, 87 Pa. 362; Fearne on Rem. 7th ed. 364-5; 4 Kent, 264; 2 Washb. Real Prop. 522.

The case of *Jackson v. Waldron*, 13 Wendell, 178, relied on so strongly by the plaintiff in error, was overruled in the case of *Miller et ux. v. Emmons et al.*, 19 N. Y. 384. The decision in the case of *Morehouse v. Wainhouse*, decided in 1767 and reported in 1 Blackstone's Reports, also relied on by the plaintiff in error, was put upon the peculiar circumstances of that case, and the facts of that case are different from the facts in this.

Judgment affirmed.

*c. Certain special cases in which the remainder is held vested, liable to divest, rather than contingent.*¹

(1.) REMAINDER TO A CLASS.

MINNIG *v.* BATDORFF.

5 PENNSYLVANIA STATE, 503. — 1847.

IN ERROR from the Common Pleas of Lebanon. Case stated. In 1793, Noll made his will, wherein he devised to his wife for life, remainder to his daughter, Elizabeth, for life. "Item, that when my said daughter depart this her natural life, the children which are come or born of her body shall hold and possess my said land or plantation. Item, I do give and bequeath my land and plantation, (at the time of my said daughter her decease,) to the children which are come and born of and from her body, together with the deeds, draughts, and all other writings thereunto belonging to them (the said plantation) and their heirs and assigns forever."

Testator died in 1794, when his daughter Elizabeth had two children, one of whom was Jacob Ditzler. After the death of testator she had four other children. In 1827, Jacob conveyed all his estate to Batdorff, the ancestor of the plaintiffs below, and died in 1836, his mother surviving; she died in 1841, leaving five children.

The court gave judgment for the plaintiffs for one-sixth of the land, and the defendants sued out this writ of error.

BELL, J. — The question presented by this record is, whether the children of Elizabeth Ditzler took a vested remainder under the will

¹ It is always a question of construction whether a condition is precedent or subsequent, and so whether the remainder is contingent, or is vested subject to being defeated. The law favors vesting even though defeasibly. The cases under this head illustrate this tendency. — ED.

of their grandfather, the testator, or whether, as the defendant avers, it was contingent as to each of them, dependent upon their respectively surviving their mother. If the limitation over vested in the children on the death of the testator, it is conceded the deed from Jacob Ditzler to John Batdorff passed a fee in one-sixth part of the land devised, and, consequently, the judgment rendered by the court below is correct.

Looking to the almost unbroken current of decisions, commencing with *Boraston's Case*, 3 Rep. 19, which settles the rule of construction that must govern here, it was hardly to have been expected we would be called on, at this late day, to reaffirm principles that have long ago passed into rules of property. One of these, clearly deducible from all the cases, is stated by Mr. Powell in his admirable *Treatise on Devises*, vol. 2, p. 215, to be, that when land is given to one person for life, or for any other estate upon which a remainder may be dependent, and after the determination of that estate it is devised over, whether to persons *nominatim*, or to a class of persons, it will vest in the objects to whom the description applies at the death of the testator. But in devises to children, where the question has been most frequently agitated — at what period are the objects who are to take to be ascertained? — the rule is different. When there is an immediate gift to children, those only living at the testator's death will take; but it is now settled, that where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution. Such a remainder vests in the objects to whom the description applies at the death of the testator, subject to open and let in others answering the description as they are born successively.¹ As to the latter, the remainder is contingent until they are *in esse*, but then it immediately vests, and from thenceforth is attended by all the properties incidental to vested estates. *Fearne on Cont. Rem.* 242; 2 *Powell on Dev.* 303, and cases there cited. Our own cases are in accordance with this doctrine, as may be seen by consulting *Wager v. Wager*, 1 Serg. & Rawle, 374, which I select as most decisive, from the fact that it was an assurance by deed, but decided on the intention of the grantor. There the conveyance was to P. and H., his wife, for their joint lives, and the life of the survivor, with remainder to the children of H. lawfully begotten, in fee, immediately after the decease of the survivor. It

¹ That is the remainder is subject to a condition subsequent — the birth of other children — upon the happening of which it will be divested *in part*. — Ed.

was held, the children in being at the death of the testator took vested remainders liable to open for the admission of those subsequently born.

But it is supposed the devise, immediately under consideration, presents peculiar features that withdraw it from the governing influence of these rules, and as showing this, the counsel for the plaintiff in error called our attention particularly to the words "when" and "which are come to be born of the body," in the clause "that when my said daughter departs this her natural life, the children which are come or born of her body shall hold and possess my said land and plantation." We are, however, unable to perceive anything in the latter words indicating an intent that only those of Elizabeth's children who should be living at her death, should take in exclusion of the heirs of such of them as might happen to die during her life. The sentence is certainly somewhat awkwardly expressed, but its terms are amply broad enough to cover all the children born of Elizabeth; and to hold that it confined the devise to children living at the death of the mother, would be straining a point against the often expressed unwillingness of the courts to construe a remainder contingent, when it may, without any manifest violence done to the language of the testator, be supported as vested. *Doe v. Perryn*, 3 Term Rep. 484. In *Doe ex dem. Barnes v. Provoost*, 4 Johns. R. 61, a case always received with approbation, the words used were much stronger to show an intent to postpone the vesting of the remainder until the death of the tenant for life, than those of the present will. The devise was, "to my daughter C. P., etc., during the term of her natural life, and immediately after her death I give the same unto and among all and every such child and children as the said C. shall have lawfully begotten at the time of her death in fee simple." It was strongly urged that the words "shall have" were to be used in immediate connection with the sentence "at the time of her death," the words "lawfully begotten" being merely used to confine the gift to legitimate children, whereby the limitation over would be restricted to such of the children as survived the mother, and therefore contingent. But it was held that to effectuate the intent, "begotten" must be taken as used synonymously with "born," and the subsequent words referring to the death of the mother, were employed simply as expressive of the time when the devise over was to vest in possession. The same may be said with much stronger show of reason in respect to the apparent intent of the deviser in the present case, for if there be nothing in the phrase "are come or born" to favor the construction of the plaintiff in error, it is certain that the word "when," used in this collocation, will not aid him.

Though this term may in certain cases import contingency, as, for instance, when a legacy is given to A. when he attains the age of twenty-one years, without more, *King v. Crawford*, 17 Serg. & Rawle, 118, yet it is settled by repeated decisions, that when it is employed as it is here, it is considered as merely marking the period at which the estate is to take effect in enjoyment, and not as postponing the period of vesting. It is scarcely worth while to run through all the cases on this point. It will be sufficient to refer to *Boraston's Case*, *supra*, as a leading authority. The devise there was, first for an estate for years, and after its determination, to the executors, for the purposes of the will, till such time as H. should accomplish his age of twenty-one years, and when H. should attain twenty-one, then to him in fee. It was contended the remainder did not vest in H. until he attained full age, but it was determined that the adverbs of time, when, etc., did not make anything necessary to precede the vesting of the remainder, but merely expressed the time when it should fall into possession. The same principle is recognized in *Hanson v. Graham*, 6 Ves. 239, cited for the plaintiff in error as an opposing authority, as established by all the cases, and particularly in *Goodtitle v. Whitby*, 1 Burr. 228, ruled by Lord Mansfield. So plainly applicable is this class of cases to the one in hand, that the attempt to distinguish it runs into a refinement of ingenuity too subtle to be practicable, and it is therefore not surprising that the counsel who essayed it found difficulty in presenting his views clearly to the court. To all that was urged by him, it would, without more, be a sufficient answer, that any other construction than that we have put on this will, would exclude the offspring of those of the children who might happen to die, pending the particular estates — an intent, in a case like the present, not to be imputed to a testator, unless it be undoubtedly manifested.

It follows, from the view we have taken, that Jacob Ditzler, eldest son of Elizabeth, and grantor to the plaintiff's ancestor, took a vested remainder in fee, immediately on the death of the testator, which opening to let in his brothers and sisters, subsequently born, left in him ultimately one-sixth part of the land in fee, expectant on the death of his mother, which passed under the conveyance made by him. The judgment of the court below in favor of the plaintiff, being for this proportion, is consequently right.

Judgment affirmed.¹

¹See also *Adams v. Ross*, *supra*, p. 483. — Ed.

(2.) REMAINDERS AFTER ESTATES-TAIL.¹HAVENS *v.* SEA SHORE LAND CO.

47 NEW JERSEY EQUITY, 365. — 1890.

[Reported herein at p. 926.]

(3.) REMAINDERS IN DEFAULT OF APPOINTMENT UNDER A POWER.²THE LORD CHANCELLOR IN CUNNINGHAM *v.* MOODY.

1 VESKY, SR. (ENG.), 174. — 1748.

NEXT as to the inheritance; and if the plaintiff must claim this reversion in fee from her sister, she cannot have it; because being but of half-blood to her, she cannot be heir. But I am of opinion, that she may claim it from her father, who took also an estate for life by the same settlement; so that according to the ordinary rules it vested in him; and whoever takes afterward must take through him. It is certain, that where no person is seen or known, in whom the inheritance can vest, it may be in abeyance; as in a limitation to several persons, and the survivor, and the heirs of such survivor; because it is uncertain who will be survivor; but the freehold³ cannot, because there must be a tenant to the *præcipe* always. The fee's being in abeyance has in some cases occasioned an act of parliament to remedy it; but here it was not so; nor does the power of appointment make any alteration therein, for the only effect thereof is, that the fee which was vested, was thereby subject to be divested, if the whole was appointed; or if part so much as was not drawn out of the inheritance, still remained in the father as part of the old fee. And there is no occasion to put the inheritance in abeyance, which the court never does but from necessity, and will so mould it by opening the estate as in *Lewis Bowle's Case*, and several others, as best to answer the purposes of the limitations. But if the appointment was not made, it remained undisturbed.

¹ These were treated as vested, but defeasible as the tenant-in-tail might bar the remainder by proper proceedings. The chance that he might do this was regarded as a condition subsequent. See Gray's Rule Against Perpetuities, § III. See for the treatment of such remainders under the N. Y. Statute, § 22, R. P. L. — ED.

² See § 31, N. Y. R. P. L., and § 112, Gray's Rule Against Perpetuities. — ED.

³ The term "freehold" is used here, as often, to denote the *present estate in possession* whether for life or in fee. — ED.

- (4.) WHERE THE EVENT WHICH FORMS THE NATURAL TERMINATION OF THE PRECEDENT ESTATE WOULD ALSO, SHOULD IT HAPPEN NOW, GIVE A PERSON IN BEING THE QUALIFICATION NECESSARY TO ENABLE HIM TO TAKE, HAS THAT PERSON A VESTED, OR A CONTINGENT REMAINDER?

IN RE JACKSON'S DEED.

4 KEYES (N. Y.) 569; 41 NEW YORK, 66; 50 NEW YORK, 161.¹

IN 1832 Samuel Jackson conveyed certain lands to his son, John Jackson, "for and during his natural life, and after his decease to his heirs and their assigns forever." John then had thirteen children. One of them died prior to 1844 and in that year John executed a deed conveying to his twelve children all his right, title and interest in the said property. One of those children died intestate, unmarried, without issue prior to 1848, and in that year John Jackson and his wife executed another deed, whereby they "granted, bargained, sold, released, conveyed and confirmed" the same land, with all their right, title, interest, etc., to his then eleven surviving children. In 1848 these eleven children undertook to partition this land among themselves by sets of partition deeds some of which were made in that year and some in 1849. In 1861 John Jackson died, one of the eleven children having died before him, leaving an infant child. After the death of John the children, ignoring their partition deeds, effected a new partition by action.

SHERIDAN *v.* HOUSE, 4 Abb. Ct. App. Dec. 218; 4 Keyes, 569. (1868). Richard Jackson, a son of John had received a certain parcel of the land by one of the partition deeds in 1849. In 1856 the sheriff sold this parcel on a judgment against Richard and the purchaser sold to House. In the action for partition after John's death these premises were again set off to Richard, and on execution against him were sold to Sheridan. This is a case submitted without action, to determine as to which, if either, has the title to this parcel of land.

The decision below was for the plaintiffs. Defendant appeals.

This court agreed that under our statute the rule in *Shelley's Case* could not apply and that the deed from John Jackson carried only his life estate.

GROVER, J., held the remainder contingent and that it could vest in no one until the death of John, by which event his heirs would be ascertained, and the remainder vest; that such an interest was not a legal estate and could not under the statutes be sold on execution; that Richard's share of the life estate is all that passed

¹ Also *Jackson v. Sheridan*, 50 N. Y. 660; *Jackson v. Little*, 56 N. Y. 108; *House v. McCormick*, 57 N. Y. 310; *Jackson v. Middleton*, 52 Barb. (N. Y.) 9. — ED.

under the first execution sale. He holds, however, that under the covenants in the partition deeds the shares in this parcel of nine of the children passed by estoppel to Richard on the death of John and so inure to defendant; that the estoppel is not binding on the infant child of Fanny, and that since said child was a party to the partition suit its interest in this parcel passed to Richard under the judgment in partition and to the plaintiff under the second execution sale. This would give plaintiff two-elevenths and defendant nine-elevenths.

WOODRUFF, J. — * * * Nor is it questioned that by the conveyance of John Jackson to his children, they acquired, as tenants in common, each an estate for his life in one undivided eleventh part of the land, and that the limitation in remainder gave them as his heirs presumptive, an estate, interest or expectation, which, at his death, they still being alive, would become in them severally an absolute fee.

If that estate, expectation or interest was alienable, then the deed of partition executed by the eleven children operated to place Richard Jackson, one of their number, in the same relation to the lots assigned and conveyed to him in severalty, in which he was before that deed, to the undivided one-eleventh of the whole property; that is to say, he held an estate for the life of John Jackson in the lots so allotted and conveyed to him in severalty, and he would be entitled to the fee of each one-eleventh part thereof, provided, in respect to each eleventh, the grantor thereof should survive John Jackson. * * *

On the other hand, if the several grantors in that deed had no estate or interest in the land which was alienable, it conveyed nothing, and considering that deed simply as a conveyance, the defendant here has no estate in the lots, because the estate which she claims was derived from a conveyance to her, or to her grantor, before the death of John Jackson. Whether that deed operated as an estoppel, so as to assure to Richard Jackson the fee, when in fact the grantors did survive John Jackson, and thus assured to her the title which they had proposed to convey, I shall not consider.

I prefer to rest my conclusions upon the answer which should be given to the question whether the children of John Jackson had, before his decease, an alienable interest or estate in the premises and by this to test the effect of the partition deed and the validity of the defendant's title. And in my opinion the consideration of this question will also determine whether, if alienable, the interest or estate of Richard was subject to levy and sale upon execution against his property.

The circumstances of the present title would not at the common law have presented the question. The abrogation of the rule in *Shelley's Case* has created a state of things which at the common law could not exist; thus by the common law under the rule in *Shelley's Case*, a grant to A. for life, with remainder to his heirs, gave to A. a fee; no question under the law of remainders could therefore arise under such a grant. And that is the case now before us in which Samuel Jackson conveyed to John Jackson for life with remainder to his heirs. On the other hand, a grant to A. for life with remainder to the heirs of B. did present a case to which the law of remainders was, of course, applicable.

In considering the effect of the grant under consideration, made since the rule in *Shelley's Case* was abrogated, we may seek for an analogy in the example last named, to wit, a grant to A. for life with remainder to the heirs of B.

In such case the limitation over to the heirs of B. is by the common law wholly contingent. It is not only impossible during the life of B. to say who will be his heirs, and hence, who will be entitled to claim under the limitation, but if B. is living at the death of A., the remainder over will wholly fail, because it cannot take effect at the expiration of the precedent freehold estate upon which it is limited. This last result is now prevented by our revised statutes, 1 R. S. § 725, 34, and therefore the limitation over is operative, and whenever B. dies it will take effect for the benefit of those who may be his heirs. In such case, however, so long as B. lives, A. being also living, there can be no vested estate in remainder under our statutes, because there are no persons in being who would have an immediate right to the possession of the land upon the ceasing of the precedent estate; that is, if A. were to die to-day, it would still be uncertain who are the heirs of B., and, therefore, there is no one who under the grant is entitled to possession.

But now suppose B. dies, then the estate would vest, and for the reason that there are now persons in being, who, if A. dies to-day, will be entitled to immediate possession. Whether the estate or interest can be defeated by the death of such persons, or by any other future event or not, their interest is vested according to the very terms of our statute.

It is this precise alteration of circumstances which furnishes examples within the contemplation of our statute in its definition of a "vested future estate" and a "contingent future estate."

1. An estate is vested where there is a person in being who will take if the precedent estate then terminates.

2. An estate is contingent while the person to whom . . . it is

limited is uncertain, *i. e.*, while it is uncertain who will take if the precedent estate then terminates.

One definition is the converse of the other, and they are to be read together.

In the case supposed, then, on the death of B., A. being still alive, the heirs of B. are in a condition to take if A. should then die, and their estate is, by the terms of the statute, a future vested estate. This, in my judgment, illustrates the new case made by our statute abrogating the rule in *Shelley's Case*.

Thus John Jackson took a life estate; and every child of his, bearing to him such relation, that, at any moment, he would, if John Jackson then died, be entitled to immediate possession, and to hold in fee, had a "vested future estate" under our statute. It was vested, because by the death of John Jackson the precedent estate terminates, and such child, then in being, becomes *eo instanti* entitled to immediate possession, which is the precise character of one who in the language of our statute has a future vested estate.

This vested estate might be defeated, because such child might die before his father; but the statute has, nevertheless, made his estate a vested estate, notwithstanding the grant under which he claims has annexed a further condition which may defeat it.

In short, the statute has made this remainder, although its beneficial enjoyment depends upon the condition that he survives his father, a vested remainder liable to be defeated by a condition subsequent.

Such an estate is, in its nature, devisable, descendible and alienable. 1 R. S. 725, § 35. This is made a general rule, going much farther, and embracing all expectant estates. In this particular case, the death of the party in whom it is vested, before the termination of the precedent estate, would defeat it, but this does not change its legal character; it is still a vested estate, although death may defeat it. It is, therefore, alienable, subject to that contingency, and the deed of partition was therefore operative.

The question remains, could this estate, vested in interest, but liable to be defeated by the death of the person to whom it was limited, be sold under execution?

Our statutes declaring the lien of judgments, and authorizing sales by virtue of execution, apply to "land, tenements, real estate and chattels real." 2 R. S. 359, § 3; 363, § 2; 367, § 24 *et seq.*; 373, § 61 *et seq.*

If the words "lands or real estate" embrace such an estate as that in question, then it was subject to sale on execution, and the defendant acquired title, defeasible as to any share of one-eleventh,

by the death of one of the eleven children of John Jackson before his decease, and actually defeated, as to the one-eleventh conveyed to Richard Jackson by his sister, Fanny Baldwin, who died before her father.

Concede that a possibility of reverter, as in 4 Den. 412, a naked possibility, as in *Edwards v. Varick*, 5 Id. 664, or a merely equitable interest, trustees being in possession, holding the legal title, as in *Brewster v. Striker*, 2 N. Y. 19; or other purely equitable interest, unaccompanied by possession, as in *Sage v. Cartwright*, 9 Id. 49, or a contingent remainder, as in *Striker v. Mott*, 28 Id. 82, cannot be sold on execution. This is far short of holding that a vested estate in remainder, only liable to be defeated by a subsequent event, may not be.

The subject of sale here was an estate in the land, a legal estate, vested in interest by the very terms of the statute, and alienable by the owner thereof; this is "real estate," and by such name is subject to levy and sale.

For these reasons, I think the judgment of the Supreme Court must be reversed.

The appellant appears, by the pleadings, to claim but ten-elevenths of the premises, and seems to concede that the death of Fanny Baldwin defeated her title to one-eleventh of the premises. This is clearly so at law; and it is not claimed that there are any equities arising out of the partition deeds which inure to the benefit of the defendant to make her purchase effectual as to that one-eleventh.

The judgment should be reversed, and judgment ordered affirming the title of the defendant to ten-elevenths and of the plaintiff to one-eleventh part of the premises in fee.

A majority of the judges concurred in this opinion.

MOORE v. LITTEL, 41 N. Y. 66 (1869). By the partition deeds of 1848 nine of the children of John Jackson set off by warranty deed to Parmenus and Edward a certain lot. Parmenus and Edward mortgaged the premises, the mortgage was foreclosed and plaintiff became the owner in 1855. This action is ejectment against a lessee (in 1860) of one of the mortgagors. Two questions are said to arise. Had the children of John Jackson any interest in the fee of the premises, which they could convey at the time when the deeds in partition were executed and if not, are they estopped by the partition deeds?

WOODRUFF, J.— * * * This liability of the precedent life estate to be determined before the actual decease of the tenant for life, has led to a discussion of the question whether, after a grant to one,

so long as he lives or so long as he lives a natural life, and after his decease, to another, does not necessarily create a contingent remainder.

This was the decision of the courts in New Hampshire in *Hall v. Nute*, 38 N. H. 422, and *Hayes v. Taber*, 41 N. H. 421.¹ But this decision has been the subject of criticism, and cannot be said to be generally approved, while the contrary has often been stated and held on the ground that it is uncertainty in the right of enjoyment, and not the uncertainty of its actual enjoyment that renders an estate contingent.

And this suggests again the inquiry whether, if it be inevitably true in a given case that the determination of the life-estate cannot happen without *eo instanti* entitling the remainderman to possession, he has not a vested remainder.

In general, the answer must and will be in the affirmative. But it is said that where the remainder is limited to the heirs of the tenant for life, there, even if you can exclude all possibility of terminating the particular estate by means other than the death of the tenant, no one can have a vested estate in remainder, because two events, in legal theory, must happen before his right is absolute: 1. The tenant must die and terminate the particular estate. 2. The tenant must die and so ascertain his heirs.

That although the single fact, to wit, the death of the tenant, accomplishes both results, and although if that death should now happen, there is a person immediately entitled to take, still, the character of heir must be gained before the remainder can vest in possession, and the remainder must vest on the instant of the death; and so in theory, the former must precede the latter.

It would be doing no violence to good sense to say that, when the same fact, the death of the tenant for life, at the same instant must determine who is heir and vest the remainder in possession, then it is true that there is at any time an ascertained person who has capacity to take if the present estate then determines.²

In such case, the test proposed by Nelson, Ch. J., in *Hawley v. James*, 16 Wend. 137, would be apt to determine that a remainder is vested in any case in which the particular estate can only be determined by the death of the tenant for life, viz., when nothing can

¹ "Inexplicable aberrations of an able and learned but eccentric court." Gray's Rule against Perpetuities, § 103, n. — Ed.

² Relying on Chancellor Kent's assertion that the New York definition (§ 30 R. P. L.) "appears to be accurately and fully expressed," certain courts have called such a remainder as this vested on supposed common law principles. See Gray's Rule against Perpetuities, § 107 n. — Ed.

prevent such remainder from vesting in possession but the death of the remainderman before the termination of the life estate.

It is not, however, in my judgment, profitable or necessary to the view which I intend to suggest, that I should pursue the consideration of the peculiar case created by the grant now in question, if it were to be governed by the refinements of the common law, under the influence of its feudal customs, restrictions, complications, and of the ingenuity and learning sometimes employed to avoid rather than give rational effect to the intentions of parties.

It was one of the objects of our Revised Statutes to reduce to greater simplicity the rules governing the taking, holding, and transmitting of real estate, and, especially, to favor the vesting of estates and the alienability thereof.

And in my judgment, the statute definition of remainders vested and contingent, in connection with other statutes, forming part of an entire system, has made the answer to some of the questions above proposed, simple and easy; and I have occupied time in the preceding discussion, chiefly that the design and meaning of the statute might be more clearly apparent. * * *

It was argued on this appeal, that definitions of vested and contingent remainders in adjudged cases, and text writers have not been successfully attempted, and that our revisors did not attempt to alter the law, or do more than describe what had already been adjudged to be vested, and what to be contingent.

In my opinion, they have defined a vested remainder in terms that do clearly avoid much of the uncertainty in which the subject was before involved, and in such terms that it is now true, that if there be a person in being of whom it can be positively averred, that if the estate for life were now to cease he would have an immediate right of possession, he has a vested remainder; and notwithstanding subsequent events may defeat it, the operation of the statute itself is to make them subsequent conditions.

Why was a remainder to the heirs of A. after the expiration of the life-estate of B. contingent at the common law? Because B. might die before it was ascertained who are the heirs of A.

Why is it said that a remainder to the heirs of A., after the determination of a life-estate in A. is contingent? Because the life-estate may, at the common law, be determined before it is ascertained who are the heirs of A.

Hence the introduction, into the various definitions, of the qualifications so much insisted upon in the argument of this appeal, that no estate can vest until the person in whom it is to vest shall be ascertained; and from this it follows, if there be some condition

which must be fulfilled, before the person who will take on the determination of the precedent estate is known, there can be no vested remainder.

But here suppose, that the one sole condition, to wit: The determination of the precedent estate is all that is necessary to entitle a person *in esse* to take, it is not denied that such a person has a vested remainder. Why, then, if the precedent estate can only be determined by the death of the life tenant, and by that death the heirship is alike also determined, is not the statute definition in all respects satisfied? It makes the precise case described, and I deny the right to interpolate qualifications drawn from the refined reasoning of cases or text books, prior to the statute, to limit the operation of its plain terms.

Now, in the case before us of an estate in John Jackson for his natural life, with remainder to his heirs, I know of nothing other than the death of John Jackson which would determine the life-estate which was vested in him; his interest may cease by conveyance or other transfer, but the life-estate will continue until his natural death. He could do nothing which would defeat the remainder. 1 R. S. 725, § 32.

He could do nothing which would extinguish the life-estate by merger in the inheritance.

His alienation, or attempted alienation, by feoffment, fine and recovery, or otherwise, of a greater estate than his own, could not forfeit the life-estate, or determine it, because feoffment and livery of seisin are abolished here; we have no fine and recovery; and, finally, conveyances here by a tenant for life, although in form conveying a greater estate than he possesses, do not work a forfeiture of his estate, but will pass to the grantee such estate, title and interest as he can lawfully convey. 1 R. S. 738, § 1, p. 739, §§ 143, 145.

Whatever effect the disclaimer of his landlord's title, by a tenant for years, in any possible form, by record or otherwise, may have upon his rights as between him and his landlord, no disclaimer by John Jackson could operate to extinguish the life-estate. See *Jackson v. Moyes*, 11 J. R. 33; *Jackson v. Vincent*, 4 Wend. 633; 1 Washburn on Real Property, 92.

Conviction of felony no longer works a forfeiture. 2 R. S. 701, § 22.

And whatever was the effect of an attainder of treason in England, it is clear that here, since it is enacted that no act of the tenant for life, nor any destruction of the precedent estate shall defeat the remainder, no outlawry upon conviction of treason which operates as

a forfeiture during his life only, 2 R. S. 656, § 3, can have any effect except as a transfer of such life-estate.

Our statutes have, therefore, taken the case out of the condition of a contingent remainder at the common law, and have brought it within the statute definition; and for the reason that in respect to any child of John Jackson, it was, at any and every moment of his life, inevitably and unquestionably true that if John Jackson then died, he would have an immediate right of possession of the lands. During John Jackson's life he was not heir, and had not such right; the one event, which might at any moment happen, determined the life-estate, and *eo instanti* being "heir," he was entitled to possession; not by descent, but by "purchase," the statute declares.

But it has been argued that this construction of the definition of vested remainders, leaves very little room for the application of the definition of a contingent remainder, which immediately follows, and that it withdraws entirely from the test of their character, in this respect, the certainty or uncertainty of the person entitled in remainder.

So far as it can be shown that the statute, or any sensible construction thereof, tends to the holding of estates vested, rather than contingent, so far that construction is strengthened and sustained by the policy of the law, which always favored such holding. And it will be no evil in this country that those interests, which, by reason of contingencies or possibilities, are often held withdrawn from the ordinary incidents of property, are few.

But the construction given to the definition, does by no means destroy the effect of the definition of a contingent remainder.

That definition is to be construed in connection with the other, if there is no person who would have an immediate right of possession upon the ceasing of the intermediate or precedent estate, *i. e.*, if no person can be found of whom this can now be avowed, either because if that precedent estate should now cease, it would be uncertain who was entitled, or whether the event upon which it was limited would happen; then the remainder is contingent. * * *

2d. If the preceding reasoning be wholly fallacious, and be deemed to give an interpretation to the statute, and a construction to the law, which is unsound, I am wholly unable to see how the result to the present appellants would be different.

The alternative insisted upon is, that since our statutes, and notwithstanding our statutes, the children of John Jackson had only contingent remainders in fee of the land, whereof they made partition, and that, therefore, they conveyed nothing by the deeds they severally executed.

Here again, the change made by our Revised Statutes is important.

A contingent remainder, it is said in the books, was alienable when the uncertainty which made it contingent was in the event upon which it was limited to take effect, and was only inalienable when it was uncertain to whom the remainder was limited; and this distinction is affirmed and relied upon by the counsel on this appeal. See Washburn on Real Prop. 237-8; Williams on Real Prop. 232-4; Preston on Estates, 76. Though this distinction has often been overlooked or denied. See *Striker v. Mott*, 28 N. Y. 82; Williams on Real Prop. 231; 4 Kent, 261-2.

It is now insisted that our statute has both affirmed and perpetuated this distinction.

The frame of the statute, and its language, are inconsistent with this; and the whole policy of our law which encourages the free transmissibility of property of every description is in marked hostility to it.

As above shown, "expectant future estates" as defined in the statute, do expressly include all remainders, whether vested or contingent. Not only so, the "expectant future estates," of which the article treats, are declared to be "contingent, whilst the person to whom, or the event upon which they are limited to take effect remains uncertain." And notwithstanding the uncertainty in the person who may in the future be entitled thereto, the expectancy or estate is declared to be a "remainder," and "it may be created and transferred by that name." Nothing can more clearly declare, therefore, that a remainder, which is contingent because the person to whom it is limited is uncertain, is an expectant estate. And thereupon, the statute declares, that expectant estates are descendible, devisable, and alienable.

Instead of perpetuating, this abrogates all distinctions, and gives to all expectant estates, of whatsoever description, and whether vested or contingent, and whether contingent upon an event which may never happen, or by reason of uncertainty in the person, the character or quality of alienability.

It is argued that another section of the statute restrains the effect of the first, to wit: "The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed," and such suspension for more than two lives in being shall render the future estate, which works that result, void.

These provisions were not intended, and do not operate to restrain alienation at all; they are made and intended expressly to prevent such restraint, except within brief limits.

They do not import that the contingent remainder may not be aliened, but only when contingent remainders are so limited that, for a period not authorized, an absolute fee cannot be conveyed, the future estate having this effect shall be void.

Indeed the alienation of the contingent remainder is entirely consistent with inability to convey an absolute fee. Where the successive estates are all valid, every person in being having any vested or contingent interest may often convey, and they may be entirely capable of conveying, and yet no absolute fee be conveyed. It is to prevent this, for too long a period, that the statute declares the effect of such a restraint of alienation.

These are the words, also, of the statute, "The absolute power of alienation is suspended when there is no person by whom an absolute fee in possession can be conveyed;" this is not saying that a future estate in expectancy cannot be aliened when there is no person by whom an absolute fee can be conveyed; and yet, this is the inference urged upon us.

It might as well be argued that the precedent life-estate cannot be aliened when there is no person by whom an absolute fee can be conveyed; and it is like the argument that because an estate is limited to an unborn child, such limitation, *per se*, imparts to the estate itself the quality of inalienability, because, until the child is born, he cannot convey. The contingency of birth may make an estate contingent, but the physical fact of inability to convey does not affect its quality. It may be a remainder in fee simple, or a term for years, or for life; their quality of alienability does not depend upon the question whether the remainder is limited to one who has legal or physical capacity to convey, but upon its essential nature. If contingent, then the statute says it is alienable, *i. e.*, it has that character and quality.

Whether the absolute fee in land may not be so situated that the actual alienation of all present vested and contingent interests will not avail to convey an absolute fee in possession, is a totally different question, and one on which the alienability of the contingent remainders in nowise depends.

It is, of course, true that in the present case the contingent estate of no child of John Jackson could descend, or be devised; but this is not because the statute has not given to all contingent remainders the quality of being devisable, descendible and alienable, but because in the special instance before us the death of such child would defeat it. The statute is to be applied according to the nature of the contingency, and in consistency with it.

An expectant estate for life, clearly vested, is alienable, but is not descendible nor devisable in its very nature.

The statute designed to give to all expectant estates, vested or contingent, the same character and quality in these respects. The actual ability to devise or transmit, or to convey, and the efficiency of alienation to confer an absolute fee, it was not the purpose of the statute to declare. In the case above referred to (*Lawrence v. Bayard*), the chancellor declares that the statute making expectant estates alienable includes every present right or interest, either vested or contingent, which may by possibility vest in possession at a future day. The mooted question whether a mere possibility, coupled with an interest, is capable of being conveyed or assigned at law is, therefore, forever put at rest in this State. *Miller v. Emans*, in this court, 19 N. Y. 384, supports the alienability of remainders, though contingent. Upon this ground, if I am wholly wrong in the point first discussed, the judgments should be affirmed.

GROVER, J., dissents on all points. All the judges, except Grover, agreed that the interest was alienable, whether vested or not.

HOUSE *v.* JACKSON, 50 N. Y. 161 (1872). Under the partition deeds Edward Jackson was assigned the lot in question. His share was sold out on execution in 1857 and this title came to plaintiff. In a partition suit defendant, the widow of Edward, who died in 1863, claims dower.

PECKHAM, J.— * * * I see no objection to the merger of this life-estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of *Moore v. Littell*, 41 N. Y. 66. This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again and the widow is then not entitled to dower.

Moore v. Littell, holds the estate of the son, prior to the death of the father, to be a vested remainder; the son was also seised in fact and in law of his father's life-estate, and then became seised of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life-estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge. Park, 191.

The rule is adopted in much broader language in our statute.
 1 R. S. 742, § 16.

At common law there might have been an intermediate estate for years and yet the wife had dower — as estates for years were not highly regarded at common law. But *cessit executio* during the term. Com. Dig. Dower, A. 6; Perk. § 336.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (Id.), though the surrender be upon condition, for the estate is gone until the condition be broken. Id.

In this case there is no intervening estate. The husband is seised of the life-estate in fact and in law, and he is also seised of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seisin as prevents the alienation of the estate or its incumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father, his dower becomes absolute. The decree must be modified according to these views, with costs to her — no costs to either of the others, and the cause remitted for further proceedings.¹

CARMICHAEL v. CARMICHAEL.

4 KEYES (N. Y.), 346. — 1868.

CLERKE, J. — Daniel Carmichael died September 3d, 1849, leaving the defendant, his widow, and six children, him surviving. The eldest of them (Otis) was the child of a first marriage. He did not live with his father, but lived in Middletown, in this State, where his father provided for him. At the time of his father's death he was an invalid, and he died about two years afterward. He married the plaintiff soon after his father's death, the engagement having been made prior to that event; he left one child. Daniel Carmichael, shortly previous to his death, made a will, of which the following is a copy: [*The material part only is given here.*]

"After the payment of all my debts, I give, devise and bequeath

¹ See also *Mead v. Mitchell*, 17 N. Y. 210; *Minot v. Minot*, 17 App. Div. (N. Y.) 521; *Lawrence v. Bayard*, 7 Paige Ch. 70; *Coster v. Lorillard*, 14 Wend. 310. In the last named case the judge boldly declares such a remainder both vested and contingent. See also discussion of this subject in Chaplin on Suspension of the Power of Alienation, §§ 28-52, and Gray's Rule Against Perpetuities, §§ 104-108. — ED.

all and singular my estate and property, of whatsoever kind, and wheresoever the same may be situate, unto my beloved wife Eliza, for and during the term of her natural life; and from and after her decease, then I give, devise and bequeath the same unto my children, who may be then living, in equal parts, share and share alike — it being distinctly understood that the part or share of my son, Otis Carmichael, under said division or appropriation, shall be held and invested by my surviving executor, his heirs and assigns, in trust, to keep the same well and securely invested during the lifetime of my said son, and to pay over to him, my said son, the rents, income and interest thereof as received, and to dispose of and apply the principal of said share as my said son may by his last will and testament, or any instrument in the nature thereof, direct, limit and appoint. And in default of such direction, then to the right heirs of my said son, under the intestate laws of New York." * * *

This will was admitted to probate on or about the 15th of October, 1849, before the surrogate of the county of Broome. Otis Carmichael, previous to his death, made a will, by which he gave to his wife (the plaintiff) the annual sum of \$500 during her natural life; and he further gave unto her, in trust, for the maintenance and education of his son, all the annual proceeds of his real and personal property, until his son should attain the age of twenty-one years. He secondly devised and bequeathed unto his son, all his real and personal property, subject to the annual payments given to his wife.

This action is brought by the widow of Otis, for the purpose of compelling the defendant, executrix of the will of Daniel Carmichael, to render an account of his property and effects, which may have come into her hands as such executrix; and, after the accounting, it is prayed that the same may be divided, and that the defendant be adjudged to pay over to the plaintiff, one-sixth part of the estate of Daniel Carmichael, with interest thereon from January 1, 1850.

The defendant demurred to the complaint, upon the ground, first, that the plaintiff had no legal capacity to sue, and, second, that the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, both at the Special and General Term.

The demurrer was properly sustained. The widow of Daniel Carmichael is living, and, by the express provision of his will, she is entitled to all the use and enjoyment of his property during the term of her natural life; and she is under no obligation to account to any of the children, for the purpose of having it divided among them. The estate does not vest in remainder until her death; and then it vests only in those children who shall be living at the time of her

death. The plaintiff, under the will of Otis Carmichael, acquired no estate or interest in the property of Daniel Carmichael, and has, in fact no standing in court.

Judgment affirmed.

HENNESSY *v.* PATTERSON.

85 NEW YORK, 91. — 1881.

[*Reported herein at p. 868.*]¹

*d. Alternate remainders.*²

WHITESIDES *v.* COOPER.

115 NORTH CAROLINA, 570. — 1894.

[*Reported herein at p. 877.*]

WADDELL *v.* RATTEW.

5 RAWLE (PA.), 230. — 1835.

[*Reported herein at p. 932.*]

MORSE *v.* PROPER.

82 GEORGIA, 13. — 1888.

[*Reported herein at p. 832.*]³

e. Acceleration of remainders.

ANDREWS, J., IN PURDY *v.* HAYT.

92 NEW YORK, 446. — 1883.

It is provided by the seventeenth section of the article of the Revised Statutes, before referred to, that “successive estates for life shall not be limited unless to persons in being at the creation

¹ For comment on this case see *Minot v. Minot*, 17 App. Div. (N. Y.), 521, and Chaplin, §§ 49-51. See n. 37 Hammond's Ed. 2 Blk. Com. — ED.

² See N. Y. R. P. L. § 41, — ED.

³ For a case in which the rule in *Shelley's Case* prevents an alternate remainder from arising, see *Loring v. Eliot*, *supra*, p. 857. — ED.

thereof; and where a remainder shall be limited on more than two successive estates for life all the life-estates subsequent to those of the two persons first entitled thereto shall be void, and upon the death of those persons the remainder shall take effect in the same manner as if no other life-estates had been created." 1 R. S. 723, § 17.¹ The prohibition against the creation of more than two successive life-estates in the same property has no necessary connection with the law of perpetuities. There is no suspense of the power of alienation of land by the creation of successive life-estates therein unless they are contingent. Any number of successive vested life-estates may be created without violating the statute of perpetuities. The prohibition against creating more than two successive life-estates in the same property applies to such estates, whether vested or contingent. The policy of the prohibition, where applied to vested and therefore alienable interests, need not be considered. It is sufficient to say that it was regarded by the Legislature as not imposing an undue restraint upon the owner of property, and the provision is in harmony with the general rule prescribing the period during which the power of alienation of land may be suspended, viz., two lives in being at the creation of the estate. The statute, however, does not avoid the whole limitation, where more than two successive life-estates are limited. It permits the first two to take effect, avoiding those only which are in excess of the permitted number. So also the seventeenth section preserves a remainder limited on more than two successive estates for life. But we apprehend that the section must be construed as referring to vested, and not to contingent remainders. It cannot in reason, or by its true construction, be held to apply to the latter. Where the right of the remainderman is vested, and the right of possession only is postponed, the statute, in cases of three or more precedent estates for life, accelerates the period fixed by the will or deed for the vesting of the remainder in possession, and vests it immediately upon the termination of the two estates for life first created. The statute so far overrides the precise intention of the grantor or testator, as expressed in the will or deed, but as the possession in the remainderman was postponed, presumably for the purpose of allowing an intermediate life-estate to run, and that purpose being defeated by section 17, the statute, by accelerating the remainder, gives effect as near as may be to the intention of the creator of the estate. But where the gift in remainder is upon a contingency which has not happened at the time of the death of the second life tenant, so that

¹ § 33 N. Y. R. P. L. — ED.

it cannot then be known who will be entitled in remainder according to the terms of the instrument creating the estate, the statute, we conceive, can have no application.

The construction that section 17 applies only to vested remainders, is, moreover, sufficiently plain upon its language. The remainder, the section says, is to take effect in the same manner as if no other life-estate had been created. Where the remainder was contingent when the life-estate commenced, and remains so at the death of the tenant of the second life-estate, it would not vest, although no other life-estate had been created, and the statute gives effect to remainders only in the same manner as if limited upon two life-estates instead of three. It is plain we think that the statute only executes the remainder in possession in favor of such ascertained persons as, except for the void life-estate, would under the terms of the will or deed, be entitled to the immediate possession. See *Knox v. Jones*, 47 N. Y. 397; *Smith v. Edwards*, 88 Id. 104.¹

3. EXECUTORY FUTURE ESTATES OR INTERESTS.²

¹ See also *Dana v. Murray*, 122 New York, 604. — ED.

² "Executory limitations." These were originally future estates of freehold not created by livery of seisin. Such estates were not possible at common law except in one or two localities in England where lands were subject to devise prior to the Statute of Wills. They ordinarily arose either under conveyances operating under the Statute of Uses (27 Hen. VIII. Cap. 10) or by virtue of devises under the Statute of Wills (32 Hen. VIII. Cap. 1.) But even in such cases where a freehold estate was created to take effect as soon as the instrument should become operative and was to be followed by a future estate which would have been a valid remainder (vested or contingent) had livery been made, the courts construed the estates on common-law principles. So also a future estate dependent upon a particular estate which was itself to begin *in futuro* would be converted into a remainder, if possible, the moment the particular estate should vest in possession. And a future use or executory devise capable of being construed as a remainder could not afterwards be saved by adopting a more liberal construction in case as a remainder it should fail. See *Waddell v. Rattew*, p. 932, *infra*.

Executory future estates may now be created in one of the following ways: (1) By an instrument operating to create a legal estate by virtue of the Statute of Uses. Such future estates are either shifting or springing uses. (2) By a devise under the Statute of Wills, — an executory devise. (3) Under statutes which declare that corporeals as well as incorporeals shall lie in grant instead of in livery (see §§ 16 and 17, Gray's Perpetuities), or perhaps under statutes which merely abolish feoffment and livery of seisin. See *Wyman v. Brown*, *infra*, p. 909. (4) Under special statutory systems regulating the creation of future estates, as in New York, and the states which have copied from it, Wisconsin, Minnesota, Michigan and others. See for New York, §§ 206, 25-54.

*a. Shifting executory future estates, "conditional limitations."*¹HATFIELD *v.* SNEDEN.

54 NEW YORK, 280. — 1873.

[Reported herein at p. 641.]²*b. Springing executory limitations.*³KENYON *v.* SEE.

94 NEW YORK, 563. — 1884.

ACCOUNTING of the executors of the will of John Mildeberger. The will gives one-third of testator's real and personal property to S. M. Spencer, in trust to pay the interest thereof to testator's "grandson, Seymour Hobart Spencer, upon the express condition that the said Seymour Hobart Spencer shall renounce the Roman Catholic priesthood, said payment of interest to commence at the time of such renunciation, and upon the further condition that the said Seymour Hobart Spencer shall marry" the principal of said trust fund is given to said S. H. Spencer. In case of the death of S. H. Spencer before marriage, his share is given to S. M. Spencer. S. H. Spencer executed an instrument under seal professing to assign all his rights under the will to S. M. Spencer and the executor paid to S. M. \$28,000, on account of his share and that of S. H. S. M. died and his executors now claim the balance of the two shares. The accounting executor claims that S. H.'s share was not assignable and must remain in the hands of the trustees to await performance of the condition.

ANDREWS, J. — Seymour H. Spencer took no vested estate or interest in the principal or income of the fund given in trust to Sel-

N. Y. R. P. L. In New York these future estates may be called "remainders" if there is any sort of a precedent estate; otherwise they are simply "future estates." — ED.

¹ These include shifting uses, shifting executory devises, and shifting estates of any kind authorized by special statute. As to the term "conditional limitation" see note, p. 551, *supra*. Alternate remainders and the like are to be carefully distinguished from these limitations. See p. 904, *supra*. — ED.

² See also *Turner v. Wright*, *supra*, p. 391; *Adams v. Ross*, *supra*, p. 483; *Evans v. Evans*, p. 669; *Edwards v. Bibb*, p. 671. — ED.

³ Here no present estate at all is created, but the fee is left in the grantor or his heirs, or the heirs of the testator, until the happening of the future event on which the future estate is limited to commence. — ED.

den M. Spencer by the eighth clause of the will of the testator, John Milderberger. The right to either was conditional. He was entitled to the income only upon and from his renunciation of the Roman Catholic priesthood, and to the principal only upon his marriage. The conditions were precedent, and, until performance, he took no interest, legal or equitable, in the fund. The tenth clause makes an alternative gift of the trust estate to Selden M. upon his marriage, in case of the death of Seymour H., without having married. This gift was conditional also, there being a double condition, first, the death of Seymour H. before his marriage, and second, the marriage of Selden M. If the contingent interest of Selden M. did not lapse upon his death before Seymour H., or in other words, if it survived and was transmissible like a vested interest, then the appellant must fail, as he has no interest which can be affected by the decree of the surrogate. We think this contingent right passed on the death of Selden M. to his representatives, and that, on the death of Seymour H. before marriage, they will be entitled to the fund. The survivorship of Selden M. is no part of the contingency upon which the gift to him is limited. The testator, as the will indicates, intended to make a complete disposition of his property. The alternative disposition was made to meet the contingency that Seymour H. might not accept the conditions upon which the gift to him depended. There is no reason to suppose that the testator intended to confine the benefit of this provision to Selden M. personally, and to exclude his family or descendants when he made marriage one of the conditions of his taking at all. If the continued existence of the legatee, in case of a contingent legacy, is part of the contingency upon which the gift is limited, then there can be no doubt. But in this case the personal enjoyment of the legacy by Selden M. was not made essential to its taking effect. The general rule is that contingent interests are assignable, devisable and descendible. "In general," says Fearné, "it seems that contingent interests pass to the real and personal representatives, according to the nature of such interests, as well as vested interests, so as to entitle such personal representatives to them when the contingencies happen." Fearné on Cont. Rem. 364. The rule stated by the learned author is supported by numerous authorities. *Pinbury v. Elkin*, 1 P. Wms. 563; *King v. Withers*, Cas. Temp. Talb. 117; *Chancy v. Graydon*, 2 Atk. 616; *Barnes v. Allen*, 1 Bro. Ch. Rep. 181; *Winslow v. Goodwin*, 7 Metc. 363.

Here one of the conditions upon which Selder M. was to take, viz., marriage, was performed before his death. The other condition, viz., the death of Seymour H. before marriage, has not hap

pened. It may never happen, as Seymour H. may marry, however improbable this may be. If he does marry, then he will be entitled to the third part of the estate of the testator, under the will, unless his attempted transfer to Selden M. operates as an estoppel. In either event, whether Seymour H. takes, or the representatives of Selden M., the appellant has no interest. One of the two things will happen, and which is a matter with which he has no concern. No question is made as to the validity of the trust in the will of John Milderberger.

We think the case was properly disposed of by the surrogate, and that the judgment of the General Term should be affirmed.

Judgment affirmed.¹

WALTON, J., IN WYMAN v. BROWN.

50 MAINE, 139. — 1863.

ANOTHER question raised in this case is, whether the deed from Mrs. Brown to Oliver S. Nay was valid. The objection to it is, that it purports to convey a freehold estate to commence *in futuro*; and such is its effect, for by its terms Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease."

Deeds in which grantors have reserved to themselves estates for life are believed to be very common in this State; and whether or not such deeds are valid is certainly a very important question, and ought to be authoritatively decided.

It was a principle of the old feudal law of England that there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule was established for two reasons: 1. That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defense of the realm would be weakened. 2. That every stranger who claimed a right to any lands might know against whom to bring his suit for the recovery of them; as no real action could be brought against any one but the actual tenant of the freehold. Consequently, at common law, a freehold to commence *in futuro* could not be conveyed, because in that case the freehold would be in abeyance from the execution of the conveyance till the future estate of the grantee should vest. And it is laid down in unqualified terms in several cases in Massachusetts, and in one in this State, that an estate of freehold cannot be conveyed to com-

¹ See also *Leonard v. Burr*, *supra*, p. 521.

mence *in futuro* by a deed of bargain and sale, which owes its validity to the statute of uses, and not to the common law.

But the doctrine that freehold estates to commence *in futuro* cannot be conveyed by deeds of bargain and sale, since the passage of the statute of 27 Henry 8, c. 10, commonly called the statute of uses, is clearly erroneous. It is clear that, at common law, such conveyances could not be made; and it is equally clear that, by virtue of the statute of uses, such conveyances may be made. Prior to the reign of Henry 8, real estate could be so held that one person would have the legal title, and another the right to the use and income. To obviate many supposed inconveniences which had grown out of this practice of separating the legal title from the use, the statute of uses was passed, by which it was enacted that the estates of the persons so seised to uses should be deemed to be in them that had the use, in such quality, manner, form, and condition, as they had before in the use. It will be noticed that the effect of this statute was to annex the legal title to the use, so that they could not be separated. Mr. Cruise says, that when this statute first became a subject of discussion in the courts of law, it was held by the judges that no uses should be executed that were limited against the rules of the common law; but that this doctrine was not and could not be adhered to, for the statute enacts that the legal estate or seisin shall be in them that have the use, in such quality, manner, form, and condition, as they before had in the use; that chancery having permitted uses to commence *in futuro*, and to change from one person to another, by matter *ex post facto*, the courts of law were obliged to admit of limitations of this kind. The statute did not attempt to limit or control the doctrine of uses; it simply declared that where the use was, there the legal estate should be also. The result was that it opened several new modes of conveying legal estates wholly unknown to the common law; for whatever would convey the use and income of real estate before its passage, would, by virtue of the statute, convey the legal estate afterwards. It will thus be seen that conveyances through the medium of the statute of uses are effected in this way: — The owner of an estate in lands, for a consideration either good or valuable, agrees that another shall have the use and income of it, and the statute steps in and annexes the legal title to the use, and thus the *cestui que use* becomes seised of the legal estate in the same manner as before the statute he would have been seised of the use. The argument, presented in a syllogistic form, is this: Since the statute of uses, freeholds can be conveyed in any manner that uses were conveyed before its passage. Before its passage, uses were conveyed to commence *in futuro*; therefore, free-

holds may be conveyed to commence *in futuro* since its passage. It must be remembered, however, that neither legal estates nor uses can be so limited as to create perpetuities. If future estates are so limited as to take effect in the lifetime of one or more persons living, and a little more than twenty-one years after, the rule against perpetuities will not be violated. We will refer to a few leading authors:

Mr. White, a very learned English writer, in one of his additions to the text of Mr. Cruise, says: "By executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited to commence *in futuro*." 1 Greenleaf's Cruise, title 1, § 36.

Mr. Chitty, after stating that by a common law conveyance, a freehold to commence *in futuro* could not be conveyed, continues. "But deeds operating under the statute of uses, such as bargain and sale, covenant to stand seised, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." 1 Chitty's General Practice, 306; 2 Bl. Com. 144, note 6.

Mr. Sugden says: "A bargain and sale to the use of D., after the death of S., is good." Gilbert on Uses (Sug. edition), 163.

Mr. Cornish: "By a bargain and sale, or covenant to stand seised, a freehold may be created *in futuro*." Cornish on Uses, 44.

Chancellor Kent: "A person may covenant to stand seised, or bargain and sell, to the use of another at a future day." 4 Kent's Com. 298.

Mr. Archibold: "Deeds acting under the statute of uses, such as bargain and sale, covenant to stand seised, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." Note to 2 Bl. Com. 166.

In a note to the 5th American edition of Smith's Leading Cases, vol. 2, p. 451, after noticing the Massachusetts cases, in which it is held that a freehold to commence *in futuro* cannot be created by a deed of bargain and sale, the learned editors say: "It is undoubtedly true that such limitations are bad at common law; but it seems equally well settled that they are good in deeds operating under the statute of uses, whether the use be raised on a pecuniary consideration or on blood or marriage. The point is so held in England, and has been repeatedly and expressly decided in New York, and several of the other States of this country. The attributes of a use are the same, whatever may be the consideration in which it is founded; and, if uses commencing *in futuro* were without the operation of the statute, when raised by a bargain and sale, they would be equally so when originating in a covenant to stand seised."

In *Rogers v. Eagle Insurance Co.*, 9 Wend. 611, the question underwent a most thorough examination, and the conclusion was, that a freehold to commence *in futuro* could be conveyed by a deed of bargain and sale, operating under the statute of uses; and the court expressed surprise that any one should have ever supposed that such was not the law.

In *Bell v. Scammon*, 15 N. H. 381, the same question was raised and the court held that "a freehold *in futuro* could be conveyed either by deed of bargain and sale, or by a covenant to stand seised."

Mr. Washburn, in his late very able work on Real Property, vol. 2, p. 617, § 16, says that the reasoning of Chancellor Walworth, in *Rogers v. Eagle Insurance Co.*, 9 Wend. 611, in which he maintains that an estate of freehold, to commence *in futuro*, can be conveyed by a deed of bargain and sale, and the authorities upon which he rests would seem to leave little doubt in the matter, beyond what arises from the circumstance that other courts have taken a different view of the law.

It is true, that in Massachusetts and this State, when determining that the deeds then under consideration were valid upon other grounds, judges have expressed the opinion that a freehold to commence *in futuro* could not be conveyed by a deed of bargain and sale; but these opinions are mere *obiter dicta*, for they have never yet had the effect of defeating a deed. The idea seems to have originated in an unauthorized statement, probably accidental, to be found in *Pray v. Pierce*, 7 Mass. 381. Having under discussion the rule that deeds should be so construed as to give effect to the intention of the parties, and not to defeat it, the case of *Wallis v. Wallis*, 4 Mass. 135, was referred to by way of illustration, and the reporter makes the court say that the deed in the latter case was held to be a covenant to stand seised, "because, as a bargain and sale, it would have been a conveyance of a freehold *in futuro*, and therefore void."

By turning to that case, *Wallis v. Wallis*, it will be seen that such a statement is unauthorized. The court remarked that, by a common law conveyance, a freehold could not be conveyed to commence *in futuro*, which was unquestionably true; but the court did not say that such a conveyance could not be made by deed of bargain and sale, which owes its validity to the statute of uses and not to the common law. Why the deed in *Wallis v. Wallis*, was not sustained as a bargain and sale, instead of covenant to stand seised, does not appear. The case was submitted without argument, and, as the deed could readily be sustained as a covenant to stand seised, it may not have occurred to the court that it could just as well be sustained as a bargain and sale. On careful examination, it will be seen that

these cases, *Wallis v. Wallis*, and *Pray v. Pierce*, are not authorities for the doctrine they are so often cited in support of.

In *Welch v. Foster*, 12 Mass. 93, the deed, for a valuable consideration, to be paid whenever the deed should take effect, and not otherwise, purported to convey a certain part of a mill, with the land, etc., "provided that the said deed should not take effect or be made use of, until the said mill-pond should cease to be employed for the purpose of carrying any two mill-wheels." It was held that nothing passed by the deed, not because it was to take effect only upon the happening of a future event, but because the event, if it should ever happen, might be delayed much beyond the utmost period allowed for the vesting of estates on a future contingency. The event, it was held, must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives, in being, and a little more than twenty-one years afterwards, to prevent the creating of a perpetuity, or an unalienable estate. Such is undoubtedly the law. Besides, no consideration was ever paid for the deed, and the grantor afterwards conveyed to another. Under these circumstances the court very properly held the deed void. But the distinction made by Judge Jackson, in that case, between covenants to stand seised, and deeds of bargain and sale, is mere *dictum*, and has neither reason nor authority to rest upon.

Speaking of the qualities of a bargain and sale, Judge Jackson says: "One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows that a freehold to commence *in futuro* cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another until the future freehold should vest." Hold what? Upon the execution of a deed in which the grantor reserves to himself an estate for life, and conveys the residue, the grantee obtains a present vested right to a future enjoyment of the property; but, until the future freehold vests, the use, the seisin, and the right of possession, remain with the grantor, and there is no conceivable thing that the bargainee will be required to "hold to the use of another."

Judge Jackson seems to have supposed that when such a deed is executed the legal estate or seisin passes immediately to the grantee, and that, until his own future freehold vests, he holds this legal estate, or ideal seisin, to the use of the grantor. But such a theory is wrong, and contrary to every authority we have been able to find. In fact, under the statute of uses, such a theory, which separates the legal estate from the use, cannot be correct; for, by the very terms

of the statute, the lawful seisin, estate, and possession, shall be deemed and adjudged to be in him that hath the use, to all intents, constructions, and purposes, in law; and is made applicable to "any such use in fee simple, fee tail, for life, or for years." "The seisin remains in the person creating the future use till the springing use arises, and is then executed to this use by the statute." 2 Washburn on Real Prop. 282. "If raised by a covenant to stand seised, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arises." Gilbert on Uses, Sugden's note, 163. "A person may covenant to stand seised, or bargain and sell, to the use of another at a future day." In such a case, "the use is served out of the grantor's seisin." 4 Kent, 298. "Here is a conveyance to the bargainee to take effect at the decease of the bargainor, which creates a resulting use to the latter during life, with a vested use in remainder to the bargainee in fee, both uses being served, in succession, out of the seisin of the bargainor." *Jackson v. Dunsbah*, 1 Johns. Cases, 96.

The rule that a bargain and sale must be to the use of the bargainee and not to the use of another, applies to only so much of the estate as is bargained for, and not to the residue, which is not bargained for, and not paid for; and the rule is not violated and there is nothing inequitable or repugnant to the grant, in requiring him to wait for the enjoyment of the property till such time as, by the express terms of the deed under which he claims, he is entitled to it.

It will be noticed that Judge Jackson assumes the existence of a rule, that one use cannot be limited upon another, and that it would be a violation of this rule to give effect to a deed of bargain and sale of a freehold, to commence *in futuro*. Such a rule does exist in England. Mr. Watkins, in his introduction to his very able work on conveyancing, says, that "about the time of passing the statute of uses, some wise man, in the plenitude of legal learning, declared there could not be an use upon an use; and that this very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted;" and Lord Hardwicke, in *Hopkins v. Hopkins*, 1 Atk. 591, says, that by this means, a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Mr. Williams, in his work on Real Property, page 124, says this rule has much of the technical subtlety of the scholastic logic which was then prevalent. Lord Mansfield calls it "absurd narrowness." 2 Doug. 774. Blackstone calls it a "technical scruple;" and Mr. Sugden, in a note to Gilbert on Uses, page 348, says it never ought to have been sanctioned at

all. In *Thacher v. Omans*, decided in 1792, reported in 3d Pick. 521, on page 528, the court refer to the censures of Blackstone and Lord Mansfield, and express strong doubts as to the propriety of admitting it in this country; and Mr. Greenleaf says it may well be doubted whether the rule has been adopted in this country. Note to Greenl. Cruise, title 12, c. 1, § 4. With such a weight of authority against it, if the effect of the rule would be to defeat such conveyances as we are now considering, we think we might be warranted in rejecting it altogether. But such is not its effect. When a freehold is conveyed, to commence at a future day, till such future day arrives the use results to the grantor, and then passes to the grantee; and the uses are not limited one upon the other, but one after the other; and, in this way, a fee simple may be carved into an indefinite number of less estates. "So long as regular order is laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people, separately, for their lives." Williams on Real Prop. 189-90. "Shifting or substituted uses do not fall within this technical rule of law, for they are merely alternate uses." 4 Kent's Com. 301.

The statement that a freehold to commence *in futuro* cannot be conveyed by deed of bargain and sale, which seems first to have been made in *Pray v. Pierce*, as before stated, has been several times repeated in Massachusetts, *Walsh v. Foster*, 12 Mass. 93; *Parker v. Nichols*, 7 Pick. 115; *Gale v. Coburn*, 18 Pick. 397; *Brewer v. Hardy*, 22 Pick. 376; and once at least in this State, *Marden v. Chase*, 32 Maine, 329; but the only case we have found in which an attempt has been made to give a reason for the supposed rule is that of *Welsh v. Foster*; and a careful examination has satisfied us that the argument in that case is unsound, and not supported by an adjudged case that has the weight of authority. It is admitted in all these cases that if it can be shown that the parties to such deeds are near relatives, effect may be given to them as covenants to stand seised, made, not as they purport to be for a pecuniary consideration, but in consideration of love and affection. And there is no doubt that if two deeds should be executed instead of one, that is, if the grantor should first convey the whole estate, and then take back a life lease, the transaction would be held legal.

The doctrine, therefore, that a freehold to commence *in futuro* cannot be conveyed by a deed of bargain and sale, amounts to no more than this: That if the owner of a fee simple estate proposes to reserve to himself a life estate, and to sell the residue, if he deals

with a relative, such an arrangement can be carried into effect by making one deed; but if he deals with a stranger it will be necessary to make two. It is certainly very strange that a doctrine so technical, so easily evaded, and so utterly destitute of merit, should have gained the currency it has.

We entertain no doubt that, by deeds of bargain and sale, deriving their validity from the statute of uses, freeholds may be conveyed to commence *in futuro*. It will be seen that the law is so held in England, and by an overwhelming weight of authority in this country. In fact that such was the law seems never to have been doubted except in Massachusetts and in this State; and we think the error originated in the unauthorized remark found in *Pray v. Pierce*, and has been repeated from time to time without receiving that consideration which its importance demanded.

We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses. In *Thacher v. Omans*, 3 Pick. on p. 525, Chief Justice Dana, speaking of our statute of conveyances, first enacted in 1697, re-enacted in the Revised Laws of 1784, incorporated into the statutes of this State in 1821, and still in force, says: "This statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments; namely, by deed, signed, sealed, and acknowledged, and recorded, as the statute mentions; it does not prescribe any particular kind of deeds or conveyances, but is general, and extends to all kinds of conveyances." On p. 532 he further says: "It seems evident to me that a deed executed, acknowledged and recorded as our statute requires, cannot be considered as a bargain and sale, because the legal estate is thereby passed without the operation of the statute of uses, in as ample a manner as by a feoffment at common law, accompanied with the ancient ceremony of livery of seisin." Such also were the opinions of Chancellor Kent and Prof. Greenleaf, 4 Kent, 461; Greenleaf's Cruise, title 12, c. 1, § 4, note; title 32, c. 4, § 1, note. Mr. Greenleaf, in the note first cited, says that in most of the States, including Maine, "deeds of conveyance derive their effect, not from the statute of uses, but from their own statutes of conveyances; operating nearly like a feoffment, with livery of seisin, to convey the land, and not merely to raise a use to be afterwards executed by the statute of uses."

Mr. Oliver in his work on conveyancing, ed. of 1853, p. 281, speaking of our common warranty deed, says: "This deed derives its operation from statute and has therefore some properties peculiar to itself. . . . The transfer is not effected by the execution of a use, as in a bargain and sale, but the land itself is conveyed, as in a feoffment, except the livery of seisin is dispensed with, upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it." We think these views are sound and if any of the technical rules which have grown up under the statute of uses stood in the way of giving effect to deeds executed in accordance with the provisions of our statute, simply because they purport to convey freeholds to commence at a future day, we think effect might be given to them independently of the statute of uses. But in our judgment no such rules do stand in the way of giving effect to such deeds. They may be upheld either as bargains and sales under the statute of uses or as conveyances deriving their validity from our own statutes.

Having come to the conclusion that the demandant is entitled to recover upon another ground, it was not absolutely necessary to consider the validity of the deed from Mrs. Brown to Oliver S. Nay, which purports to convey a freehold to commence *in futuro*. But, as the question involved is an important one, and was ably argued by the counsel in the case; and, as the court has already decided one case within the past year (*Hunter v. Hunter*), in the county of Sagadahoc, in accordance with the views here expressed, but without any written opinion, and as several other suits involving the same question, are still pending before the court, we deemed it best to make known our decision of the question, and to state our reasons for the decision, in connection with this case.

II. Special rules to be observed in creating future estates subject to a condition precedent.¹

- I. A COMMON-LAW CONTINGENT REMAINDER MUST BE SO CREATED THAT IT MAY BY POSSIBILITY VEST IN INTEREST DURING, OR *EO INSTANTI* WITH THE TERMINATION OF, THE PARTICULAR ESTATE.² FURTHERMORE, IT CANNOT BE MADE TO DEPEND ON AN ESTATE FOR YEARS.

¹ The condition precedent referred to is one which either may not happen at all, or may not happen before some other future event expressly connected with it by the terms of the deed or will. See note p. 869, *supra* — Ed.

² See definition *supra*. The remainder will be valid in its creation if it obeys this rule though it may afterwards fail because the particular estate ends before

STEWART *v.* NEELY.

139 PENNSYLVANIA, 309. — 1890.

Per Curiam. — The authorities cited on behalf of the appellants were not necessary to sustain the familiar rule of the common law, that a contingent remainder must have an estate of freehold to support it. The application of this rule to the case in hand is unique. It may be concisely stated thus: The tenant for life purchases, and has conveyed to her by deed, the interest of the contingent remainderman — the one furthest removed from the succession. The life-tenant then claims that her life-estate is merged into the remainder, that intermediate contingent remainders are thereby destroyed, and that by reason thereof the life-estate has been enlarged into a fee. The idea of a life-estate being merged into a contingent remainder is a novel proposition. Aside from this, a contingent remainder can only be conveyed by a devise; a deed purporting to convey it operates only as an estoppel, unless the conveyance is after the contingency happens. 4 Kent Com. 260; William, R. P. 215; 1 Washb. R. P. 264. We think judgment was properly entered for the defendant on the case stated.

Affirmed.

GOODRIGHT *v.* CORNISH.

1 SALKELD (ENG.), 226. — 1693.

IN ejectment a special verdict was found, viz., Knowling had issue two sons, John and Richard, and devised lands to John for 50 years, if he should so long live, and as for my inheritance after the said term, I devise the same to the heirs male of the body of John, and for default of such issue, then to Richard. The court resolved, 1st. That John had not an estate tail by implication upon the words without issue, because the devisor had given him an estate for years by express words, and the court cannot make such a construction

it is ready to vest. There seems also to be one specific rule limiting contingent remainders, viz: "An estate cannot be given to an unborn person for life followed by an estate to any child of such unborn person." The latter will be a void limitation. It is thought by some that the "rule against perpetuities" applies to common-law contingent remainders, but this is more than doubtful. See Gray (who favors the doctrine) Rule against Perpetuities, §§ 284, 298. In those States where remainders are cut loose from their dependence on the precedent estate there is no doubt that the rule against perpetuities must be extended to them; they would otherwise be under no limitation against remoteness. — ED.

against express words, when thereby they would also drown the estate for years, and make an estate of inheritance. 2d. The court held this devise to the heirs male of the body of John, to be void in its creation. For, for want of an estate of freehold to support it, it was void as a remainder; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it is limited *per verba de præsenti*. If one devise his estate to the heir of J. S., and J. S. is living, the devise shall not be construed an executory devise, and such a devise is therefore void; but if it were to the heir of J. S., after the death of J. S., that is good, as an executory devise. So note the diversity *inter verba de præsenti* and *verba de futuro*. 3d. The court held the limitation to the heirs male of John was become void by the event, whatever it was in its creation, because John is now dead without issue. 4th. The court held, that if the remainder to the heirs male of John was void in point of limitation, then the next remainder limited to Richard took effect presently. 4 Mod. 255, s. c.

THE CHANCELLOR IN HAWLEY *v.* JAMES.

5. PAIGE'S CHANCERY (N. Y.), 318. — 1835.

THE 20th section of the title of the Revised Statutes, so often referred to, prohibits the creation of a contingent remainder upon a term of years, unless the nature of the contingency upon which it is limited is such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of the remainder, or at the termination of such lives. 1 R. S. 724.¹ But this provision of the Revised Statutes cannot be construed to mean that no contingent remainder shall be limited on a term of years, unless it is so limited as to render it certain that the remainder must, in any event, become vested in interest. Upon such a construction of the 20th section of the statute, the next section is not only useless but absurd. The 21st section provides that no estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate. 1 R. S. 724. A remainder to a person not in being must always be contingent until his birth; and until that event it cannot be known that it will ever vest in interest, in whatever form it may be limited. Even if it is to the general heirs of a person in being at the creation of the remainder, it may never become vested, as such person may die

¹ N. Y. R. P. L., §§ 36, 37. — ED.

without an heir. The fair construction of these two sections of the statute taken together, therefore, is, that a contingent remainder upon a term of years must be so limited that it will necessarily vest in interest within the period required by the 20th section, if it ever becomes thus vested. And that a contingent remainder for life, to a person not in being, shall not be limited on a term of years, although it is so limited that it will become vested within that period, if ever. Neither does this 20th section of the statute render it absolutely necessary that the term of years, on which a contingent remainder is limited, should be made determinable upon lives. But such remainder may be limited upon a term in gross, if the remainder itself is so limited that it must necessarily become vested in interest, if ever, during, or at the expiration of, not more than two specified or ascertained lives, in being at the creation of such remainder. Thus, upon a devise to A. for fifty years, as an absolute term, remainder to B. for life, if he should marry C., and remainder in fee to the children of such marriage. The remainder to B., upon condition of his marriage with C., is contingent, but must necessarily vest in interest, if ever, during the period of his own life, although it will never vest in possession if he dies within the term. And the ultimate remainder in fee to the children of the marriage must also vest in interest, if ever, within the period of one life in being at the death of the testator. The first child of the marriage would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children. And it would be no objection to the validity of the contingent remainders to the children, in the cases supposed, that a child might not be born in the lifetime of the father, although begotten before his death, and that it might be brought into existence by the cæsarean operation, even after the death of the mother. For, upon a limitation of a future estate to children, or heirs, or issue, a posthumous child, if born alive, is considered as in existence and capable of taking a vested interest for its own benefit, in the same manner as if born and living at the death of its parents. 1 R. S. 725, sec. 30.¹ *Marsellis v. Thalheimer*, 2 Paige's Rep. 35.

¹ N. Y. R. P. L. § 46. — ED.

2. EXECUTORY FUTURE ESTATES, SUBJECT TO A CONDITION PRECEDENT, MUST OBEY IN THEIR CREATION THE "RULE AGAINST PERPETUITIES."¹

FIRST UNIVERSALIST SOCIETY *v.* BOLAND.

155 MASSACHUSETTS, 171. — 1892.

[Reported herein at p. 525.]²

3. IN NEW YORK AND A FEW OTHER STATES³ TWO OTHER RULES ARE SUBSTITUTED FOR THE RULE AGAINST PERPETUITIES.

- a. "*Every future estate shall be void in its creation which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age.*"⁴

- (1.) ESTATES SUBJECT TO A CONDITION PRECEDENT COME NATURALLY WITHIN THIS RULE.

HAYNES *v.* SHERMAN.

117 NEW YORK, 433. — 1889.

[Reported herein at p. 922.]

¹ This rule, in general terms, is that "no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life [or lives] in being at the creation of the interest." Gray, Rule Against Perpetuities, §§ 201, 214. Periods of gestation, if they occur, will be included. § 220, Gray. Some of our States have rejected the absolute term, allowing an actual minority. This is not a rule against the suspension of the power of alienation. It applies even though the interest be alienable. Gray's Rule against Perpetuities, § 268. A "perpetuity" in the sense of the rule is not "an inalienable, indestructible interest." but "an interest which will not vest till a remote period." *Id.*, § 140. — ED.

² See *Leonard v. Burr*, p. 521, *supra*. *Sears v. Russell*, *infra*, p. 1134. — ED.

³ See note p. 867, *supra*. — ED.

⁴ § 32, N. Y. R. P. L. "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed." *Id.* — ED.

(2.) BY CONSTRUCTION OF THE COURTS AND WITHIN THE SPIRIT OF THE RULE
A SPENDTHRIFT TRUST MAY VIOLATE THE RULE.¹HAYNES *v.* SHERMAN.

117 NEW YORK, 433. — 1889.

EARL, J. — Elijah T. Sherman died in the city of New York in October, 1886, leaving his wife and six children, him surviving, three of them minors, and leaving a will in which he disposed of his estate as follows: "After paying my just debts I give, devise and bequeath all my estate, real and personal and mixed, and wherever situate, to my wife Catharine M. Sherman, in trust, nevertheless, to have and to hold the same and use so much of the income and principal as she may deem necessary for her support and the support of our children until our youngest child now living shall arrive at the age of twenty-one years or would arrive at that age if living, and at that time I order and direct my said estate to be divided among my legal heirs then living in such manner and proportion as they and each of them would be entitled under the laws of the State of New York if I had died intestate." And he appointed his wife sole executrix and empowered her to sell and convey all or any portion of his estate at such prices and upon such terms as she might elect.

The plaintiff contends that this disposition of his estate by the testator is invalid because it offends against the statutes which prohibit perpetuities, and that, therefore, the estate has passed as if he had died intestate; and we are of that opinion. The youngest child of the testator living at the date of his will was born December 10, 1872, and will not, therefore, attain the age of twenty-one years until the 10th day of December, 1893.

The defendants contend that the words "or would arrive at that age if living," may be disregarded, and that the trust would be simply for the minority of the youngest child, would terminate at his death if he died before twenty-one, and hence that it could not extend beyond his life, and is, therefore, valid. When a will contains separate trusts, some of which are legal and some illegal, or various limitations of estates not dependent upon each other or essentially connected, some of which are legal and some illegal, the illegal portions may be stricken out and the other portions permitted

¹The new revision — the Real Property Law of 1896 — has changed the arrangement of the sections of the Revised Statutes and their phraseology to some extent. It has been suggested that an *unlawful* suspension of the absolute power of alienation cannot now arise merely on account of the creation of a spendthrift trust, no matter how many lives are involved. Chaplin on "Express Trusts and Powers," §§ 383-386. — ED.

to stand; and the books are full of illustrations of such cases. The courts will strive to uphold so much of a will as they can without frustrating the main intention of the testator or violating any rule of law. Here it is clear that the testator meant that the trust should last, not only during the life of his grandchild if he should die before twenty-one, but until the time he would reach twenty-one if living. It is the same as if he had in terms created a trust to last until the 10th day of December, 1893. It was then, and not till then, that he meant his estate should be divided among his legal heirs living at that time. There are not two trust terms, but one, and there is but one trust, and hence no part of the trust term can be cut off and no part of the trust can be disregarded for the purpose of rendering the remainder of the term and trust valid. It matters not that the youngest child might live until he should be twenty-one. He might not live so long, and that is enough to condemn the trust. In determining the validity of limitations of estate under the Revised Statutes, 1 R. S. 723, § 15;¹ Id. 773, § 1², as said by Grover, J., in *Schettler v. Smith*, 41 N. Y. 328, "It is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estates will be held void."

It cannot be well said that this trust was limited upon the life of the widow and to terminate at her death. It is doubtless true that the testator expected that his wife would live to the termination of the trust. But the trust was for the benefit of his children as well as his wife, and they have an interest in its execution. It was to continue until the division of the estate, and that was not to take place until December 10, 1893. If the widow should die before that date, the trust, if valid, would devolve upon the court, and it could appoint another trustee. The trust was not so far personal that it would disappear with the death of the widow. The discretion vested in her was not a personal discretion, but one to be exercised by her as trustee, which could, therefore, be devolved upon her successor to be appointed by the court. *Hull v. Hull*, 24 N. Y. 647; *Rogers v. Rogers*, 111 Id. 228.

It is contended further, on the part of the defendants, that, as the widow has full power to use so much of the principal of the estate as she might deem necessary for the support of herself and children,

¹ N. Y. R. P. L., § 32. — ED.

² N. Y. Personal Property Law, § 2. — ED.

and as she has full power of sale the testator meant her to have dominion of the entire estate, and that her children should take what she did not use, and that such disposition confers upon her a fee; and the cases of *Beaumont v. Beaumont*, 91 N. Y. 464; *Wager v. Wager*, 96 Id. 164; and *Crane v. Wright*, 114 Id. 307, are cited to uphold this contention. These cases, as well as certain provisions of the Revised Statutes (1 R. S. 733, §§ 81-83), would have been controlling if the testator had given his widow the absolute power to dispose of the estate for her sole benefit. But she was not solely interested in the estate. She was a trustee and was clothed with a power for the benefit of others as well as herself, and, therefore, she took no greater or other estate under the will than its terms gave her.

As there was here an absolute power of sale conferred upon the widow, it cannot be said that the power to alienate the real estate was suspended. But the proceeds of the sales of the real estate, whether regarded as realty or personalty, would be tied up by the trust, in violation of the provisions of the Revised Statutes first above referred to, and hence the power of sale does not save the provisions of the will from condemnation.

This estate did not vest in the testator's children at his death. It vested in the widow as trustee, and at the termination of the trust period what remained of it was to vest in the testator's legal heirs then living as if he had then died intestate. There were, therefore, no persons in being at the death of the testator, assuming the trust to be valid, who could convey an absolute title to the estate. The trust stood in the way of such a conveyance as well as the impossibility of determining who would take the estate after it passed from under the trust.

We are, therefore, brought to the conclusion that the judgment of the General Term should be reversed and that of the Special Term affirmed, and that the costs of all parties upon the appeal to the General Term and in this court should be paid out of the estate.

Judgment reversed.

*b. "Estates in 'Remainder' Shall be so Limited that Within the Statutory Period, if Ever, they Must Vest in Interest."*¹

¹ Chaplin on The Suspension of the Power of Alienation, § 1. The term "remainder" is here used in the broad sense given to it by the New York statutes. See note, p. 867, *supra*. This rule is nowhere stated in terms in the N. Y. statute, but is a generalization from §§ 32-36, 40, N. Y. R. P. L. The "statutory period" is two lives in being at the creation of the estate, except in the case of a contingent remainder limited on a fee. § 32. See §§ 319, 323 Chaplin. — Ed.

4. THE RULE RESTRICTING THE ACCUMULATION OF THE INCOME OF LAND.¹

III. Descent, devise and alienation of future estates and interests in land.²

HALL v. CHAFFEE.

14 NEW HAMPSHIRE, 215. — 1843.

ANOTHER question in the case arises from the deed by Mrs. Hall. It appears that on the 26th day of April, 1824, the petitioner and her husband, by their quit-claim deed, conveyed to Gaius Hall "all our right, title and claim to all the land or real estate willed to us by Seth Britton." The defendants have all the right and interest of Gaius Hall. Mrs. Chaffee died in the year 1839. The question is, whether the interest which Mrs. Hall took under the will, being by way of executory devise, could be transferred by such a conveyance? A contingent remainder does not confer any interest which is grantable. *Shep. Touch.* 238. At common law, a possibility was held not to be assignable. 6 *Cruise*, tit. 39, § 47. Contingent executory interests or possibilities may be passed at law by fine, by way of estoppel. *Fearne on Rem.* 551. An assignment of a contingent interest in lands of inheritance may be carried into execution by a court of chancery, upon the ground that it is such a contract that its specific performance may be decreed. *Wright v. Wright*, 1 *Vesey*, Sen. 409. It may be transferred by deed in equity to a stranger. *Higden v. Williamson*, 3 *P. Wms.* 132. A court of law, however, will not recognize the assignment of such interests before they vest in possession. 2 *Prest. Abstr.* 118. If A have a term for 1,000 years, and devise it to B for life, remainder to C and his heirs, C may release his interest to B, although he cannot grant it over. 1 *Co.* 110, 114, *Albany's Case*; 10 *Co.* 47, 51, 52, *Lampet's Case*.

But the deed of the petitioner contained a covenant of warranty against all claims under the grantors, and the effect of this covenant remains to be considered. And here the case of *Blanchard v. Brooks*, 12 *Pick.* 47, is in point. In that case, a person being the devisee of a contingent, and also of a vested remainder in lands, made a deed, with covenants of general warranty, and for quiet enjoyment, purporting to convey all his "undivided share or portion, right, title and interest of, in and to" the lands. Mr. Ch. Justice

¹ This rule is statutory. For the New York Statute, see the N. Y. R. P. L., §§ 51-53.

² See § 49, N. Y. R. P. L. — ED.

Shaw says: "The grant in the deed is of all his right, title and interest in the land, and not of the land itself, or of any particular estate in the land. The warranty is of the premises, that is, of the estate granted, which was all his right, title and interest." "The grant in legal effect operated only to pass the vested interest, and not the contingent interest, and the warranty being coextensive with the grant, did not extend to the contingent interest, and of course did not operate upon it by way of estoppel." It was held that the plaintiff was not bound as a privy in estate with the grantor.

The opinion of the court is, that the petitioner is not estopped by her deed to claim the land.

HAVENS *v.* SEA SHORE LAND CO.

47 NEW JERSEY EQUITY, 365. — 1890.

VAN VLEET, V.-C. — This is a partition suit. The title to one of the tracts which the complainants seek to have divided is in dispute. The defendant asserts title to the whole tract; the complainants, on the other hand, assert a title to the undivided half of it, but admit that the defendant has title to an undivided fourth and that the title to the other undivided fourth is in certain other persons. The defendant exhibits a paper title to the whole tract; the important question, therefore, presented for decision is, is the title exhibited by the defendant valid? for if it is, the bill as against the defendant, to that tract, must be dismissed.

Both parties claim under David Curtis, who died testate between 1783 and 1788. At the time of his death he owned two undivided sevenths of Manasquan Beach, one of which he acquired from Elisha Lawrence, by deed dated July, 1770, and the other from Benjamin Lawrence, by a deed which it is alleged is lost. Among the gifts made by David Curtis by his will there is one which reads, in substance, as follows:

"I give and devise unto my eldest son, Elisha, that right of beach I bought of Elisha Lawrence — to him and the heirs of his body lawfully begotten, and for the want of such heir or heirs, then to be equally divided between my two sons, John and Benjamin."

David Curtis, besides limiting over to his two sons, John and Benjamin, the land devised to his son, Elisha, made John and Benjamin his residuary devisees, and they, as such devisees, took that undivided seventh of Manasquan Beach which had been conveyed to their father by Benjamin Lawrence. The thing in dispute is the one-half of that seventh which David Curtis acquired from Elisha Lawrence, and which he by his will limited over to his son

John in case his son Elisha, for the want of heirs of his body, did not take it. The defendant claims this half and puts forward as the foundation of its title a deed purporting to have been made on the 31st day of May 1788, by John Curtis to Joseph Lawrence. The whole contest between the parties centres in this deed. If it passed the land in controversy, the defendant will be entitled to prevail in this suit; if it did not, the complainants will be entitled to the decree they ask. The complainants contend, first, that the deed has not been sufficiently proved to entitle it to be admitted in evidence; and, secondly, that if it was admitted, no effect could be given to it — first, for the want of apt words to pass any right or estate which the grantor may have held at the time of its execution; and, second, because the grantor then held no right or estate in the land which he could grant or convey. These questions will be considered in an order directly the reverse of that in which they have just been stated.

It is undisputed that Elisha Curtis, the eldest son of David, died childless, never having had issue of his body. John died before Elisha. Their deaths occurred very near together in point of time, but the proof makes it entirely clear that John died first, so that it was undetermined when John died whether or not Elisha would have issue of his body. As the law stood when the devise to Elisha took effect, it is clear that he took an estate tail in the land devised. Our statute cutting an estate tail down to an estate for life in the first taker, with remainder in fee to the issue of his body, was not passed until 1820, Elm. Dig. 130, § 6, and the devise to Elisha took effect prior to 1788. Chief Justice Kirkpatrick stated with great clearness in *Den v. Taylor*, 2 South. 413, 417, what words would be held to be sufficient to create an estate tail. He said: "It is well settled that a devise to one and his heirs if he die without issue, then over to another, creates an estate tail, as if the principal devise had been in the most technical language, to him and the heirs of his body. The words of the devise over — if he die without issue then over to another — limit the generality of the term heirs in the principal devise, and lead us to the inevitable conclusion that the testator intended heirs of the body only, and not heirs generally. And whenever this intention can be collected from the whole will, taken together, let the phraseology in the particular clauses of it be what it may, it has been always construed to make an estate tail." This statement of the law has been so uniformly followed by the courts of this State as to have become a canon of real property law. *Moore v. Rake*, 2 Dutch. 574, 585. It is entirely clear that Elisha Curtis took an estate tail in the land in controversy.

This being so, it necessarily follows that the devise over to John and Benjamin, in case Elisha did not have issue of his body, gave them a vested remainder in fee, subject to be defeated by the birth of issue to Elisha. The law is settled, that a remainder limited upon an estate tail will be held to be vested, though it is uncertain whether a right to possession will ever vest in the remainderman. The decision of the Court of Errors and Appeals in *Moore v. Rake*, 2 Dutch. 574, is directly in point, and furnishes an authoritative illustration of the manner in which this principle of law is to be applied. The devise in that case took effect in 1795, and was expressed substantially in this form:

"I give to my son Isaac, his heirs and assigns, all my lands whereon I now live, to hold to him, his heirs and assigns forever, but if my son Isaac should die without lawful issue, then I give all my land to my wife, her heirs and assigns forever."

The testator's son Isaac died in 1843, without issue, never having been married. His mother, the testator's widow, died in 1832, over ten years before Isaac. The controverted question in the case was what estate the testator's wife took under the devise. The court held that she took a vested remainder, and not by way of an executory devise, nor a contingent remainder. Each of the three judges who wrote opinions — Chancellor Williamson and Justices Elmer and Vredenburg — so expressly declared. Justice Vredenburg (p. 586) gave the following summary of the leading rules distinguishing a vested from a contingent remainder: "An estate is vested when there is a present fixed right of present or future enjoyment. The law favors the vesting of remainders, and does it at the first opportunity. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of the actual enjoyment. A remainder limited upon an estate tail is held to be vested, though it is uncertain if the possession will ever take place." There can, therefore, be no doubt that John Curtis, by force of the devise to him, took a vested remainder in fee in the land in controversy, and it is equally certain, if such was the character of his estate, that he had good right and full power to make an effectual conveyance of it during the life of his brother Elisha.

If a different conclusion had been reached as to the nature of John's estate, and it had been found that the remainder limited to him was contingent, still I think the court would have been bound to declare, in conformity to the well-settled law on this subject, that

he had full power, during the life of Elisha, to make an effectual conveyance of his estate in the land, though it was uncertain whether such estate would ever vest in possession. All contingent estates of inheritance, or possibilities coupled with an interest, where the person who is to take is certain, may be conveyed or devised before the contingency on which they depend happens. In *Ackerman's Admr. v. Vreeland's Exr.*, 1 McCart. 23, 29, Chancellor Green said, it may be relied on as a rule, that every interest in land, however remote the possibility is, may be released. The law on this subject as stated by Sergeant Williams, in his note to *Purefoy v. Rogers*, 2 Saund. 388k, and adopted by the Supreme Court in *Den v. Manners*, Spen. 142, 145, and restated approvingly by Justice Vredenburg in *Moore v. Rake*, 2 Dutch. 593, is this: "It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates and possibilities, accompanied by an interest, are descendible to the heir, or transmissible to the representative of a person dying, or may be granted, assigned or devised by him, before the contingency upon which they depend takes effect." These authorities make it plain that the first question must be decided in favor of the defendant. At the date of the deed which the defendant puts forward as the foundation of its title there can be no doubt that John Curtis had full power to make an effectual conveyance of the land in controversy. * * *

IN RE JACKSON'S DEED.

4 KEYES (N. Y.), 369, AND OTHER CASES.

[Reported herein at pp. 890-902.]

BATES. v. SHRAEDER.

13 JOHNSON (N. Y.), 260. — 1816.

[Reported herein at p. 460.]¹

NICOLL v. NEW YORK AND ERIE R. R. CO.

12 NEW YORK, 121. — 1854.

[Reported herein at p. 527.]

UPINGTON v. CORRIGAN.

151 NEW YORK, 143. — 1896

[Reported herein at p. 533.]

¹ See also *Cook v. Hammond*, 4 Mason, 467, Fed. Cases No. 3159. — ED.

IV. The destruction of future estates and interests in land.¹BRAYTON, J., IN WILLIAMS *v.* ANGELL.

7 RHODE ISLAND, 145. — 1862.

A SECOND objection suggested to this title of the wards is, that the title has been forfeited under the condition imposed upon the estate for life. This condition was, that the tenant for life should pay into the hands of Elisha Harris, appointed a trustee for that purpose, yearly, the sum of twenty-five dollars. This annuity was not paid. The arrears amounted, in 1841, to the sum of \$211.77, no part of which has ever been paid. It is suggested that the life-estate, by the forfeiture, was destroyed before the birth of issue, and before the remainder could, by law, vest, and so the remainder failed for want of this estate to support it.

By failure to pay, and suffering the annuity to be in arrear, the life-estate became liable to forfeiture; and had the proper proceedings been taken to avoid the estate for this cause, and equity had not relieved against it, as it might, it might have been and would have been destroyed. In order to the forfeiture in such case, however, it is necessary that there should be an entry for condition broken, or claim by the heirs for the purpose of avoiding the estate.

Co. Lit., § 247; 2 Bl. Com. 135; Cruise Digest, c. xxxii., § 30. No direct claim, and no entry were ever made for the forfeiture of this estate while it existed; but it remained subsisting in the donee until it expired by its own limitation, upon his death, and until, by the terms of the will, the remainder vested in his issue.

JORDAN *v.* MCCLURE.

85 PENNSYLVANIA STATE, 495. — 1877.

SHARSWOOD, J. — * * * But let us concede that the instrument of May 6th, 1819, is distinguishable from that in *Turner v. Scott*, *supra*, that it was not a will but an irrevocable grant. *Eckman v. Eckman*, 18 P. F. Smith 460. It conveys to Pomp, Tamer and Betty the premises "for their own use during their natural life, and afterwards to their lawful [issue], if they have any, and if not [no] lawful issue remains after their deaths, the above described lands shall revert to the lawful heirs of James Nicholson, and the said Pomp, Tamer and Betty Mathers are to take possession of said tract

¹See *Moore v. Littel* p. 894 *supra*, at p. 897. See also N. Y. R. P. L. §§ 47-48. — ED.

of land immediately after the decease of the said James Nicholson and Mary, his wife, and not before, then to have full possession, one or more of them, during their natural life and the life or lives of their lawful issue, which land by them, or any one or more of their lawful issue shall not be allowed to rent or dispose of in any way or manner whatsoever."

If this instrument were a will and to be construed according to the principles applied in such cases, there would be great reason for holding the limitation to be that of an estate tail to Pomp, Tamer and Betsey. But it is a deed and the word "issue" will not supply the want of the word "heirs" in a deed. 2 Black. Com. 115. Lord Coke tells us, on the authority of Littleton, that if a man giveth land to a man *et exitibus de corpore suo, legitimate procreatis or semine suo* he hath but an estate for life, for that there wanteth words of inheritance. Co. Litt. 20 b.

Taking the entire clause together we are of the opinion that it granted an estate for their lives to Pomp, Tamer and Betty, with a remainder to their children for their lives. This was of course a contingent remainder to the children, as there were none then in being. The reversion in fee was invested in James Nicholson, for a limitation to the right heirs of the grantor continues in him as the old reversion. Fearne on Cont. Rem. 50. James Nicholson devised this reversion after the death of his widow to Pomp, Tamer and Betty in fee, subject as we have seen to an executory devise over to the survivor.¹ When it vested in them a merger of their life estate held under the deed immediately took place — of the lesser into the greater estate. No children of Pomp, Tamer and Betty had been then born — the life-estate to them in remainder was still in contingency. It was destroyed by the merger, a familiar and well-settled principle. Fearne on Cont. Rem. 323. The life-estate in remainder was left without any particular estate to support it and it fell. The deed to McClure then passed to him the fee.

Thus we conclude that *quacunque via data*, whether the instrument of May 6th, 1819, be regarded as a will or as a deed, the title to the premises was in the defendant below.

Judgment affirmed.

¹ This will was made in 1828. — ED.

WADDELL *v.* RATTEW.

5 RAWLE (PENN.), 230. — 1835.

KENNEDY, J. — As the question to be decided in this case arises out of the will of John Rattew, deceased, it becomes necessary in order to solve it correctly, to ascertain, if possible, from the face of the will itself, what was the intention of the testator. And after having discovered this, it will be our duty in construing the devise in question, to carry it into effect, so far as it shall be found consistent with the rules and policy of the law to do so.

The words of the will which have given rise to the present controversy are: "Item, I give and bequeath to my son Aaron, the messuage, plantation, and tract of land, where my son John now lives, in Middleton township, containing about one hundred and nineteen acres, more or less, with the appurtenances, to hold to him, my said son Aaron, during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, and his heirs and assigns forever; but in case he shall die without having such issue, then I give and devise the same to all the rest of my children, and their heirs and assigns forever, as tenants in common."

The plaintiff's counsel contend that Aaron took under the will a conditional fee, determinable upon his dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or, in other words, they allege that Aaron, according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee simple estate in the land devised to him, defeasible, however, upon his dying without issue living at the time of his death. The birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator could only have operated as an executory devise; because, as a contingent remainder, it could not take effect after the determinable fee had become vested in Aaron. I must confess that this view of the devise in question when first presented by the counsel for the plaintiff struck me forcibly as having something in it; and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common-law recovery and had had issue, who had died during his life, and he had then died himself without any living at the time of his death, it may possibly be that

the ulterior devise of the land to the other children of the testator would have been operative and taken effect as an executory devise, for it has been said that an estate may be devised over in either of two events, so that in the one event the devise may operate as a contingent remainder, and in the other as an executory devise. *Doe v. Selby*, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. Law Rep. 277; 2 Pow. on Dev. by Jarman, 245.

Be this, however, as it may, the event which has occurred in this case does not render it necessary to decide it under such aspect; but if it did, I see no objection that could be made to it, unless it might possibly be thought by some, that to adopt such a principle would be entrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise. *Reeve v. Long*, Carth. 310; *Purefoy v. Rogers*, 2 Saund. 380, and cases cited in note (9), also 2 Pow. on Dev. by Jarman, 237. Besides these there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel; it is this: That to constitute an ulterior limitation, an executory devise where there is a prior estate of freehold devised, the latter must not be merely liable to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A. for life, and after his decease to the unborn children of B., this would be a contingent remainder in such children; but under a devise to A. for life, and after his decease and one day to the children of B., the children of B. in this case would take an executory devise. 2 Pow. on Dev. by Jarman, 238. And for the day undisposed of, between the death of A. and the time fixed for the ulterior devise to the children of B. to take effect, the estate would belong to the heir or residuary devisee. *Ibid.* *Stephens v. Stephens*, Ca. Temp. Talb. 238. Now, it is obvious in the case under consideration, that the prior estate devised to Aaron for life could not be said to be necessarily determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect; it was at most, even upon the construction contended for by the counsel of the plaintiff, only liable to be determined before that event might happen; and hence according to the rule just mentioned cannot, or at least in the event that has occurred cannot, be considered an executory devise, but must be deemed a contingent

remainder. This construction seems to be requisite also, for the purpose of carrying into effect an intention pretty plainly manifested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate in him for life, making it neither more or less with a contingent remainder to him in fee upon his dying, leaving issue living at the time of his death; we give full effect to the letter of the will, as well as the intent of the testator. If the fee given to Aaron, which is admitted to have been determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being ever in contingency and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and, therefore, could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over to them, after a prior vested determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees limited merely as substitutes or alternatives, one for the other, that is, the first to Aaron, if he should die leaving issue living at the time of his death; but, if not, then to the other children of the testator in lieu thereof; thus substituting the latter in the room of the former, if it should fail of effect. This is the principle which was decided in *Loddington v. Kyme*, 3 Lev. 431; s. c. 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation, was termed a contingency with a double aspect. *Fearne on Cont. Rem.* 373. So that if the estate vested in the one, it never could in the other. *Herbert v. Selby*, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. L. Rep. 278. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron, by suffering the common recovery, having determined his life-estate, the only proof of the remainder, before it became vested, it fell, and never could take effect afterwards.

The plaintiffs, therefore, have no right to recover the land, and the judgment is affirmed.

RICE *v.* BOSTON & WORCESTER RAILROAD CORPORATION.

12 ALLEN (MASS.), 141. — 1866.

WRIT of entry. Demandant's father conveyed the premises in question to the railroad corporation in 1834, by a warranty deed which stated that the conveyance was made upon the express condition that the corporation should forever maintain and keep in good repair a pass-way over the same, and also certain fences. In 1842 demandant's father conveyed to him by a deed of warranty a large tract the description of which included the demanded premises, and died intestate before any breach of the condition. Demandant offered evidence of a breach of condition after his father's death. The judge excluded the evidence and demandant excepts.

BIGELOW, C. J. — It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by a deed to a third person before entry for a breach. This rule is stated in Co. Litt. 214 a, in these words: "Nothing in action, entry or re-entry can be granted over;" and the reason given is "for avoiding of maintenance, suppressing of rights and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." This ancient doctrine had its origin in the early statutes against maintenance and champerty in England, the last of which, 32 Henry VIII., c. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or, as Coke expresses it, "the grantor and grantee, albeit the grant be merely void, are within danger of the statute." Co. Litt. 369 a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text writers and courts of justice. 2 Cruise Dig., Greenl. ed., tit. xiii., c. 1, § 15; 1 Washburn on Real Prop. 453; 2 Ib. 599; I. Smith's Lead. Cas. (5th ed.) 113; *Nicoll v. New York & Erie Railroad*, 2 Kernan 133; *Williams v. Jackson*, 5 Johns. 498; *Hooper v. Cummings*, 45 Maine 359; *Guild v. Richards*, 16 Gray.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 157, 158: A condition "may be discharged by matter *ex post facto*; as in the

examples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition, (1 d. 11) the rule is said to be, "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." See also 1 Washburn on Real Prop. 453; *Hooper v. Cummings*, 45 Maine, 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities, it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor alienes the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est hæres viventis*; and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever. Perkins, §§ 830-833; Litt., § 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities already cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage

maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as a foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of the law. Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. Stearns on Real Actions, 226.

We know of no statute which has changed the rules of the common law in this commonwealth in relation to the alienation of a right of entry for breach of a condition in a deed. By these rules, without considering the other grounds of defense insisted upon at the trial, it is apparent that the demandant cannot recover the demanded premises; not as heir, because he did not inherit that which his father had conveyed in his lifetime; nor as purchaser, because his deed was void.

Exceptions overruled.¹

¹ It has been held in two states that the right of re-entry for condition broken can be reserved (sold ?) to a person other than the grantor or his heirs. *McKissick v. Pickle*, 16 Pa. St. 140; *Hamilton v. Kneeland*, 1 Nev. 40. — ED.

CHAPTER VII:

JOINT OWNERSHIP OF INTERESTS IN LAND.

I. Kinds of joint interests and characteristics of each.

I. ESTATES IN JOINT TENANCY.

BABBITT *v.* DAY.

41 NEW JERSEY EQUITY, 392. — 1886.

[*Reported herein at p. 685.*]¹

HAUGHABAUGH *v.* HONALD.

I CONSTITUTIONAL COURT (S. C.), 90. — 1812.

THIS was an action to recover a moiety of 100 acres, originally granted to Anthony Slack. — A. S. by his last will, in 1761, devised the 100 acres to his wife and three daughters, and their heirs. The widow and three daughters occupied the land after his death; afterwards the widow died intestate; then one of the daughters died an infant and unmarried. The two surviving daughters married; one of them with Mark Honald; the other with John Seastrunk. Seastrunk and Honald, and their wives, lived on the same tract, and a fence divided their possessions. In 1786 Mark Honald's wife died, leaving one son, David Honald. Mark Honald continued in possession after his wife's death, married a second wife, and died in the year 1795, leaving a widow, the defendant, Hannah Honald, who has continued in possession from the time of his death. John Seastrunk and his wife continued in possession of their part until 1798, when they conveyed a moiety of the said 100 acres to one John Wainwright; which moiety they describe as bounded on the upper side by part of the said tract held by the heirs of Mark Honald. This deed was executed by the wife of Seastrunk, but she did not release her inheritance. John Wainwright conveyed the part purchased of Seastrunk to the plaintiff. David Honald, after he became of age, conveyed to the plaintiff the other moiety.

¹ As to the "unities" needful to constitute an estate in "joint tenancy" see *Spencer v. Austin*, p. 944, *infra*. — ED.

The defendant contended that at the death of the wife of Mark Honald, her interest survived to her sister, Mrs. Seastrunk, and that nothing passed to the plaintiff by the conveyance of David Honald.

His Honor charged the jury that, on the death of Mrs. Honald her part survived to Mrs. Seastrunk, her sister; and no estate in the land descended to David Honald, the lessor of the plaintiff.

Verdict for defendant. Motion for a new trial.

COLCOCK, J. — It is conceded that the daughters of Anthony Slack held as joint tenants. The only question then is, "Was there any division in their lives of the property?" It does not appear that there was any division, or any act of the parties, which the court can construe into a severance of the estate. On the death of Mrs. Honald, her sister took the whole by survivorship. The land did not descend to the son, and therefore he had no right to convey to the plaintiff. As the plaintiff must recover on the strength of his own title, the defendant's need not be inquired into. I am of opinion the motion should be rejected.

BREVARD, J. — The plaintiff must recover in this action on the strength of his own title, and not on the weakness of his adversary's. It was contended for the plaintiff: 1st. That on the death of Mrs. Honald in 1786, the estate did not vest in Mrs. Seastrunk, by survivorship, for that the act of Assembly of 1748, P. L. 217, takes away the right of survivorship. 2d. That the evidence given in the case was sufficient to prove a severance of the joint estate before Mrs. Honald's death. My opinion is the verdict ought to stand. The act of Assembly, 1748, only provides an easier mode for obtaining partition of joint estates; but does not change their nature or properties. The *jus accrescendi* was abolished by the act of 1791, and not before. This act is a legislative declaration of what the law was before that time. On the death of Mrs. Honald, in 1786, the whole estate vested in her sister, unless the joint tenancy had been severed in her life. If there was clear proof, or even such evidence as would amount to a strong probability, of a severance between the joint tenants, by agreement; or, by a bargain and sale of Mrs. Seastrunk's moiety, which would operate a severance, before Mrs. Honald's death, my opinion would be different. A parol agreement and partition was good at common law, Co. Lit. 165, 171; and notwithstanding the statute of frauds, such a partition may be valid, if the line be sufficiently marked on the ground, and manifested by a separate distinct possession for a sufficient length of time. 1 Binney, 216. The evidence in this case was too vague and slight to found

a presumption of a legal and valid partition, even by parol. There was no evidence of agreement to divide. The joint tenants were both married women, and would not be bound by any agreement made by their husbands, unless their consent was obtained agreeably to law. The evidence of a separate possession was too loose to afford any solid ground to presume a partition. This evidence consists chiefly of proof that Mark Honald was in possession of a part until his death; and that in 1798 John Seastrunk and his wife conveyed to John Wainwright a moiety of the tract; and the conveyance in describing the land states that it is bounded on the upper side by part of the said tract held by the heirs of Mark Honald. Mrs. Seastrunk is joined in this deed, but there is no renunciation of her inheritance. The argument drawn from the language of this deed in the description of the premises has no weight. It cannot by intendment and implication divest Mrs. Seastrunk of her inheritance. For anything that appears to the Court, she has never consented to part from her estate. The deed could not estop her, even if it were more explicit than it is. * * *

Since, therefore, there is no will, no proof whatever of partition, agreeably to the act of 1748, and the primogeniture act does not apply, it follows that Mrs. Seastrunk took the whole estate by survivorship, and nothing passed to the plaintiff by the deed of David Honald.

Motion refused.

THORNBURG *v.* WIGGINS.

135 INDIANA, 178. — 1893.

DAILEY, J. — This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees [Wiggins and wife] a warranty deed, conveying to them the fee-simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th " day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were

defendants below, recovered a judgment in the Randolph Circuit Court for the sum of \$403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof, taken as the property of said appellee, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death.

It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 396.

The 9th Am. and Eng. Encyc. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally . . . they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seized not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seized of the whole, and each being seized of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. . . . Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole, the estate is inseverable — cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424. * * *

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Preston on Estates, 132; 2 Blackstone's Com., Sharswood's note; 4 Kent's Com., side page 363; 1 Bishop on Married Women; Freeman on Cotenancy, § 72; *Fladung v. Rose*, 58 Md. 13 (24).

"And in case of devises and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stewart on Husband and Wife, §§ 307-310; Tiedeman on Real Property, § 244.

"And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise,"

etc. *Hoffman v. Stigers*, 28 Ia. 310; *Brown v. Brown*, 32 N. E. Rep. 1128.

So it seems that husband and wife may, by express words, be made tenants in common by gift to them during coverture. *McDermott v. French*, 15 N. J. Eq. 80. * * *

If, as contended by appellees, the rule prevails that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties — joint tenancy would be superseded or put in abeyance by the estate created by law — tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution. *Freeman on Ex.*, 125.

Judgment reversed, with instructions to the Circuit Court to sustain the demurrer to each paragraph of the complaint.

CAMPBELL v. HERRON.

I CONFERENCE REPORTS (N. C.), 291. — 1801.

[Reported herein at p. 947.]

2. ESTATES IN COMMON.

SPENCER *v.* AUSTIN.

38 VERMONT, 258. — 1865.

BILL in chancery to ascertain the interests of the several parties in the premises in question. In 1830 Gideon and Stephen Spencer, owning the lands in common, by joint lease demised the lands to one Ward, reserving an annual rent of \$800. The lease contained a clause for re-entry in case of non-payment of rent. In 1833 Stephen Spencer transferred to Apollos Austin all his right in the lands and rents. In 1836 Ward transferred his rights under the lease in one undivided moiety of the same land to Austin. Gideon Spencer died in 1847.

WILSON, J. — The orators seek to charge the whole land with the payment of the rent due to them as the assignees and representatives of Gideon Spencer, and whether they are entitled to the relief sought for depends upon the original rights of Gideon and Stephen Spencer as tenants in common of the land sought to be charged, and upon the legal effect of the several conveyances under which these parties respectively claim title to the premises. Gideon and Stephen Spencer were, at the date of the lease to Ward, tenants in common of the land conveyed. "The only unity required between tenants in common is that of possession, for one tenant may hold his part in fee simple, the other in tail or for life; so that there is no unity of interest. One may hold by descent, the other by purchase; so that there is no unity of title. One estate may have been vested fifty years, the other but yesterday; so that there is no unity of time." Litt., § 292; 1 Inst. 190; Cr. Dig. B. 2, tit 20; 2 Black. Com. 191. "Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." Black. Com. 146. And among the incidents attending a joint tenancy is the doctrine or right of survivorship which does not exist in tenancy in common. The ancient English law was apt in its constructions of conveyances to favor joint tenancy rather than tenancy in common; but joint tenancies, for a long period of time, have been and still are regarded with so little favor in England and in this country, both in courts of law and equity, that whenever the expressions will import an intention in favor of a tenancy in common, such effect will be given to them. Our legislature, for the purpose of protecting the several interests of persons in the same land, and guarding them against the incidents attending a joint tenancy and the injustice which might

result therefrom, has declared that all conveyances and devises of lands made to two or more persons, except conveyances and devises made in trust, or made to husband or wife, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them or unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy. G. S., c. 64, §§ 2 and 3.¹ The reason of the rule which protects the title and several interests of tenants in common, while they jointly possess the estate, each under his own absolute title to a moiety of the lands, may exist in case of a joint conveyance by them, of part of their interest in the premises, and upon principle the rule should extend to and protect their reserved rights in the estate under such conveyance, and preserve them in severalty, so long as such relation exists, either in respect to the proceeds of the estate, or in respect to their reserved rights in the estate, unless the conveyance contain some express provision to the contrary. The principal incidents then attending a tenancy in common being such as merely arise from the unity of possession, it follows that one tenant in common may convey his estate without the other, and resume it at any time, or they may unite in a common conveyance of their respective estates, without necessarily intermingling or prejudicing their separate rights or interests.

The two Spencers, holding by separate and independent titles, in 1830, by their joint deed, made the lease to Ward, reserving an annual rent of \$800. The lease among other stipulations contained a clause of re-entry in case of non payment of the rent. The rent was made payable in gross, but it belonged to each separately, in equal moieties, as tenants in common, in the same right as that in which they had held the land. By the terms of the lease neither Spencer released to the other any right to or interest in his moiety of the estate, nor in his security upon such moiety for his share of the rent. The joint lease of Spencers to Ward did not in any manner affect their reserved rights as tenants in common. They were the same as if the lease to Ward had been made by two separate deeds of the Spencers, each of his own moiety, reserving rent, and a right of re-entry for condition broken. The lease gave neither of them any estate in, or control over the title or part of the other. Their reserved estate in the land was, in effect, several, their right to the rent several, and their right of re-entry for condition broken

¹ For New York see the R. P. L., § 56. — ED.

was several. And "where a person enters for condition broken the estate becomes void *ab initio*, and the person who enters is again seised of his original estate in the same manner as if he had never conveyed it away." Lit., § 325; 1 Inst. 202 a; Cruise's Dig. B. 2, tit. Condition. Stephen Spencer in 1833 conveyed his interest in the premises to Apollos Austin. He conveyed to Austin his moiety of the rent due and growing due, and his moiety of the land charged only with the payment of his part of the rent; by which Austin succeeded to the title and rights of Stephen Spencer which were co-extensive with the rights of Gideon Spencer. In 1836 Ward assigned his interest in one undivided moiety of the same land to Austin, by which Austin became seised of all the right and title to the moiety owned by Stephen Spencer at the time the lease was made by the Spencers to Ward. It is urged by the orators that the assignment from the lessor Stephen Spencer of one-half of the lessor's interest in the premises, and the conveyance from Ward of one-half of the lessee's interest, operated as a merger of these estates in Apollōs Austin and vested in him the title to one undivided half, in fee. It is true that those conveyances vested in Apollōs Austin the title to one undivided half of the premises, but it did not necessarily follow that the conveyances operated as a merger of those estates in Austin, so far as to extinguish his rights under the lease. The question is upon the intent of Austin, in whom the interests were united; and it appears to us that there could have been no intention to create a merger of the estates. In *Walker, Smith & Co. v. Barker and Fletcher*, 26 Vt. 710, it was held that the estates when united will not be treated as merged, so as to operate as payment or extinguishment of the debt, unless such was the evident intention of the parties, nor will that result follow if there exists some beneficial interest that should be protected, and where it is for the benefit of the party to keep the legal and equitable interests separate and distinct. And in the case of *Forbes v. Moffat*, 18 Vesey 384, the rule was recognized that the whole question rests upon an expressed or presumed intention of the parties, and that the debt will be treated as paid and satisfied when it is evident that the estates were united with a view to satisfy the debt, otherwise it will have no such effect; and such is the rule both at law and in equity. Under the circumstances we think the case stands the same as if Stephen Spencer had become the assignee of Ward. The two estates, viz.: that of Stephen Spencer reserved in the lease, and that of Ward in Stephen Spencer's moiety of the land, were united in Apollōs Austin and he became the owner of the moiety of Stephen Spencer and a tenant in common with Gideon Spencer with all the right of prop-

erty vested in him that was vested in Stephen Spencer at the date of the lease. The right of Austin to the rent in arrear was not satisfied by the union of the two estates; he still had a right to enjoy his moiety of the land, as well for the rent in arrear as for the accruing rent. Gideon Spencer, at the time of the execution of the lease by him and his co-tenant Stephen Spencer to Ward, had no title to or interest in Stephen Spencer's moiety of the premises; he derived none from the joint lease to Ward, nor from the subsequent assignment and conveyance by which Austin became the owner of Stephen Spencer's moiety of the premises; and it is clear that Austin is entitled to the free use and profits of his moiety of the lands, and to an equal lien and charge for the Stephen Spencer rents, upon the property in the same manner and to the same extent as the orators. We are entirely satisfied with the result, for it appears to be in accordance with the intention and understanding of the parties as disclosed by the testimony in the case. It is not reasonable to suppose that the Spencers, by uniting in the execution of the lease to Ward, intended to affect their separate rights in the estate, or the rights of their grantees, nor will equity allow the orators to extend their security over the whole land when so manifestly contrary to the intention of the parties. * * *

The decree of the chancellor, by which the orator's bill was dismissed, is affirmed with costs to the defendants. * * *

3. ESTATES IN COPARCENARY.

CAMPBELL *v.* HERRON.

I CONFERENCE REPORTS (N. C.), 291. — 1801:

THE will of Rufus Mersden gave to his wife the use of certain lands for life and after her death to the use of his "three daughters, namely, Hannah, Alice and Peggy, and to their heirs, executors, administrators and assigns forever, and to no other use or uses whatever." Hannah married and both she and her husband died before the widow, leaving a child, Alice, one of the complainants herein. The widow died in 1758, leaving her daughters, Alice and Peggy, and her granddaughter Alice surviving. Peggy married in 1785, and is now deceased, leaving her husband and a son, both of whom are defendants herein. The daughter Alice and John Lorden, husband of Peggy, are in possession of the land. Complainant claims one-third part of the premises and an account of the profits accrued since the death of the life tenant. Defendant demurred on

the ground that the daughters were joint tenants and that therefore complainant has no claim to a share of the land. If they took as co-parceners or tenants in common, complainants could succeed.

BY THE COURT. — It is not doubted but that if a person devises land to one who is his next heir, and his heirs, the devise is void, and the heir shall take by descent; or if a testator devise that his lands shall descend to his son, the devise is void, and the devisee shall be in by descent. Powell on Devises, 427, 428, and the authorities there cited. 1st. Because it was for the benefit of creditors. 2d. Because the lord would have been defrauded of the fruits of his seignior, the consequence of descent. But wherever the devise makes an alteration of the limitation of the estate, from that which takes place in the case of descent, then the principle ceases to operate, and the heir takes by purchase. Pow. Dev. 439. In the present case, if the lands, etc., had descended to the three daughters, they would have taken as coparceners. Survivorship therefore never could have taken place between them. But the testator, after giving a life-estate to his wife in the premises, gives, grants, etc., the use of them to his three daughters, named Hannah, Alice and Peggy, and to no other use or uses whatsoever.

It is admitted that the words made use of in this devise, in feudal times, would have created an estate in joint tenancy — the reason assigned why joint tenancies were favored in those times is that it prevented a multiplication of tenures. But it is said that as the feudal tenures wore off this rule has been gradually departed from — that the intent, and not the words, should form the rule of decision. It is true that joint tenancies are less and tenancies in common are more favored than they anciently were, particularly where a father is making provision for his children, and makes use of any words, which a court can properly lay hold of and make instrumental for that purpose. 1 P. W. 14, 2 Atk. 122; Cowp. 660, 2 Ves. 252, 256; 3 Atk. 731. But every one of the cases proves that an estate created by the same words that are made use of in the present instance must be a joint tenancy. The ground of decision in every one of them was particular words made use of, from which the court collected an intent in the devisor to create a tenancy in common; such as, “equally to be divided, etc.,” “respectively, etc.” But we know of no case even in a will, or in deeds which derive their operation from the statute of uses, where the same or similar words are not made use of, that a similar determination has taken place; so that these cases are rather exceptions to the general rule; and as no words are made use of here that can bring the case within any of the exceptions, it must be considered a joint tenancy.

Can it be presumed, in the case of *Regden v. Valliers*, as reported in 2 Ves. 252, and 3 Atk. 731, above cited, that Lord Hardwicke would have made the same determination, had the words "equally to be divided between them" not have been made use of in this deed? Or would his reasoning have been applicable to the case had these words been omitted? Although the reasons that formerly favored joint tenancy do not hold now so strong as formerly, yet the rules to which they gave rise in many respects exist (Pow. Dev. 355), although frequently inconveniencies are felt from them. We therefore think that the words made use of in this devise create a joint tenancy, there being no particular circumstance or words in it from which an intent can be collected that the testator meant to convey a tenancy in common. Pow. Dev. 439; Cro. Eliz. 431; 2 Vern. 545; 3 Lev. 127, 128; Co. Litt. 189; 1 Lev. 112.

GILPIN *v.* HOLLINGSWORTH.

3 MARYLAND, 190. — 1852.

EJECTMENT to recover an undivided third part of certain lands. The question involved arises under the will of Henry Hollingsworth, the material part of which is set forth in the opinion. Hollingsworth left two children by his first and four by his second wife. These six children partitioned the land amongst themselves by mutual deeds and the parcel in question was allotted to Anne, one of the second wife's children. Anne died seised, intestate and without issue. Her half-sister, Mary, her sister of the whole blood, Elizabeth, and children of another sister of the whole blood survived her. The plaintiffs are the heirs-at-law of Mary, who died after Anne's decease, and they claim an undivided third as against Anne's relations of the whole blood, who are defendants.

TUCK, J., delivered the opinion of this court.

THE will of Henry Hollingsworth contained the following clause: "All the rest and residue of my estate, real, personal or mixed, whatsoever or wheresoever, I give, devise and bequeath, to be divided amongst all my children, in equal shares and portions, to them, their heirs and assigns, forever." He left children of the whole and of the half blood. If his children took by descent, and not by purchase, the plaintiffs are entitled to recover, being of the half blood; if, on the contrary, the property passed by the will, the defendants, being of the whole blood, must succeed.

"Where the same quantity and quality of estate is devised, that

the devisee would have acquired by descent, the title passes by the worthier title — by descent, and not by purchase." 7 Gill & Johns. 70; 2 Hilliard on Real Prop. 528, 529. The only inquiry, then, would seem to be whether these devisees took the same estate as if their father had died intestate? Estates in joint-tenancy, coparcenary, and in common, are different from each other. We need not mention the well-recognized distinctions. It may be conceded, as contended in argument, that for most practical purposes in this country, there is no real difference between coparceners and tenants in common, yet they are different as legal estates, and their qualities and incidents are not the same. Tenancies in common and joint tenancies are recognized by the act of 1822, ch. 162; and estates in coparcenary by the Court of Appeals in the case of *Hoffar v. Dement*, 5 Gill, 132, where it is said: "In Maryland the children of parents who die intestate, seized in fee in lands, etc., take as coparceners, and are so treated by the act of 1820, ch. 191, sec. 5." The same principle applies to persons inheriting in virtue of the act of 1786, ch. 45. They all constitute but one heir. Suppose, instead of the words employed in this clause, the will had devised this residue to the children, as tenants in common, can it be doubted that they would have taken as devisees, and not as heirs-at-law? 3 Anstr. 727. These words are not used, but terms of the same import are. In wills the expressions, "equally to be divided," "share and share alike," "respectively between and amongst them," have been held to create a tenancy in common. 2 Bl. Com., ch. 12, note by Chitty, and in 2 Powell on Devises, ch. 18, pages 370, 371, it is said: "It may be stated generally that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will have this effect." He also states several examples and references. We are referred to 4 Kent Com. 367, as an authority to show that in this country, where primogeniture does not exist, the technical distinction between coparcenary and estates in common may be considered as essentially extinguished. This, however, is not the law in this State, for, as we have seen, these estates have been recognized by the legislature and by the Court of Appeals.

But the question has been expressly decided in England. At common law it could not arise, except where the ancestor died without male heirs, or where lands descended to all the sons according to the custom. Where a testator seized of lands in fee, being of the nature of gavel-kind, devised them to his heirs, by the custom and to their heirs equally to be divided amongst them, the question was, whether they should be in by descent or devise? Ander-

son, J., held that without the words "equally to be divided amongst them," they would be joint tenants, and that with these words they were tenants in common, but, in either case, that they took as heirs, and the other justices concurred. *Bear's Case*, 1 Leon. 112, 315. This case is quoted as authority in 1 Powel, 428, and 1 Jarman on Wills, 68. See also *Packman v. Cole*, 2 Sid. 53, 78, to the same effect. And so in Cro. Eliz. 431, a man having two daughters, being his heirs, devised his land to them and their heirs. "The question was whether they took as joint tenants by the devise, or as coparceners by descent?" And all the justices held clearly that they took as joint-tenants. If, therefore, the will creates a joint tenancy, or a tenancy in common, the property does not pass to the devisees as heirs-at-law, but as purchasers under the will.

It is contended that the distinction is merely technical, and does not affect the enjoyment of the estate, whether held in coparcenary or in common, as in Maryland there is very little, if any, difference between these titles, and we are told that this distinction should not avail against the rule on which the appellants rely to convert this devise into an inheritance. This argument may be applied the other way with as much force. When a will is made the presumption is that the testator intended that the estate should pass by devise and not by descent. This design, however, is sometimes frustrated by rules of law, which is sought to be done in the present case, by one for which there are not the same reasons under our laws as in England. 1 Powel, 421. This rule is as technical as the other. However, it exists, and we have no disposition to disregard it, but we think it does not apply in the present case, as the will does not pass the same estate in quality and quantity that the devisees would have taken as heirs-at-law.

Judgment affirmed.

HOFFAR v. DEMENT.

5 GILL, (MD.) 132. — 1847.

ASSUMPSIT by one of the heirs-at-law of Joseph N. Stonestreet, deceased, for use and occupation of lands of said decedent after his death. The court instructed the jury that plaintiffs are not entitled to recover for the reason, among others, that the several heirs of J. N. Stonestreet should have been united as plaintiffs. Judgment for defendants. Plaintiffs appeal.

SPENCE, J. — * * * The first question to be disposed of is, whether the county court erred in deciding that the plaintiffs could

not recover upon the first count in the declaration? We think they did not. The defendant's testator entered upon the land under a purchase from Nicholas Stonestreet, subsequent to the death of Joseph Stonestreet; there is no evidence of any express demise or agreement, to rent by the heirs of Joseph Stonestreet, jointly or severally; in fact the evidence is conclusive that there was none. The plaintiffs, to maintain this action, then must rely upon an implied demise or agreement to establish the relation of landlord and tenant between George Dement, the defendant's testator, and the children of J. N. Stonestreet.

Tindal, C. J., in the case of *Decharms v. Horwood*, 10 Bingham's R. 526, expresses his opinion in this unequivocal language: "The authorities all agree that whatever be the number of coparceners, they all constitute but one heir — they are connected together by unity of interest and unity of title." In Maryland the children of parents who die intestate seised in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the act of 1820, ch. 191, § 5; and the conclusion is irresistible that if they cannot separately maintain an action of assumpsit, for money had and received, against a person who had received the rent in the character of trustee, as was decided in the case of *Decharms v. Horwood*, that they cannot recover in separate actions upon an implied demise or agreement to rent, upon a count for use and occupation.

4. ESTATES BY THE ENTIRETY.

BERTLES *v.* NUNAN.

92 NEW YORK, 152. — 1883.

SUIT to compel a purchaser of lands to complete the purchase. The lands in question were conveyed "to Cornelius Day and Hannah Day, his wife, . . . their heirs and assigns." Cornelius died, and thereafter Mrs. Day remained in possession of the premises until her death. The premises were sold by the administratrix of Mrs. Day for the payment of debts against her estate. Purchaser asserts that Mrs. Day was not seised of more than an undivided half interest and that plaintiff cannot give a good title to the whole under the surrogate's order. Judgment for plaintiff below. Defendant appeals.

EARL, J. — On the first day of August, 1868, certain land, which is the subject of this controversy, was conveyed by deed to Cornelius Day and Hannah Day, his wife, and to their heirs and assigns; and the sole question for our determination is whether the grantees took

the land as tenants in common or whether each took and became seised of the entirety.

By the common law, when land was conveyed to husband and wife, they did not take as tenants in common, or as joint tenants, but each became seised of the entirety, *per tout, et non per my*, and upon the death of either the whole survived to the other. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During the joint lives the husband could, for his own benefit, use, possess and control the land, and take all the profit thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the rights of his wife in case she survived him.

This rule is based upon the unity of husband and wife, and is very ancient. It must have had its origin in the archaic period of our race, and it colored all the relations of husband and wife to each other, to the law and to society. In 1 Blackst. Com. 442, the learned author says: "Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquired by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason a man cannot grant anything to his wife or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself." They were not allowed to give evidence against each other, mainly because of the union of person, for if they were admitted to be witnesses for each other they would contradict one maxim of the common law, *nemo in propria causa testis esse debet*; and if against each other they would contradict another maxim, *nemo tenetur se ipsum accusare*.

As one of the consequences of the same rule, the husband was made responsible to society for his wife. He was liable for her torts and frauds, and, in some cases, for her crimes.

This, and the other rules regulating the effect of marriage at common law, were not designed to degrade and oppress the wife.

Blackstone (2 Com. 445) says: "Even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit; so great a favorite is the female sex of the laws of England."

The common-law rule as to the effect of a conveyance to husband and wife continued in force, notwithstanding the Revised Statutes, which provided that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless

expressly declared to be in joint tenancy." 3 R. S. 2179 (7th ed.);¹ *Dios v. Glover*, 1 Hoff. Ch. 71; *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Saddler*, 20 id. 320. In the latter case Comstock, J., said: "It appears to be well settled that this statute does not apply to the conveyance of an estate to husband and wife. They are regarded in law as one person."

But the claim is made that the legislation in this State, in the years 1848, 1849, 1860 and 1862, in reference to the rights and property of married women, has changed the common-law rule so that now when land is conveyed to husband and wife they take as tenants in common, as if unmarried. In construing these statutes the rule must be observed, and usually has been observed, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language used in the statutes absolutely requires.

Section 3 of chapter 200 of the Laws of 1848, as amended by chapter 375 of the Laws of 1849, provides that "any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, or any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband or be liable for his debts." It is not the effect of this section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and whatever the effect of a conveyance to a husband and wife was prior to that statute, so it remains. If the operation of such a conveyance was to convey the entire estate to each of the grantees, so that each became seised of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed so as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture what she did not have at common law, the use, benefit and control of her own real estate, and the right to convey and devise it as if she were unmarried.

By § 1 of the act (chapter 90 of the Laws of 1860) it is provided that "the property, both real and personal, which any married woman now owns as a sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she

¹ N. Y. R. P. L. § 56. — ED.

acquires by her trade, business, labor or services, carried on or performed on her sole and separate account; that which a woman married in this State owns at the time of her marriage, and the rents, issues and profits of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts;" and in § 3 of the Act of 1860, as amended by the act, chapter 172 of the Laws of 1862, it is provided that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect, in all respects, as if she were unmarried." There is great plausibility in the claim that these provisions in the Acts of 1860 and 1862 have reference only to the separate property of a wife, which she owns separate from her husband, and that they have no reference whatever to land conveyed to husband and wife, in which, by the common law, each became seised of the entirety. The language is not so strong and direct as that of the Revised Statutes, which provided that a grant to two or more persons shall create a tenancy in common, and which was yet held not to make husband and wife tenants in common. But it is not necessary now to determine that these provisions of law do not apply to lands conveyed to husband and wife, and we pass that question. It is sufficient now to hold that they do not limit or define what estate the husband and wife shall take in lands conveyed to them jointly. Their utmost effect is to enable the wife to control and convey whatever estate she gets by any conveyance made to her solely or to her and others jointly.

The claim is made that the legislation referred to has destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes. We are of the opinion that the statutes have not gone so far. The legislature did not intend to sweep away all the disabilities of married women depending upon the common-law fiction of a unity of persons, as a brief reference to the statutes will show. The Act of 1848 gave no express authority to a married woman to grant or dispose of her property; such authority came by the Act of 1849. The legislature clearly understood that the common-law unity of husband and wife, and the disabilities dependent thereon still remained, notwithstanding those acts, because in 1860, by the act of that year, it empowered a married woman to perform labor and to carry on business on her separate account; to enter into contracts in reference to her separate real estate; to sue and be sued in all matters having relation

to her property, and to maintain actions for injuries to her person. Until 1867 (chap. 782) husbands retained their common-law rights of survivorship to the personal property of their wives. It was not until chapter 887 of the laws of the same year that husband and wife could, in civil actions, be compelled to give evidence for or against each other; and in 1876 (chap. 182), for the first time, they could be examined in criminal proceedings as witnesses for each other; and provision was first made in the Penal Code (§ 715) that they could, in criminal proceedings, be witnesses for and against each other.

From this course of legislation it is quite clear that the legislature did not understand that the common-law rule as to the unity of husband and wife had been abrogated by the acts of 1848, 1849 and 1860, and that whenever it intended an invasion of that rule, it made it by express enactment. Still more significant is the act, chapter 472 of the Laws of 1880, which provides that "whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants or as tenants by entireties, they may make partition or division of the same between themselves," by deeds duly executed under their hands and seals. Here the disability of husband and wife, growing out of their unity of person, to convey to each other is recognized, as is also the estate by entireties created by a deed to them jointly.

So the common-law incidents of marriage are swept away only by express enactments. The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. A husband still has his common-law right of tenancy by the curtesy. Although § 7 of the Act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury, and so it was held, notwithstanding the acts of 1848, 1849 and 1860, that the common-law disability of husband and wife growing out of their unity of person to convey to each other still existed. *White v. Wager*, 25 N. Y. 333; *Winans et al. v. Peebles et al.*, 32 Id. 423; *Meeker v. Wright*, 76 Id. 262, 270. It is believed also that the common-law rule as to the liability of the husband for the torts and crimes of his wife are still substantially in force.

[After discussing *Goelet v. Gori*, 31 Barb. 314; *Farmers and Mechanics' National Bank of Rochester v. Gregory*, 49 Barb. 155; *Miller v. Miller*, 9 Abb. Pr. (N. S.) 444; *Freeman v. Barber*, 3 N. Y. Sup. Ct. (T. & C.) 574; *Beach v. Hollister*, 3 Hun 519, and *Ward v. Crum*, 54 How. Pr. 95, the court proceeds:]

It is true that these decisions are not absolutely binding upon this court, but they settled the law in the Supreme Court. For twenty years after 1849 there was no decision or published opinion in this State in conflict with them, and they are, under the circumstances, entitled to great weight here. They undoubtedly lay down a rule which has been followed and observed by conveyancers, and we have no doubt that property to the value of millions is now held under conveyances made in reliance upon the common-law rule as thus expounded. These decisions were never questioned in this State by any court until the decision in the case of *Meeker v. Wright*, which was rendered in this court in 1879 (76 N. Y. 262). In that case the learned judge writing the opinion reached the conclusion that the common-law rule governing conveyances to husband and wife had been abrogated by the modern legislation in this State. But that portion of the opinion was not concurred in by a majority of the judges. The views of that judge were very forcibly and ably expressed, and they have been carefully reconsidered. They do not convince us that the conclusions he reached should be adopted by this court. That case is supposed to have unsettled the law somewhat in this State. In *Feeley v. Buckley*, 28 Hun 451, it was held upon its authority, by a divided court, that tenancy by the entirety is abrogated by the Married Woman's Acts; and upon the same authority it is said a similar holding was made in *Zornitlein v. Bram*, decided in the Superior Court of New York, in January of this year, by a divided court. It is also said that in *Forsyth v. McCall*, in the fourth department in June, 1880, and in *Meeker v. Wright*, after a new trial, in the third department, in April, 1882, it was decided that the common-law rule was not abrogated. 27 Albany Law Journal, 199. And these decisions, together with the one which is now under review, are all the decisions made in this State since the case of *Meeker v. Wright* was in this court which have come to our attention.

Legislation similar to that which exists in this State, as to the rights and property of married women, exists in many of the States of the Union, and the decisions are nearly uniform in all the other States where the question has arisen, that a conveyance to husband and wife has the common-law effect, notwithstanding such legislation. Without citing all, we call attention to the following cases and authorities: *Bates v. Seeley*, 46 Penn. St. 248; *French v. Mahan*, 56 Id. 289; *Diver v. Diver*, Id. 106; *Fisher v. Peovin*, 25 Mich. 350; *McDuff v. Beauchamy*, 50 Miss. 531; *Washburn v. Burns*, 34 N. J. 18; *Chandler v. Cheney*, 37 Ind. 391; *Morburgh v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Bennett v. Child*, 19 Wis. 362; *Robinson v. Eagle*,

29 Ark. 202; 1 Washb. on Real Prop. (3d ed.) 577; Schouler on Husband and Wife, §§ 397, 398; 1 Bishop on the Laws of Married Women, 438, §§ 613, etc.; 2 Id. 284, § 284. In the last section the learned author says: "Under the late married woman's statutes, the effect of which is to prevent any part of the wife's interest in her lands passing to her husband, the rule of the common law, by force of which the two became tenants by the entirety of lands conveyed to both, is not changed," and he says: "The reason for the doctrine, looking at the question in the light of legal principle, is, that the statutes which preserve to married women their separate rights of property do not have, or profess to have, any effect upon the capacity of the wife to take property, or the manner of her taking it, but when she does take it they simply preserve the right in her, to her separate use, forbidding it to pass in part or in full to her husband under the rules of the unwritten law. If, then, land is conveyed to a husband and his wife, they take precisely as at the common law — that is, as tenants by the entirety." In *Diver v. Diver*, Strong, J., said: "But it is said the Act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the act. 'To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property, by removing it from under the dominion of the husband. To effect this object she was enabled to own, use and enjoy her property, if hers before marriage, as fully after marriage as before, and the act declared that if her property accrued to her after marriage, it should be owned, used and enjoyed by her as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them, and regulates the enjoyment, that is the enjoyment of the estate after it has vested in the wife.'"

At common law, where the estate was conveyed to husband and wife, as above stated, the husband had the control and use of the property during their joint lives. It is unnecessary now to determine whether, under the Married Woman's Acts in this State, the husband still has such a right in real estate conveyed to him and his

wife jointly. It was said in some of the authorities cited that the statutes had changed that common-law rule, and that while husband and wife, in conveyances to them jointly, each took the entirety, yet that the land could not be sold for the husband's debts, or the use and profits thereof during their joint lives be entirely appropriated by him. It is not important in this case to determine what the relation of the wife to the land, in such a case, now is, during the life of her husband.

It is said that the reason upon which the common-law rule under consideration was based has ceased to exist, and hence that the rule should be held to disappear. It is impossible, now, to determine how the rule, in the remote past, obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, and yet, on that account, courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate.

It was never, we believe, regarded as a mischief that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to believe that it was within the contemplation of the legislature to change that rule. Neither do we think that there is any public policy which requires that the statutes should be so construed as to change the common-law rule. It was never considered that that rule abridged the rights of married women, but rather that it enlarged their rights, and improved their condition. It would be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed it should be changed by a plain act of the legislature, applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common-law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished and the best civilization of any age or country has grown up.

We are, therefore, of opinion that the judgment should be affirmed, with costs.¹

¹ But if the intent of the deed is clear a grant to husband and wife may make them joint-tenants, *Thornburg v. Wiggins*, p. 940, *supra*; *Joose v. Fay*, 129 N Y 17; or tenants in common, *Miner v. Brown*, 133 N. Y. 308. — Ed.

STELZ *v.* SHRECK.

128 NEW YORK, 263. — 1891.

ACTION for the admeasurement of dower. Cross appeals from an order of the General Term denying motions by both plaintiff and defendant for a new trial.

The premises in question were conveyed in 1886 to William Stelz and Minnie Stelz, his wife. William thereafter obtained a divorce from Minnie for her adultery; later he married the plaintiff, Maria Stelz, and died intestate. Minnie is the defendant. Maria claims dower in the whole estate; Minnie claims to be absolute owner of the entire parcel of land.

PECKHAM, J. — We agree in this case with the views expressed by the learned judges who delivered the opinions at the Special and General Terms of the Supreme Court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety. *Bertles v. Nunan*, 92 N. Y. 152; *Zornitlein v. Bram*, 100 Id. 13.

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Id. 175; *Bertles v. Nunan*, *supra*.

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. *Jackson v. McConnell*, *supra*.

At common law husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole and not of any undivided portion. They were thus seised of the whole because they were legally but one person. Death separated them, and the survivor still held the whole because he or she had always been seised of the whole, and the person who died had no estate which was descendible or devisable.

Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the first wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as plausible view to say that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity; anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one as in the case of death there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place, each takes his or her proportionate share of the property as a tenant in common without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seisen by the entirety does not create a joint tenancy either in substance or form (19 Wend. *supra*), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seisen should be turned into a joint tenancy by virtue of the very fact which terminated the unity of persons upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would, at common law, have created a joint tenancy. But our statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy, 1 R. S. 727, § 44. This statute did not reach an estate by the entirety, nor did the statutes of 1848 and 1849, and 1860 and 1862. *Bertles v. Nunan, supra*. It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of a tenancy by the entirety, resulting from an absolute divorce, be changed into a joint tenancy in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and, therefore, when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute.

The counsel for the defendant urges that we are giving by this decision a retroactive effect to a decree of divorce in a case not warranted by the statute, and in violation of the well-settled rule in this State as to the effect of such a decree. He says that we change the effect of the deed of conveyance and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this State only operates for the future, and has no retroactive effect or any other effect than that given by the statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revert in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must, therefore, remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common, and of course without any survivorship.

I think the contention that the first wife is entitled to the whole

of the estate as the survivor of her husband cannot be maintained. although the question is new in this State, it has been somewhat debated in the courts of some of the other States. In *Harrer v. Wallner*, 80 Ill. 197, and *Lash v. Lash*, 58 Ind. 526, and *Ames v. Norman*, 4 Sneed, 683, similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan in the case of *Lewis*, reported in 48 Northwestern Reporter at 680. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal, the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state and shall not by his or her misconduct cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treats the estate as dependent upon any such condition, and however proper it might be to enact by legislative authority a condition of that nature, this court has not that power. * * *

Judgment affirmed.

HILES *v.* FISHER.

144 NEW YORK, 306. — 1895.

EJECTMENT. The premises in question were conveyed to defendants as husband and wife. The husband, in 1886, mortgaged the premises to secure certain of his debts. In 1890 Fisher quitclaimed the land in question to his wife. The mortgage was foreclosed in 1892, and plaintiff acquired the title under the foreclosure. The plaintiff now claims that he should recover the premises with right to hold the same during the joint lives of husband and wife, and in fee in case the husband survives the wife. Mrs. Fisher claims the mortgage was void as she did not sign it. The General Term held with the plaintiff. Defendant appeals.

ANDREWS, CH. J. — It was decided in *Bertles v. Nunan*, 92 N. Y. 152, that the separate property acts relating to the rights of married

women had not abrogated the common-law doctrine, that under a conveyance to husband and wife they take not as tenants in common, nor as joint tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife as survivor took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife during their joint lives, was not considered or decided, but was expressly reserved on the ground that it was not involved in the case then before the court. That question is involved in the present case and must now be decided.

The decision in *Bertles v. Nunan* is supported by the great weight of authority in other jurisdictions in this country, but in some of the States it has been held that as a consequence of statutory provisions substantially like those in this State, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands, as *femes sole*, estates by entireties have been abrogated and turned into tenancies in common. In the States where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those States where it is held that notwithstanding the new legislation a conveyance to husband and wife retains its common-law character and incidents. If the right of the husband to use during the joint lives of lands held under this tenure was a right growing out of an incident to this particular species of tenancy; in other words, if it was one of its specific and essential characteristics, then it would be difficult to segregate this right from the other rights incident to and flowing from the tenancy, and to say that while the estate by entireties continues this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by

entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right operating upon property so held, as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 Bl. 182; Wash. on Real Prop. 425. Each is said to be seised of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained, that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in *Miner v. Brown*, 133 N. Y. 308, and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common that estate would be created. See, also, *McDermott v. French*, 15 N. J. Eq. 78; *Wales v. Coffin*, 13 Allen, 213; 1 Wash. on Real Prop. 425. There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See *In re March*, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards. Coke on Litt. 187b. It would seem to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by husband and wife as tenants by the entirety, in the aspect of its inseverability has been adverted to. But it is important in view of the subsequent discussion to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship in the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seisin or a joint

possession for the purpose of the use during coverture. The husband was held to be entitled to the full control and to take the rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnel*, 19 Id. 175; *Meeker v. Wright*, 76 N. Y. 262; *Bertles v. Nunan*, *supra*; *Ames v. Norman*, 4 Sneed, 683; *Pray v. Stebbins*, 141 Mass. 219. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from the general principle of the common law, which vested in the husband *jure uxoris* the rents and profits of his wife's lands during their joint lives. 2 Kent Com. 130; Stewart on Husb. & Wife, § 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this State has had upon the right of the husband to the rents, profits and control of lands held by him and his wife in entirety, during their joint lives, it is important to regard not only the language, but the spirit of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands *jure uxoris*, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the Act of 1848, and enlarged

them in other directions, but the Act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of Courts of Chancery to secure to married women the enjoyment of their own property.

In determining the question now before us, too much emphasis cannot be placed upon the fact that the legislation of 1848 and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife and the right to exclude her from its enjoyment. If it is still held, notwithstanding this legislation, that the husband takes the whole rents and profits during coverture in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and estate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives. Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in *McCurdy v. Canning*, 64 Pa. St. 39, or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in *Buttler v. Rosenblath*, 42 N. J. Eq. 651. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right *jure uxoris*, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint

lives of Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife of the premises subject to her right of survivorship. The opinion of the General Term exhibits, with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives the wife. See 1 Wash. Real Prop. 425; 1 Prest. Est. 135; *Ames v. Norman*, *supra*.

The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without costs to either party.

5. ESTATE IN HOMESTEAD.¹

HELM *v.* HELM.

11 KANSAS, 19. — 1873.

[*Reported herein at p. 711.*]

6. COMMUNITY PROPERTY.

BELL, J., IN DE BLANE *v.* LYNCH.

23 TEXAS, 25. — 1859.

THE principle which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife shall be their common property. It would be unnecessary consumption of time to quote authorities for this proposition.

It is true that in a particular case satisfactory proof might be made, that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation the law cannot permit inquiries into such matters. The law, therefore, conclusively presumes that whatever is acquired,

¹ The "homestead" interest is in some jurisdictions an estate, of a special character, in the husband alone, in others it is a sort of joint estate in husband and wife, in still other jurisdictions it is not regarded as an estate at all. See the American note to Hutchins' Williams on Real Property, pp. 153-163, for a general view of the statutory provisions and the leading decisions thereunder. For the New York statute, see §§ 1397-1404, Code Civ. Pro. — Ed.

except by gift, devise or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife's slaves on the wife's land, it is community property, because the law presumes that the husband's skill or care contributed to its production; or that he, in some other way, contributed to the common acquisitions.¹

PARKER *v.* CHANCE.

II TEXAS, 513. — 1854.

HEMPHILL, Ch. J. — The ground upon which the exception was sustained does not appear from the record. From the special cause of exception, that the land was the individual property of the defendant Lucy, and from the argument of counsel, it is to be inferred that in the opinion of the court the land was the separate property of the said defendant, and was therefore not to be classed among effects of the deceased. The question then for decision is, whether the land belonged to the community existing between the deceased Farris and his wife, or to the wife exclusively in her separate right.

To determine this it will be necessary to ascertain in what the community consists, and whether property conveyed to the wife forms presumptively a portion of it.

In the case of *Yates v. Houston*, 3 Tex. R. 433, the articles composing the community were specified; and among other things it was said, in effect, that property acquired in the name of both partners becomes common, whether the accession be by gift or purchase, and when received in the name of one, by onerous title, the property is also common; but if by lucrative title, it becomes the separate right of the beneficiary. That such are the established rules of Spanish jurisprudence may be seen by referring to the authorities cited in *Scott and Solomon v. Maynard and Wife*, Dallam 550. Vide La. R. 520. In that case reference was made to Febrero Addicionado. In the Mexican edition of that author the doctrine is stated in § 6, vol. 1, p. 219. It is there said that the common gains are not only those which both purchase during marriage, with the funds of the community, but also those which the husband purchases by himself

¹ The doctrines of the Civil Law upon this topic are in force, modified more or less by statutes, in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. For the origin and general features of this estate see Ballinger on Community Property, Chapter I. — ED.

singly, or his wife with his license express or tacit — and whether the purchase money be the common funds or the separate property of one of them, since in all these modes the property becomes common, for the reason that the time of the acquisition is to be regarded, and not the person in whose name the purchase is made.

In the succeeding section some limitations are placed on this rule; as, for instance, where with the proceeds of the sale of an article of property belonging to one of the partners another article is purchased, and this is so expressed in the instrument of conveyance, or is proven by witnesses or other legal means or the other partner admits it; although such mere admission is but feeble proof, since it will be regarded as a donation between the two, and this is confirmed only by death and for so much as by law is permitted; in such case the article purchased will remain the individual property of the partner whose funds were employed in making the purchase; and also where one article of property is exchanged for another, the articles procured will be substituted in the place of the one exchanged, etc., etc.

It appears, then, that under the law of Spain, the fact of the conveyance being in the name of the wife is not conclusive or *prima facie* presumptive proof that the property belongs to her exclusively. It would, however, doubtless have some weight, if there were other circumstances conducing to prove that the property belonged individually to the wife.

The mere fact that the conveyance was made by Slauter to Mrs. Farris does not make the land her separate property. Is there anything in the circumstances under which this conveyance was made which would confer on her a separate right? To arrive at a correct conclusion on this point, we must ascertain whether the property in the certificate or the land surveyed under it, belonged to the community or the husband individually. If it belonged to the husband in his own right, then an intention to make a gift to his wife may be very properly inferred from his acts; if, however, it belonged to the community, it will be seen that no presumption of donation can arise from the facts as stated in the petition.

In the case of *Burris v. Wideman*, 6 Tex. R. 232, we have decided in effect that headright certificates, issuing under the Constitution of the Republic and the law of 1837, form a portion of the community property; and such is the legitimate and necessary inference from the principles decided in *Yates v. Houston*, 3 Tex. R. 433.

The certificate, then, placed in the hands of Slauter, belonged to the community; for, although it is not expressly averred that the certificate was issued to Edward Farris as the head of the matri-

monial union of which his wife Lucy formed the other partner, yet such is the legitimate inference from the facts as averred.

The certificate being a portion of the community, what is the effect of the assignment to Slauter, and the transfer of the one-half to Mrs. Farris? Can it have any other consequence than would arise from a retransfer to the husband, viz., to restore it to the community from which it had been taken? The transaction is, in substance, an agreement by the husband to convey to the locator one-half of a community league of land for clearing out the other half. This he might have done by taking the patent in his own name, and assigning one-half to the locator. But he pursued another mode. He assigns the whole of the certificate and land, with an obligation to reconvey the one-half, not to himself but to his wife. Could this change from one partner to the other alter the rights of the community or of the individual partners? When the land was assigned it belonged to the community; in the hands of the locator it remained common property; and it is of no consequence that he conveyed it to the wife, when under the law it is immaterial whether the conveyance be to the wife or husband. For whether it be in the name of either or of both, the property conveyed belongs to the community.

The presumption of law is that property, conveyed to the wife, belongs to the community; and the direction of a husband, to make out the deed in the name of the wife, will not, of itself, rebut this legal presumption. In this case Slauter, the locator, might have conveyed to either husband or wife. His conveyance to either has the like effect, viz.: to vest the property in the community.

Where the husband intends to relinquish his right in the community property, and to transfer it to his wife, his act must be explicit and such as to leave no doubt of his intentions. A mere transfer of the property to a stranger, with directions to reconvey to the wife, will not accomplish the object, and show that a donation was intended; and especially when the stranger is bound under penalty, to make title. For, in such case, the conveyance, though made in the name of the wife, cannot deprive the community of its rights.

It is not necessary, in this case, to express any opinion as to the validity or extent to which donations of community property may be made from one partner in matrimony to the other.

Had this transaction, embracing the assignment of the league and the retransfer of the one-half to the wife, taken place under the common law, where the estate of community and the doctrines in relation to it are unknown, the conveyance to the wife would have been presumptive evidence of a gift in advancement by the husband. 2

Vern. 67; 8 Ves. 199; Bright, Hus. and Wife, vol. 1, p. 32. Where a husband purchases stock in the name of himself and wife, it is *prima facie* a gift to her in the event of her surviving; Bright, Hus. and Wife, vol. 1, p. 32; and a transfer, by the husband, of stock already purchased, in, (into), their joint names, would be presumed a gift to the wife. *Ib.* These are doctrines of the common law, and cannot be recognized under a system in which a conveyance to the wife is presumptive evidence, not of her separate right but of that of the community.

The doctrine in relation to donations between husband and wife need not be discussed; as we are of opinion that the facts do not afford any evidence of donation. Judgment reversed and cause remanded.

Reversed and remanded.

7. ESTATES IN PARTNERSHIP.

BOPP *v.* FOX.

63 ILLINOIS, 540. — 1872.

[*Reported herein at p. 686.*]

II. Incidents of joint estates.

1. POSSESSION AND DISSEISIN.

WASS *v.* BUCKNAM.

38 MAINE, 356. — 1854.

[*Reported herein at p. 640.*]

2. WASTE.

MCCORD *v.* OAKLAND QUICKSILVER MINING CO.

64 CALIFORNIA, 134. — 1883.

[*Reported herein at p. 396.*]

JOHNSON *v.* JOHNSON.

2 HILL'S EQUITY (S. C.), 277. — 1835.

[*Reported herein at p. 398.*]

3. REPAIRS AND IMPROVEMENTS.

WALKER *v.* SHERMAN.

20 WENDELL (N. Y.), 636. — 1839.

[Reported herein at p. 218.]

CALVERT *v.* ALDRICH.

99 MASSACHUSETTS, 74. — 1868.

FOSTER, J. — The issue in this action is on an account of one cotenant in common against another to recover from the defendant in set-off part of the cost of certain needful repairs made by the plaintiff in set-off upon the common property. It is not founded upon any contract between the parties, but upon a supposed legal obligation which, if its existence were established, the law would imply a promise to fulfill.

The doctrine of the common law on this subject is stated by Lord Coke as follows: "If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith *ad reparationem et sustentationem ejusdem domus teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Litt. 200 b; Ib. 54 b. And in another place he says: "If there be two joint tenants of a wood or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione facienda* against the other. This is said to be because of "preeminence and privilege which the law gives to houses which are for men's habitation." *Bowles's Case*, 11 Co. 82.

In *Carver v. Miller*, 4 Mass. 561, it was doubted by Chief Justice Parsons whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne, c. 1, revised by St. 1795, c. 74. * * *

Doane v. Badger, 12 Mass. 65, was an action on the case. The plaintiff had a right to use a well and pump on the defendant's land; and the defendant had removed the pump and built over the well, thereby depriving the plaintiff of the use of the water. The judge before whom the case was tried had instructed the jury that the

defendant, by the terms of a deed under which he claimed, was bound to keep the well and pump in repair, although they were out of repair when he purchased, and, without any previous notice or request, was liable in damages for the injury the plaintiff had sustained by his neglect to make repairs. The court held that no such evidence was admissible under the declaration, the cause of action stated being a misfeasance, and the proof offered being of a non-feasance only; also, that a notice and request were indispensable before any action could be maintained. Mr. Justice Jackson in delivering the opinion made some general observations, unnecessary to the decision of the cause, the correctness of which requires a particular examination. He said that the action on the case seems to be a substitute for the old *writ de reparatione facienda* between tenants in common, and could not be brought until after a request and refusal to join in making the repairs. He added: "From the form of the writ in the register, it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes, '*in ipsius dispendium non modicum et gravamen.*' It is clear that until he have made the repairs he cannot in any form of action recover anything more than for his loss as of rent, etc., while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money to that purpose." *Mumford v. Brown*, 6 Cowen, 475, a *per curiam* opinion of the Supreme Court of New York, and *Coffin v. Heath*, 6 Met. 80, both contain *obiter dicta* to the same effect, apparently founded upon *Doane v. Badger*, without further research into the ancient law. If it were true that the writ *de reparatione* was brought by one cotenant, after he had made repairs, to recover of his cotenant a due proportion of the expense thereof, there would certainly be much reason for holding an action on the case to be a modern substitute for the obsolete writ *de reparatione*. But all the Latin forms of the writ in the Register, 153, show that it was brought before the repairs were made, to compel them to be made under the order of court. Indeed, this is implied in the very style by which the writ is entitled, *de reparatione facienda*, viz.: of repairs to be made; the future participle *facienda* being incapable of any other meaning. This also appears in Fitzherbert, N. B. 127, where the writ between cotenants of a mill is translated; the words, *in ipsius dispendium non modicum et gravamen*, quoted by Judge Jackson, being correctly rendered, "to the great damage and grievance of him," the said plaintiff. Fitzherbert says: "The writ lieth in divers cases; one is, where there are three tenants in common or

joint or *pro indiviso* of a mill or a house, etc., which falls to decay, and the one will repair but the other will not repair the same; he shall have this writ against them."

In the case of a ruinous house which endangers the plaintiff's adjoining house, and in that of a bridge over which the plaintiff has a passage, which the defendant ought to repair, but which he suffers to fall to decay, the words of the precept are, "Command A. that," etc., "he, together with B. and C., his partners, cause to be repaired." The cases in the Year Books referred to in the margin of Fitzherbert confirm the construction which we regard as the only one of which the forms in that author are susceptible, namely, that the writ *de reparatione* was a process to compel repairs to be made under the order of court. There is nothing in them to indicate that an action for damages is maintainable by one tenant in common against another because the defendant will not join with the plaintiff in repairing the common property. In a note to the form in the case of a bridge, it is said in Fitzherbert: "In this writ the party recovers his damages, and it shall be awarded that the defendant repair, and that he be distrained to do it. So in this writ he shall have the view *contra*, if it be but an action on the case for not repairing, for there he shall recover but damages." There is no doubt that an action on the case is maintainable to recover damages in cases where the defendant is alone bound to make repairs for the benefit of the plaintiff without contribution on the part of the latter, and has neglected and refused to do so. See *Tenant v. Goldwin*, 6 Mod. 311; S. C. 2 Ld. Raym. 1089; 1 Salk. 21, 360.

The difficulty in the way of awarding damages in favor of one tenant in common against his co-tenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. Upon a review of all the authorities, we can find no instance in England or this country in which, between co-tenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join. We are satisfied that the law was correctly stated in *Converse v. Ferre*, 11 Mass. 325, by Chief Justice Parker, who said: "At common law no action lies by one tenant in common, who has expended more than his share in repairing the common property, against the deficient tenants, and for this reason our Legislature has provided a remedy applicable to mills." The writ *de reparatione facienda* brought before the court the question of the reasonableness of the repairs proposed, before the expenditures were incurred. It seems to have been seldom resorted to; perhaps because a division of the common

estate would usually be obtained where the owners were unable to agree as to the necessity or expediency of repairs. Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved. But if we have fallen into any error in our examination of the original doctrines of the common law of England, it is at least safe to conclude that no action between tenants in common for neglecting or refusing to repair the common property, or to recover contribution for repairs made thereon by one without the consent of the other, has been adopted among the common-law remedies in Massachusetts.

This result is in accordance with the rulings at the trial.

Exceptions overruled.¹

4. ACCOUNTING FOR RENTS, ETC.

PICKERING *v.* PICKERING.

63 NEW HAMPSHIRE, 468. — 1885.

BINGHAM, J. — The plaintiff seeks for an accounting, and to charge the defendant for the rents and income of lands and buildings thereon. The parties are tenants in common. The defendant has had the possession and income of the property since December 27, 1883, and has in that time expended \$370 in necessary repairs that materially increased the value of the buildings and the income, and claims to be allowed for the same in the accounting. The plaintiff had no notice of the repairs, and was not requested to join in making them.

If we are to consider it settled at common law that one tenant in common cannot recover of his co-tenant a contribution for necessary repairs, where there is no agreement or request or notice to join in making them, or excuse for a notice not being given to join, *Stevens v. Thompson*, 17 N. H. 103, 111; *Wiggin v. Wiggin*, 43 N. H. 561, 568, because both parties, until this is done, are equally in fault, one having as much reason to complain as the other, *Mumford v. Brown*, 6 Cow. 475-477; *Kidder v. Rixford*, 16 Vt. 169-172, 4 Kent. Com. 371; *Doane v. Badger*, 12 Mass. 65-70; *Calvert v. Aldrich*, 99 Mass. 78, it does not follow that in this proceeding for an equitable accounting for the income, a part of which is produced by the repairs, the defendant may not be allowed for them. There is a

¹ See also *Pickering v. Pickering*, *infra*. — ED.

wide difference between a right of action at common law to recover a contribution for repairs, and a right to have them allowed out of the income, which exists in part through their having been made. In the first case, the party makes them at his will on the common property without the consent or knowledge of his co-tenant, while in the last the co-tenant recognizes the existence of the repairs, that they have materially increased the income, but demands the increase and refuses to allow for the repairs. The objection, that no privity, no joint knowledge, no authority existed is in equity and good conscience waived when the entire income is demanded. It is not unlike the ratification of the acts of an assumed agent; it relates back to the time of making the repairs, and makes the plaintiff a privy from the beginning. He cannot claim the repairs and the income, and equitably ignore the expense of making them.

In *Moore v. Cable*, 1 Johns. Ch. 385, a bill for the redemption of a mortgage, it was decided that the mortgagee should not be charged for rents and profits arising exclusively from repairs made by him.

In *Jackson v. Loomis*, 4 Cow. 168, an action of trespass for mesne profits against a *bona fide* purchaser, it was held that he should be allowed against the plaintiff, in mitigation of damages, the value of permanent improvements, made in good faith, to the extent of the rents and profits claimed by the plaintiff. *Green v. Biddle*, 8 Wheat. 1.

In *Rathbun v. Colton*, 15 Pick. 472, 485, it was decided that when the rent of a trust estate is increased in consequence of improvements made by the trustee, the beneficiary may be put to his election, either to allow the trustee the expense of such improvements, or be deprived of the increase of rent obtained by means thereof; that the question was not whether the trustee has a right to make a charge for the improvements, but whether the plaintiffs were entitled to receive any benefit for them, they refusing to contribute their share towards the expense.

It seems, however, that courts of equity have not confined the doctrine of compensation for repairs and improvements to cases of agreement or of joint purchases, but have extended it to other cases where the party making the repairs and improvements has acted in good faith, innocently, and there has been a substantial benefit conferred on the owner, so that in equity and right he ought to pay for the same. 2 Story Eq. Jur., §§ 1236, 1237, 799 b; *Coffin v. Heath*, 6 Met. 76, 80. And in 2 Story Eq. Pl., § 799 b, n. 1, it is said: "In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without

notice seeks an account in equity as plaintiff against such possessor for the rents and profits, it is the constant habit of courts of equity to allow such possessor, as defendant, to deduct therefrom the full amount of all meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits. . . . So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate beneficial to the owner." This is on the old-established maxim in equity jurisprudence, that he who seeks equity must do equity. *Hannan v. Osborn*, 4 Paige Ch. 336; *Dech's Appeal*, 57 Penn. St. 468, 472; *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325; 349; *Hibbert v. Cooke*, 1 Sim. & S. 552.

The sum of \$370 for the repairs may be deducted from the income, if it amounts to that sum; if not, then to cancel the income, whatever it may be.

The claim for insurance should be disallowed. It does not appear that it was procured for the plaintiff, or in her interest, or with her knowledge, or that she has ever received or accepted any benefit arising from it.

Case discharged.

5. TRANSFER, DESCENT, ETC.

BABBITT *v.* DAY.

41 NEW JERSEY EQUITY 392. — 1886.

[*Reported herein at p. 685.*]¹

III. Partition.

I. VOLUNTARY.

RECTOR *v.* WAUGH.

17 MISSOURI, 13. — 1852.

[*Reported herein at p. 511.*]²

¹See *Overman v. Sasser*, p. 310 *supra*, and *Ferguson v. Tweedy*, p. 628 *supra*. — ED.

²See also *Ferguson v. Tweedy*, *supra*, p. 628. Chap. 472, laws of 1880. — ED

2. COMPULSORY.¹WALKER *v.* SHERMAN.

20 WENDELL (N. Y.), 636. — 1839.

[Reported herein at p. 218.]²

¹ See New York Code of Civil Procedure, §§ 1532-1595. — ED.

² See also *Wass v. Bucknam*, p. 640, *supra*. For a sketch of the history of compulsory partition, see *Mead v. Mitchell*, 5 Abb. Pr. (N. Y.), 92 (aff'd 17 N. Y. 210). For an exhaustive discussion of voluntary partition by parol see *Wood v. Fleet*, 36 N. Y. 499. — ED.

PART V.
OF THE LAW OF PERSONS IN RELATION TO LAND.

CHAPTER I.

ALIENS.

I. Capacity to take and hold.¹

FOSS *v.* CRISP.

20 PICKERING (MASS.), 121. — 1838.

[*Reported herein at p. 645.*]

PRIEST *v.* CUMMINGS.

20 WENDELL (N. Y.), 338. — 1838.

[*Reported herein at p. 692.*]

CRAIG *v.* LESLIE.

3 WHEATON (U. S.), 563. — 1818.

[*Reported herein at p. 71.*]

II. Capacity to transfer or transmit title.

SHAW, C. J., IN SCANLAN *v.* WRIGHT.

13 PICKERING, 523. — 1833.

IN regard to the other objection, that Bishop Cheverus, by accepting a civil and ecclesiastical office in France, renounced his

¹ It is not intended to treat very fully the subjects in Part V. They belong to the course on the "Law of Domestic Relations and Persons." For other cases on these topics see Woodruff's "Cases on the Law of Domestic Relations and Persons." The present New York law as to the capacity of aliens to take, hold, transmit and transfer interests in land will be found in the N. Y. R. P. L., §§ 4 to 8. See also *Id.*, §§ 1 and 2 and chap. 593, Laws of 1897. — ED.

American allegiance, and so became an alien, and that therefore nothing passed by his deed, the consequence which is suggested would not follow if the fact were proved. Were he in all respects an alien, having been once well seised of an indefeasible estate, his conveyance would not be void; it would vest an estate in his grantee, subject only to be defeated by the government.

The other objections to the petitioner's title cannot be sustained, especially when taken by a stranger, one who does not himself claim the same title. So far as the alienage of Thomas Scanlan is relied upon, as disabling him to join with his wife, in this petition, it is in abatement only, and comes too late. If it be contended that he could not take and become seised jointly with his wife in her right, this is contrary to the rule of law, which is, that an alien may take but cannot hold against the government; he takes a defeasible estate, subject to escheat, at the suit of the government. But till office found he is seised. If it be contended that on a feoffment to the wife the husband becomes seized by act of law, and as in case of descent the law will not cast seisin of an estate upon one who cannot hold it, the consequence would be that the wife would remain seised alone, and that she must petition by her husband as guardian or next friend, instead of joining with him in the usual form. But this would be mere matter of form, not affecting the title or merits of the case.

CHAPTER II.

INFANTS.

I. Nature of an infant's transfer.

WELCH *v.* BUNCE.

83 INDIANA, 382. — 1882.

SUIT to set aside a deed and recover the possession of certain lands. Plaintiff below had inherited the lands from her father and, her husband joining with her in the deed, had conveyed them to Welch. The complaint alleges that "at the time of executing said conveyance this plaintiff was a minor, under the age of twenty-one years, and is yet," and that on a certain day named she had repudiated the conveyance. The defendant demurred for the reason, among others, that the complaint did not state facts sufficient to constitute a good cause of action. The demurrer was overruled and defendant appeals to this court.

Howk, J. — * * * This action was commenced on the 3d of November, 1879, and it was alleged in the complaint then filed that the appellee, Nancy Bunce, was then "a minor, under the age of twenty-one years," and that she had disaffirmed her conveyance of the real estate to the appellant on the 25th of October, 1879, preceding the commencement of this suit. It is clear, therefore, that the question above stated¹ is fairly presented for decision by the demurrer to the complaint. We are of the opinion that the question stated must be answered in the negative. It would seem to be settled by the decisions of this court that an infant cannot disaffirm or avoid his or her conveyance of real estate, simply on the ground of infancy, which is the only ground relied upon in the case at bar, until his or her arrival at majority. *Chapman v. Chapman*, 13 Ind. 396; *Miles v. Lingerman*, 24 Ind. 385; *Law v. Long*, 41 Ind. 586.

¹ "Can an infant disaffirm his or her conveyance of real estate during infancy, or before he or she arrives at the full and lawful age of twenty-one years." — Ed.

The appellee's counsel, as we understand their argument, concede that the rule of law, on the subject under consideration, was formerly as we have stated it. But counsel claim that this rule was changed by the provisions of § 10 of the Civil Code of 1852, and that this section has been overlooked by this court in its more recent decisions on the subject of the rule. This section 10 provides as follows: "When an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being at full age." 2 R. S. 1876, p. 37; § 12, Civil Code of 1881; § 255, R. S. 1881.

We are of the opinion, however, that the section quoted has no application to the question under consideration, and, therefore, makes no change in the rule of law in relation thereto. An infant has no right of action as to lands conveyed away by him or her, simply on the grounds of infancy, until such conveyance has been disaffirmed or avoided. An infant's conveyance of real estate is not void, but is merely voidable; and it cannot be avoided or disaffirmed, simply on the score of infancy, until the infant has arrived at majority. It seems to us, therefore, that the facts stated in the complaint, in the case now before us, showed clearly that the appellee, Nancy Bunce, had no right or cause of action against the appellant, at the commencement of this suit, and that the demurrer to the complaint, for the want of sufficient facts, ought to have been sustained.

Some other points, of minor importance, are noticed, rather than discussed, by the appellant's counsel. We deem it unnecessary for us to consider or decide these points, as the judgment must be reversed for the reasons already given.

The judgment is reversed, with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.¹

¹ But the infant may enter while under age, and continue to take the profits until he is of age, when he may either affirm or disaffirm. *Bool v. Mix*, 17 Wend. 119. — Ed.

GREEN v. GREEN.

69 NEW YORK, 553. — 1877.

CHURCH, C. J. — The important question in this case is whether it was necessary for the defendant to restore the consideration received for the transfer of the land to the plaintiff to entitle him to rescind the contract. The defendant is a son of the plaintiff. He conveyed to the plaintiff the premises in question when under the age of twenty-one years, for which he received the sum of \$400. It appeared affirmatively that the son had used up, lost, or squandered the money before he became of age, and had no part of it, nor any other property except the land at the time of arriving at age. After a careful examination of the authorities and the conflicting opinions below, we are inclined to concur with the opinion of Gilbert, J., in affirmance of the judgment. We do not deem it profitable to review the authorities upon the question, and do not intend to extend our decision beyond the principal facts involved in this case.

There are expressions of judges, and general rules laid down by text writers, and some cases which seem to favor the doctrine contended for by the appellant, but in nearly all of them there is a manifest distinction in the facts. The weight of authority is to the contrary effect. 10 Peters U. S. 58, 74; 97 Mass. 508; 6 Gray, 279; 27 Vt. 268; 100 Mass. 474. These and like authorities, we think, accord with the general principles of the law for the protection of infants. The right to repudiate is based upon the incapacity of the infant to contract, and the incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. A person purchasing real estate of an infant, knowing the fact, and especially the father, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity. The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle we think a restoration of the consideration could not be exacted as a condition to a rescission on the part of the defendant.

Mere acquiescence for three years after arriving at age without any affirmative act was not a ratification. 11 J. R. 539; 14 Id. 124; 23 Maine R. 517. The entry made by the defendant in this case for the purpose of disaffirming the contract with notice of such intention was sufficient to entitle him to recover. 17 Wend. 120.

The judgment must be affirmed.¹

II. Effect of judicial sales on legal character of infant's interest in realty.

MARSH v. BERRIER.

6 IREDELL'S EQUITY (N. C.), 524. — 1850.

[*Reported herein at p. 70.*]²

¹ See the New York statutes as to infant's powers to convey, § 3 R. P. L. For special proceedings for sale of infant's real estate, see Code Civ. Pro., §§ 2345-2364. — ED.

² See also § 2359 N. Y. Code Civ. Pro. — ED.

CHAPTER III.

MARRIED WOMEN.

I. Husband's right to dissent to devise or conveyance to wife.

BAXTER *v.* SMITH.

6 BINNEY, 427. — 1814.

TILGHMAN, C. J. — It was given in charge by the president of the Court of Common Pleas that the lease was void because made to a married woman, against whom no action could be supported for the non-performance of her part of the agreement. He took for granted from the evidence that the husband did not assent. This broad position took from the jury all right of considering the circumstances of the case; and it appears to me that the president went too far in saying that the lease was void, because no action lay against the woman. For granting that no action lay, yet if in fact all the stipulations on her part were complied with, both during her husband's life and afterwards, neither Finley himself, who had received the benefit of those stipulations, nor the plaintiffs who claim under his will, would be permitted to aver that the lease was void, such averment being against all equity and good conscience. A married woman may take by purchase unless her husband expressly dissents. So that the jury should have been instructed to consider whether from the direct or circumstantial evidence George Baxter, the defendant's husband, had assented to this lease, or whether the terms agreed to by his wife had been complied with, and in either case, if their opinion should be in the affirmative, the lease was valid and the plaintiffs ought not to recover. I give no opinion on the evidence, which is sent up with the record, that being a matter not proper for our consideration. On the whole, I am of opinion that there was error in the judge's charge, and therefore the judgment should be reversed, and a *venire facias de novo* awarded.

II. Transfers by married women.

JEWITT, J., IN ALBANY FIRE INSURANCE CO. v. BAY.

4 NEW YORK, 9. — 1850.

By the common law a married woman is disabled from alienating her lands by deed, either by uniting with her husband, or by executing it alone. The only mode in which she had power to transfer her title or interest in real estate was by levying a fine or suffering a common recovery, her deed being void. 1 Bl. Com. 444; 4 Cruise's Dig., tit. 32 Deed, ch. 11, § 29; *Compton v. Collinson*, 1 H. Bl. Rep. 345; *Jackson v. Vanderheyden*, 17 John. 167; *Martin v. Dwelly*, 6 Wend. 9; *Bool v. Mix*, 17 id. 128; 2 Kent's Com. 150, 1; *Gillet v. Stanley*, 1 Hill, 121; 5 Cruise's Dig., tit. 25, Fine, ch. 10, § 5; *Constantine v. Van Winkle*, 2 Hill, 240. The husband, as a general rule, was required to be a party with the wife in levying a fine for the conveyance of her lands; but she might, as a *feme sole*, levy a fine of her lands without her husband, and it would be valid and effectual as against her and her heirs, unless it should be avoided by the husband during the coverture, which he might do for the benefit of the wife as well as of himself. 1 Preston on Abst. 336; Com. Dig., tit. Baron and Feme, G. 88; *Mary Portington's Case*, 10 Coke, 43, p. 322. Lord Loughborough, in *Compton v. Collinson*, *supra*, said that it had been settled ever since the case in the 17 Ed. 3, Year Book 17 Ed. 3, 52, 78, that if a fine be levied by a *feme covert* without her husband, it shall bind her and her heirs, if it be not avoided by the husband; and that both Rolle and Comyns seem to intimate that the law would be the same as to a recovery. In the same case, page 345, it was said, in reference to the power of a *feme covert* to dispose of her lands, that it would be more accurate to state the law to be that a married woman can make no conveyance of her lands, except by fine or recovery, and that a fine levied by her alone is avoidable only by her husband.

The disability of a married woman to convey her lands by deed was not supposed to arise from want of reason, but because by her marriage she was placed under the power and protection of her husband; and it was upon that ground that the separate examination of such woman on a fine was good, because when delivered from her husband her judgment was supposed to be free. *Hearle v. Greenbank*, 3 Atk. 712; *Compton v. Collinson*, *supra*; 2 Kent's Com. 150; *Durant v. Ritchie*, 4 Mason, 54. Judge Story, in the case of *Durant v. Ritchie*, said that fines, as a mode of conveyance, did not appear ever to have been adopted in this country; and

common recoveries, though resorted to for other purposes, were not known to have been used for transfer of the estates of *femes covert*. Thompson, Ch. J., in *Jackson v. Gilchrist*, 15 John. 115, in regard to the alienation of lands by married women, remarked that the common-law modes, by fine and recovery, never were in use here.

The great object which the common law aimed at was to ascertain whether the wife, in the transfer of her estate or interest in real property, acted under fear or compulsion of her husband. In a conveyance by fine and recovery, the wife was privately examined by the court, as to her voluntary consent, which removed the general presumption of the law that she was acting under the compulsion of her husband. 2 Bl. Com. 355; 5 Cruise's Dig., tit. 35, §§ 7, 8, 9; *Bool v. Mix*, 17 Wend. 128.

Instead of using fines and recoveries for the conveyance of lands by married women, under the government of the colony of New York, deeds were used for that purpose, and upon their simple acknowledgments by the grantors, or proof made by a subscribing witness before a member of his majesty's council, a judge of the supreme or county court, or a master in chancery, and sometimes before a justice of the peace, without private examination; and there were lands held under deeds of married women not acknowledged or proved even in the manner mentioned; which practices were recited in the act of the 16th of February, 1771, and such deeds were confirmed by it. As to future conveyances, it was enacted by that act, that no estate of a *feme covert* should thereafter pass by deed without a previous acknowledgment made by her, apart from her husband and on a private examination, that she executed the same freely, and without any fear or compulsion of her husband. 2 Kent's Com. 150; *Jackson v. Gilchrist*, 15 John. 109. This act prescribing the form in which the deed of a *feme covert* should be acknowledged in order to pass her real estate has been substantially continued in respect to married women residing in this State in the successive revisions of the laws. 2 Greenleaf, 99, § 3; 1 R. L. 369, § 3; 1 R. S. 758, § 10.¹ No distinction is made, in either of the statutes referred to, between the effect of a deed executed by the husband and wife for the conveyance of her lands, where the wife resides in this State, and a deed executed by the wife without her husband for such purpose. By our usages and laws we have substituted her deed for a conveyance of lands in the place of the common-law mode, by fine. It is conceded that it must have the same effect under our laws, where the husband joins with

¹ See for present law § 251 R. P. L. — ED.

the wife, if properly acknowledged, as a fine had, at the common law, as a conveyance, where the wife joined with her husband in levying it. And I can see no reason why her deed, properly acknowledged, where the husband does not join with her in it, should not have at least as extensive an effect as a fine had, at the common law, when levied by her alone. * * *

At the time Mrs. Treat executed the mortgage in question, she was seised of the premises in fee, capable of holding lands; and it is not pretended that she was either an idiot or a person of unsound mind, or an infant; and therefore was a person expressly authorized by the statute to alien her estate or interest in lands at her pleasure, subject only to such restrictions and regulations as were provided by law; and that as to them the certificate of the officer before whom she acknowledged the execution of the mortgages shows an exact compliance. The defendants insist upon another restriction to her alienating her estate or interest in lands; that her husband must have joined with her in the conveyance to give it the effect to pass her estate. I think that is answered by the fact that there is no provision in our laws making it necessary in order to the passing of the estate or interest of a married woman residing in this state, in lands of which she is seised or entitled to, that her husband should join with her in the conveyance.

It is said in 2 Kent's Com. 152, that the weight of authority would seem to be in favor of the existence of a general rule of law, that the husband must be a party to the conveyance or release of the wife, and that such a rule was founded on sound principles, arising from the relation of husband and wife. It was, however, admitted that there were exceptions to the rule, and that it was not universal in its application. * * *

The substitute in favor of a conveyance by the wife of a deed for a fine or common recovery was made at an early day by most, if not all, the colonial governments, by statutes which have been substantially continued to this period by legislative enactments. These statutes, in most cases, have expressly provided that the husband and wife must join in the conveyance, to have the effect of passing her present or contingent estate or interest in real estate. This is so as it respects Maryland, *Lawrence v. Heister*, 3 Har. & John. 371; New Hampshire, Massachusetts, Vermont, and several other States. In Vermont, the right of a married woman to convey her lands by deed is given by statute to convey "by deed of herself and baron," and making her separate examination and acknowledgment necessary, and to be certified upon the deed. *Sumner v. Conant*, 10 Vern. Rep. 20.

It is said, 2 Kent's Com. 153, that the particular question, whether the husband must be a party to the deed of release by the wife of her dower, to give it validity, has never been judicially settled in this State. * * *

So far as judicial decision is concerned it is an open question in this State. But if we may rely upon the dicta or casual remarks of learned judges bearing upon it but not involved in the questions determined, it may be as well sustained that a *feme covert* can, during her coverture, part with her interest in her real estate by deed without her husband, as that she must join with him to effect it. * * *

I have come to the conclusion that a *feme covert* residing within this State has power to convey her estate or interest in her land by her separate deed without her husband, if she acknowledge, before a proper officer, on a private examination apart from her husband, that she executed such deed freely and without any fear or compulsion of her husband, and such acknowledgment is properly certified by such officer; and therefore that the mortgages executed by Mrs. Treat are valid and subsisting liens on lot No. 1.

III. Her power to devise her lands.

DENIO, J. IN WADHAMS v. AMERICAN HOME MISSIONARY SOCIETY.

12 NEW YORK, 415. — 1855.

AN argument in favor of this will has been deduced from the course of decisions in respect to testamentary dispositions of real estate made by married women, notwithstanding the prohibition contained in the English Statute of Wills, and which we have seen was re-enacted in this State. It is familiar law that, notwithstanding this prohibition, a married woman was competent to appoint the uses of land where a power for that purpose had been reserved by or given to her by some conveyance competent to raise and to direct the execution of such use, or where land had been conveyed in trust for her benefit with a like power of appointment, and this she might do by will where the power authorized it. Wills operating by way of the appointment of a use were common before the statute had authorized a devise of lands. The use was considered as a thing distinct from the land, and might be transferred by methods which would be entirely insufficient to convey the land itself. The statute of uses, passed a few years prior to the statute of wills, was designed

to put an end to this distinction by conferring upon the possessor of the use the legal seisin and ownership of the land. The manner in which the intention of the legislature was defeated by the courts forms one of the most curious chapters of the law of real estate, but it is sufficient here to mention a single feature of this system, the one which declared that future or contingent uses might be limited upon a conveyance in fee, which would remain unexecuted until they were designated and pointed out by the party to whom the power to do so was given. When the power was executed the person in whose favor the appointment was made became invested with the use, and instantly gained the legal estate by force of the statute. 3 Reeves' Hist. Eng. Law, 365, 366; 4 Id. 247, 253, 360; 1 Sugden on Powers, 12, 184.

Now, by the common law, a married woman could not dispose of her legal estate in lands without a fine or recovery, and by the statute of wills she was expressly prohibited from devising her lands; but as the instrument or attorney of another she could, both before and since the statute, convey an estate in the same manner as her principal, because the conveyance was regarded as the deed of the principal and not of the attorney. 1 Sugden on Powers, 184; *Thomlinson v. Dighton*, 1 P. Williams, 149. It follows that a married woman cannot in England, and could not in this country until the passage of the act respecting married women in the year 1849, make a will of her real estate, except by virtue of a power or by way of appointing a use; but where she is clothed with such a power, her coverture forms no impediment to the transaction. *Peacock v. Monck*, *supra*; *Bradish v. Gibbs*, 3 J. C. R. 523. It may be proper to mention, to prevent misapprehension, though the doctrine has no particular bearing upon this case, that a formal conveyance to uses, or to trustees upon trusts to be executed by virtue of a power, is unnecessary; and that marriage articles, by which the husband agrees that his intended wife may dispose of her real estate, will be enforced in the same manner as though there had been a formal conveyance. Lord Hardwicke, in *Peacock v. Monck*, expressed a doubt whether a simple agreement between husband and wife would be sufficient; but the cases since that time have definitely settled the question that a court of chancery, acting upon the consciences of the parties and considering that done which they had agreed to do, will sustain an appointment under the provisions of an ante-nuptial contract, simply executory in its terms. *Wright v. Cadogan*, 6 Brown's P. C. 156; *Rippon v. Dawding*, Ambler, 565; *Bradish v. Gibbs*, *supra*.

ANDREWS, J. IN *BROWN v. CLARK*.

77 NEW YORK, 369. — 1879.

WE concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. *Force and Hembley's Case*, 4 Co. 61. The reason of the rule is stated by Lord Chancellor Thurlow in *Hodsdon v. Lloyd*, 2 Bro. Ch. 534. He says: "It is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix; and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void." The rule that the marriage of a *feme sole* revoked her will was made a part of the statute law of this State by the Revised Statutes. 2 R. S. 64, § 44. The language of the statute that the will of an unmarried woman shall be deemed revoked by her subsequent marriage is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation. 4 Kent, 528. It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this State takes away the reason of the rule of the common law, and that upon the maxim *cessante ratione legis, cessat lex ipsa*, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a *feme sole* should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was well settled. *Force and Hembley's Case*, 1 Jarman, 106; 4 Kent, 598. But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the Legislature should have intended to leave the statute of 1830 in force, although the new statutes took away the reason upon which it was based. The Legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage.

IV. Married woman's separate estate and her power to control and dispose of same.

JAQUES *v.* TRUSTEES, ETC.

17 JOHNSON (N. Y.), 548. — 1820.

[*Reported herein at p. 93.*]

PULLEN *v.* RIANHARD.

1 WHARTON (PA.), 514. — 1836.

[*Reported herein at p. 95.*]

FEARS *v.* BROOKS.

12 GEORGIA, 195. — 1852.

[*Reported herein at p. 571.*]

CHAPTER IV.

PERSONS OF UNSOUND MIND.

ALLIS *v.* BILLINGS.

6 METCALF (MASS.), 415. — 1843.

WRIT of entry to recover certain lands. Tenant gave in evidence a deed from demandant. Demandant offered to prove that he was insane when the deed was given. The judge instructed the jury "that if demandant was not of sane mind when he made the deed, it was void absolutely, and not voidable merely, and that the receipt of money on the note would not bar an action, though demandant was sane when he received it." The jury found that demandant was insane when the deed was made.

New trial to be granted if ruling of judge was incorrect: otherwise judgment to be rendered for the demandant on the verdict.

DEWEY, J. — The question raised in the present case is, whether the deed of one who is insane at the time of the execution thereof is void absolutely or merely voidable.

The term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable;" it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question, then, arises: Is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries, vol. ii., p. 291, states

the doctrine thus: " Idiots, and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable, but not actually void."

Chancellor Kent says: " By the common law a deed made by a person *non compos* is voidable only, and not void." 2 Kent's Com., 4th ed., 451. In *Wait v. Maxwell*, 5 Pick. 217, this court adopted the same principle, and directly ruled that the deed of a *non compos* not under guardianship was not void, but voidable. Such a deed conveys a seisin to the grantee, and the deed, to that extent, is valid until, by entry or action, the same is avoided. *Mitchell v. Kingman*, 5 Pick. 431, is to the like effect. In *Seaver v. Phelps*, 11 Pick. 305, the contracts of insane persons are noticed as contracts not absolutely void, but voidable.

It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such a contract. But this objection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it to some present purposes effectual and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common-law writers group together idiots, madmen, and infants, as parties incapable of contracting for want of a rational and deliberate consenting mind. 1 Story on Eq., § 223, and authorities there cited. It is true that the rule of the common law, as held at one time, seemed to sanction, in one particular, a most unwarrantable distinction between the cases of deeds made by persons *non compos* and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although it allowed privies in blood, or privies in representation, after the death of the *non compos*, to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our courts. On the contrary, we hold that such conveyance by one *non compos mentis* may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in the case of *Mitchell v. Kingman*, 5 Pick. 431. Indeed, the English rule has, in modern times, been often questioned in England; and in the courts of our sister States it has

received little if any sanction. 1 Story on Eq., § 225, and cases there cited.

It was urged by the demandant's counsel that the doctrine that the deed of a *non compos* person was voidable only, and not void, was to be limited to feoffments, or cases where there is a livery of seisin, or what is equivalent, and would not embrace a conveyance by an unrecorded deed. But we do not think that such a distinction can be maintained. As between the grantor and the grantee, such unrecorded deed is good and effectual, by force of our statute; and the effect of such a conveyance would be to vest the title of the grantor in the grantee immediately upon the execution of the deed, and before the same is recorded *Marshall v. Fisk*, 6 Mass. 31. A deed made in proper form, and duly acknowledged and recorded, is, in this commonwealth, equivalent to a feoffment with livery of seisin. *Somes v. Brewer*, 2 Pick. 197. Without the registry, where the delivery of the deed is accompanied by the surrender of the possession of the conveyed premises to the grantee, the effect would be the same, as to the conveyance by a *non compos*, as would result from a feoffment made by him. A deed of bargain and sale, it is said, places the grantee upon the footing of a feoffment, as it passes the estate by the delivery of the hand; such grants or deeds as take effect by delivery of the hand being voidable only. *Somes v. Brewer*, 2 Pick. 197; *Zouch v. Parsons*, 3 Burr. 1804. We come, therefore, to the result that the deeds of infants and insane persons are alike voidable, but neither are absolutely void. * * *

The presiding judge ruled, as a matter of law, that a deed of an insane person was absolutely void. Under this ruling all that was required of the demandant, to entitle himself to a verdict in his favor was to show a temporary insanity at the time of the execution of the deed. No matter what might have occurred subsequently, or how soon afterwards the demandant might have been restored to a sound mind; no matter what acts of confirmation may have been done by him, or however fully he may have adopted and ratified the transaction, by the receipt of money or other valuable consideration paid for the land; still the legal title in the land would be in him. This was the necessary result of the doctrine. The deed of a *non compos* was absolutely void, while, if it had been held only voidable, these subsequent acts of the party might materially affect the verdict of the jury. But adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid his deed, and thus furnishes full protection to him against all acts injurious to his interests, done while he was *non compos*, also entitles the other party to set up

the deed, if he can show a ratification or adoption of it by the grantor, after he is restored to a sound mind. If the grantor, when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them; if he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane — it is competent for him to do so. But the consequence will be to give force, effect, and legal validity to his contract, which was before voidable.

In the present case, therefore, upon the point first relied upon in the defense, viz.: that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the demandant to avoid it on that ground, if not estopped by his subsequent acts, done while in his right mind; but that a voidable deed was capable of confirmation; and that, if the grantor, in his lucid intervals, or after a general restoration to sanity, then being of sound mind, and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it, by receiving from the purchaser the purchase-money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become effectual to pass the lands, and divest the title of the grantor. Such instructions would have presented the question in issue in a different aspect to the jury, and might have led to a different result upon the only point upon which they passed.

Verdict set aside, and a new trial granted.¹

¹ See, however, *Aldrich v. Bailey*, 132 N. Y. 85. See the New York statutes, § 3, R. P. L.; §§ 2345 2364, Code Civ. Pro. — ED.

CHAPTER V.

CORPORATIONS.

1. POWER TO TAKE AND HOLD.

NICOLL *v.* N. Y. & E. RAILROAD CO.

12 NEW YORK, 121. — 1854.

[*Reported herein at p. 527.*]

WHITE *v.* HOWARD.

46 NEW YORK, 144. — 1871.

[*Reported herein at p. 47.*]

CONGREGATIONAL SOCIETY *v.* STARK.

34 VERMONT, 243. — 1861.

[*Reported herein at p. 509.*]

THE ASSISTANT VICE-CHANCELLOR IN BARRY *v.* MERCHANTS EXCHANGE COMPANY.

1 SANFORD'S CHANCERY (N. Y.), 280. — 1844.

EVERY corporation, as such, has the capacity to take and grant property, and to contract obligations in the same manner as an individual.

This is the general rule. But corporations are usually created for some limited and specific purpose, and therefore the general powers incident to a body corporate at common law are restricted by the nature and object of the institution of each. And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter.

Upon this principle, and to the extent stated, a corporation in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge, it may contract a debt for the labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land, or materials, or to pay for such labor. And as evidence of the indebtedness and as security for its repayment, it may execute to the creditor a promissory note, a bond or a mortgage; whether the debt be for the money borrowed, or for the work, materials or land. * * *

In the last revision of our statutes the Legislature thought proper to enact many of the principles of the common law as then understood. And it is accordingly provided in 1 Rev. Stat. 599, 600, § 1, that every corporation as such has power, among other things, "to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." By the third section, "In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given." * * *

Having examined some of the usual capacities of a corporation created for a limited purpose or object, I will next inquire with what power it is clothed in regard to real estate.

The Merchants' Exchange Company is expressly authorized by its charter to take, hold and convey real estate. To what extent it may hold real estate is fully discussed in a subsequent part of the case.

At common law a corporation aggregate has an incidental right to dispose of both lands and chattels. Except when restrained by law, all corporations have the absolute *jus disponendi*, and in its exercise are unlimited as to objects and quantity. 2 Kent's Commentaries, 281, 2d ed.; Comyn's Digest, Franchise, F. 11, 18; 1 Kyd on Corp. 108; Angell & Ames on Corp. 125, 2d ed.; *Case of Sutton's Hospital*, 10 Reports, 30 b; *The Mayor, etc., of Colchester v. Lowten*, 1 Ves. & Beames, 226, 244, and the arguments at the bar in that case, pp. 237, 240.

This general right of disposal as to lands was much circumscribed by the various statutes relative to charitable societies in England; and in this country, where all grants of corporate power emanate from the legislature, it is usual to limit the *jus disponendi*, in religious

societies and others of a charitable nature. Again, a corporation which can dispose of its property, may, in general, dispose of any interest in the same, as it deems expedient; and in this respect has the same power as an individual. Thus, it is said that it may lease, grant in fee or for life, mortgage, and even make an assignment for the benefit of creditors, giving preferences, where the law admits of such assignments by natural persons. Angell & Ames on Corp. 126, and the cases there cited. Two of these cases, *Jackson v. Brown*, 5 Wend. 590, and *Gordon v. Preston*, 1 Watts, 385, I have stated at large, and they establish the power to mortgage.

2. POWER TO CONVEY OR MORTGAGE.

AURORA AGRICULTURAL & HORTICULTURAL SOCIETY v. PADDOCK.

80 ILLINOIS, 263. — 1875.

MR. JUSTICE CRAIG delivered the opinion of the Court: This was a bill in equity, brought by appellees, to foreclose a mortgage executed by the Aurora Agricultural and Horticultural Society of Aurora, on the 28th day of December, 1870, to secure the payment of \$6,000 loaned by John R. Coulter to the society. The court, on a hearing of the cause, rendered a decree directing a sale of the mortgaged premises in satisfaction of the mortgage debt.

The society has prosecuted this appeal, and in order to obtain a reversal of the decree, it is insisted by the counsel for appellant:

First. — That the society had no power whatever to mortgage.

Second. — That the mortgage in question was wholly unauthorized.

The appellant was organized on the sixth day of March, 1869, under an act approved Feb. 15, 1855, which authorized the incorporation of agricultural societies. Gross' Statutes, 1869, page 119. By the third section of the act the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value \$10,000.

While it is true no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be

regarded as an incident to the power to acquire and hold real estate and make contracts.

We understand it to be the common-law rule that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by the act under which they are organized or by statute.

It is said in Angell & Ames on Corporations, p. 153: "Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity." The same doctrine is clearly laid down by Kent, vol. 2, page 280.

We are, therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts. * * *

Decree affirmed.

PART VI.

OF THE ACQUISITION AND TRANSFER OF INTERESTS IN LAND.

CHAPTER I.

TITLE BY ORIGINAL ACQUISITION.¹

I. Title by occupancy.²

ATKINSON *v.* BAKER.

4 DURNFORD & EAST (ENG.), 229. — 1791.

[Reported herein at p. 579.]

II. Title by accretion or accession.

DEERFIELD *v.* ARMS.

17 PICKERING (MASS.), 41. — 1835.

[Reported herein at p. 108.]

¹ "A title is thus defined by Sir Edward Coke, *titulus est justa causa possidendi id quod nostrum est*; or, it is the means whereby the owner of lands hath the just possession of his property." 2 Blk. Com. 195. For the elements of a complete title, see *Id.*, 195-199, and note 41 to Hammond's edition.

Title by original acquisition and title by derivative acquisition are both titles by "purchase" as distinguished from title by descent in which latter class of titles no element of consent on the part of the recipient is involved or required. — ED.

² The term occupancy (*occupare*) is used here in the primary sense of grasping or seizing upon. In a broader sense all titles by original acquisition may be called titles by "occupancy." In the narrow sense the term is applied to the acquisition of property which has no owner. The only case for the application of the principle in modern law is the one illustrated in the text, as the ultimate ownership of land is now in the crown or the State. It is not intended to consider in this Part (except it be incidentally), the acquisition of title by the State; this may be by discovery, conquest, treaty, confiscation, escheat, the exercise of the right of eminent domain, or by purchase from individuals. — ED.

GODDARD *v.* WINCHELL.

86 IOWA, 71. — 1892.

[*Reported herein at p. 109.*]¹RITCHMYER *v.* MORSS.

3 KEYES (N. Y.), 349. — 1867.

[*Reported herein at p. 283.*]WARREN *v.* CHAMBERS.

25 ARKANSAS, 120. — 1867.

COMPTON, J. — This was a bill in chancery, exhibited by Samuel H. Warren against William E. Chambers, as administrator of Stephen Bonnell, deceased, for an abatement in the price of certain lands which Bonnell sold to the complainant.

At the final hearing the bill was dismissed, and the complainant appealed.

The ground on which an abatement of the purchase money is sought is, that Bonnell has no title to a portion of the land embraced in his deed to the appellant. The land sold was bounded on Tucker's lake, according to the original survey of the meanders of the lake, made by authority of the United States. Shortly before the sale to the appellant, the meanders of the lake were again surveyed, when it appeared that there was a strip of land lying between Bonnell's land, as originally run, and the lake, which had become dry by recession of the water. This strip was conveyed with the other land, and is described in Bonnell's deed as "the swamp land recently surveyed." The evidence showed that the water receded gradually — continuing to do so through a series of years.

Waiving other questions that have been discussed, we will proceed to determine whether Bonnell had title to the strip of land above indicated; for, if he had, then this controversy is ended, and the decree of the circuit court below must be affirmed. The question presented involves an examination, to some extent, of the doc-

¹ See as to ice, pp. 136, 146, *supra*; as to fixtures, see also the cases on pp. 218, 224, 227 and 309, *supra*. See also cases on sea-weed, wreck, stranded property, mislaid goods, fish and game, pp. 351-371, *supra*, for analogous principles. — Ed.

trines of alluvion and dereliction. Alluvion, according to the English common law, is an addition made to land by the washing of the sea, a navigable river, or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time. Land thus formed belongs to the proprietor of the adjacent land to which it is attached. [Dereliction, according to the same authority, is a recession of the waters of the sea, a navigable river, or other stream, by which land that was before covered with water is left dry. In such case, if the alteration takes place suddenly and sensibly, the ownership remains according to former bounds; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has so receded.] Woolrych on Water Courses, marg. 29, 34, 35, 46, 47, and authorities there cited. And the reason, as given by Blackstone, why alluvial and derelict land, gained by imperceptible degrees, belongs to the owner of the adjoining land, is that *de minimis non curat lex*, and because such owners, being often losers by the breaking in of the water, or at charges to keep it out, this possible gain is a reciprocal consideration for such possible charge or loss. Bl. Com., vol. 2, 262.

In this country these rules of the common law have been applied to lake as well as other waters. Thus, in *Murry v. Sermon*, 1 Hawks. 56, decided by the Supreme Court of North Carolina, the defendant in ejectment claimed title to the land in dispute, which was bounded by Mattamuskeet lake, under a patent dated in 1761; and the plaintiff claimed under a grant of recent date, covering lands between the defendant's lines and the lake. Both parties introduced evidence as to what had been actually run for the lines of the defendant's land; and the court below instructed the jury to find for the defendant, no matter whether the lake had receded or not; for, in either case, it remained his boundary. This was held to be erroneous, and a new trial was awarded, in order that the jury might find the fact whether the waters of the lake had receded gradually and imperceptibly, or suddenly and sensibly, from the land in controversy, because, on that question, the court said the rights of the parties depended. So, in *Banks v. Ogden*, 2 Wal. 57, recently determined in the Supreme Court of the United States, it was held that accretion by alluvion from Lake Michigan belonged to the proprietor of the land bounded by the lake. It is true that, in both of these cases, the lakes are navigable, and in the case before us evidence was introduced in the court below to prove that Tucker's lake is navigable; but in such cases it is immaterial whether the water is navigable or not. In England, from whence we derive the doctrine

of alluvion and dereliction, and where it is said to be applicable to streams generally, Woolrych on Waters, marg. p. 46, no river is navigable, in a common-law sense, above the point where the tide ebbs and flows though it may be so in fact; and this rule has been adopted in most of the American States. Angell on Water Courses, § 542 *et seq.*, and cases there cited. Whether a river is navigable, in a technical common-law sense, or in the ordinary acceptance of the term, or whether it is navigable or not, may become an important inquiry in cases touching the right of the public to use it as a highway, and for commercial purposes. So, a like inquiry would be pertinent in cases involving the ownership of the bed of the stream, as between the government or those claiming under it and the riparian proprietors, because, at common law, the bed of a river belongs to the government so high up only as it is navigable in a technical sense, that is, as far as the tide ebbs and flows; and above that point it belongs to the riparian owners; each — where their lands lie on opposite sides of the river — owning to the middle or thread of the stream. [But whether a river or other water is or is not navigable can in no way affect the right of the riparian proprietor to such additions as may be made by alluvion or dereliction.] His right rests altogether on another and different foundation. The facts to be ascertained are the local situation of the land and the mode by which the increase has been added. If the land is contiguous to the water and the addition is made slowly and insensibly, his title to such addition is complete. In *Municipality No. 2 v. Orleans Cotton Press*, 18 La. Rep. 122, it was decided that the right to future alluvial formation was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches, and that it was an accessory to the principal estate or land, which cities as well as individuals might acquire, *jure alluvionis*, as owner of the front or riparian proprietor, and that the right was founded in justice, arising from the risks to which the land was exposed, and from the burden of keeping up levees or embankments in front of the river to protect the estate. And in *Banks v. Ogden*, *supra*, the Supreme Court of the United States said: "The rule governing additions made to land bounded by a river, lake or sea has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislatures, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and repairs, imposed by the contiguity of waters, ought to

receive whatever benefits they may bring by accretion; by others it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself.

The testimony in the record brings the case before us clearly within the rules of law to which we have referred. The conclusion, therefore, is that the appellant acquired title to the derelict land under the conveyance from Bonnell, and that consequently the decree must be affirmed.

HALSEY *v.* McCORMICK.

18 NEW YORK, 147. — 1858.

PRATT, J. — It was settled by this court, when this cause was before it upon a former occasion; that the plaintiff's south line did not originally extend to the centre of the creek, but only to the line of low water on the north bank. Assuming this to be settled, the plaintiff does not claim that, as the creek originally ran, the land in dispute was embraced within the boundaries of his lot. But if I understand it, he claims that the land in dispute is alluvion, and he is entitled to it as a riparian owner. But to acquire title to land as alluvion it is necessary that its increase should be imperceptible — that the amount added in each moment of time should not be perceived. When the change is so gradual as not to be perceived in any one moment of time, the proprietor, whose land on the bank of a river is thus increased, is entitled to the addition. Ang. on Water Courses, § 53; 2 Bl. Com. 262; 3 Kent, 519.

It is enough that no such fact is found in this case as that this piece of ground is alluvion — that it was formed by imperceptible accretion. The evidence shows that it was not thus formed. McCormick deepened the bed of the stream on the south side, and placed stones along the centre so as to confine the water in the channel thus deepened, and by this means the land in question was left bare. He may have been guilty, by these acts, of a violation of the riparian rights of the plaintiff or his grantors, but I know of no rule of law which would constitute an illegal act of the kind a transfer of the title.

As the case stands, it is not necessary to pass upon the question whether there is a distinction between the case of alluvion formed by natural or artificial means. I find no such distinction in the books. If, by some artificial structure or impediment in the stream,

the current should be made to impinge more strongly against one bank, causing it imperceptibly to wear away, and causing a corresponding accretion on the opposite bank, I am not prepared to say that the riparian owner would not be entitled to the alluvion thus formed, especially as against the party who caused it.

If the accretion was formed under all the other circumstances necessary to constitute it alluvion, I can scarcely suppose that a person could successfully resist the otherwise valid claim of the riparian owner, by alleging his own wrong, by showing that the accretion would not have thus formed if he had not himself wrongfully placed impediments in the stream. But that question is not before us. It is enough that this case does not show that the land in question was alluvion.

The judgment, therefore, must be affirmed, with costs.

III. Title by adverse possession.¹

I. PRELIMINARY CONSIDERATIONS.

a. Mere possession as a title.

SHERIN *v.* BRACKETT.

36 MINNESOTA, 152. — 1886.

BERRY, J. — This is an action in the nature of ejectment, in which the plaintiffs, seeking to recover possession of a strip of land, alleged that on October 1, 1885, and long before, they were and now are owners thereof; and further that they and their ancestors, from whom they derive title, have been in the actual, peaceable, open, notorious, adverse, and continuous possession thereof for more than twenty-five years prior and up to October 8, 1885; that on that day, while they were in such actual possession, defendant unlawfully entered upon said strip of land and wrongfully ejected them therefrom, and ever since wrongfully detains possession thereof.

Doubtless the intent of the pleader was to set up title in fee based

¹ This is not, in and of itself, a complete and perfect title. It arises on a disseisin or ouster of the true owner, and consists in an adverse holding subsequent thereto, and is good as against all the world, except the true owner, or one claiming under him; it may become perfect by an estoppel or by the operation of a statute of limitations. See below and compare title by prescription. It is to be noted that immediately upon the disseisin, the estate of the disseisee is turned into a right of entry and later the right of entry may be *toll*ed in one way or another. The disseisee then has a mere right of action which a statute of limitations may ultimately cut off. — ED.

upon what is called adverse possession. But as the greater includes the less, the complaint sufficiently pleaded actual possession at the time of the defendant's alleged entry, so that if upon the trial the plaintiffs failed to make out adverse possession, such as would give them title as against the holder of the paper title, still, if they proved actual possession, they might properly insist that they were within the allegations of their complaint, and had made out a case as against a mere trespasser. For as against one showing no title in himself, possession is title. *Wilder v. City of St. Paul*, 12 Minn. 116, (192); *Rau v. Minnesota Valley R. Co.*, 13 Minn. 407, (442); Sedg. & W. Tr. Title Land, §§ 717, 718.

The evidence upon the trial below in the case at bar showed that plaintiffs were in possession of the strip of land in controversy at the time of defendant's entry upon it, and defendant gave no evidence of any right or title in himself. In this state of the evidence the plaintiffs were entitled to judgment, and hence the trial court erred in dismissing the action at the close of the plaintiffs' testimony. As this point is insisted upon by plaintiffs, it cannot be disregarded, and so there must be a new trial.

This disposes of the present appeal, but, as we surmise, not of the real merits of the controversy, and, therefore, with reference to a new trial³ we deem it expedient to determine certain other questions raised upon the argument.

And, *first*, though there are a few cases which hold that the statutory period of adverse possession, which will bar an action for the recovery of land, may be made up by tacking together the periods of the adverse possession of several successive holders between whom there is no privity, (see *Scales v. Cockrill*, 3 Head, 432; *Smith v. Chapin*, 31 Conn. 530; *Davis v. McArthur*, 78 N. C. 357), the rule laid down by the great majority of courts and by text-writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable. And this upon the principle that unless the successive adverse possessions are connected by privity the disseisin of the real owner resulting from the adverse possession is interrupted, and during the interruption, though but for a moment, the title of the real owner draws to it the seisin or possession. *Melvin v. Proprietors, etc.*, 5 Metc. 15, (38 Am. Dec. 384); *Haynes v. Boardman*, 119 Mass. 414; *McEntire v. Brown*, 28 Ind. 347; *Jackson v. Leonard*, 9 Cow. 653; *Wood, Lim.* § 271; *San Francisco v. Fulde*, 37 Cal. 349; *Crispen v. Hannavan*, 50 Mo. 536; *Shuffleton v. Nelson*, 2 Sawy. 540; *Ang. Lim.* 413, 414; Sedg. & W. Tr. Title Land, §§ 740, 745-747; *Riggs v. Fuller*, 54 Ala. 141.

Second. The privity spoken of exists between two successive holders when the latter takes under the earlier, as by descent, for instance, a widow under her husband, or a child under its parent, or by will or grant, or by a voluntary transfer of possession. *Leonard v. Leonard*, 7 Allen, 277; *Hamilton v. Wright*, 30 Iowa, 480; *Jackson v. Moore*, 13 John. 513 (7 Am. Dec. 398); *McEntire v. Brown*, *supra*; *Weber v. Anderson*, 73 Ill. 439; Wood, Lim. § 271; Sedg. & W. Tr. Title Land, §§ 747, 748.

Third. While to operate as a bar, adverse possession must be continuous, continuity will not be interrupted by the possession, during any part of its period, of one who occupies the premises as a tenant of the alleged possessor. In such cases the tenant's possession is that of his landlord. *San Francisco v. Fulde*, *supra*; *Rayner v. Lee*, 20 Mich. 384; Sedg. & W. Tr. Title Land, § 747.

Fourth. Possession, to be adverse, so as to bar an owner's right of action, must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely. Sedg. & W. Tr. Title Land, § 731 *et seq.*

This is all which we deem it necessary to say in this case; for, as there is to be a new trial, we forbear to comment upon the evidence.

Order reversed, and new trial awarded.

b. Forcible entries and detainers.

PHELPS *vs.* RANDOLPH.

147 ILLINOIS, 335. — 1893.

CRAIG, J. — The time for which the premises were leased had expired when Phelps took possession and removed Randolph's cattle, horses and other property from the lot or tract of land, and it is claimed that he had the right to take possession of the property, provided he could do so without a breach of the peace, while, on the other hand, it is claimed that Randolph, being in the lawful possession of the property, was entitled to hold that possession until dispossessed in an action brought for that purpose. The court, on the trial, instructed the jury, in behalf of the plaintiff [Randolph], in substance as follows:

"The jury have nothing to do, in this case, with the question of the ownership of the property in controversy. If they believe, from the evidence, that the plaintiff was in possession of it, claiming the right thereto as tenant of defendant, they should find that he was

entitled to retain such possession until deprived of the same by process of law or by his own acts.

"The jury are instructed that forcible entry does not necessarily mean the taking of real estate from the possession of another by breach of the peace. The taking of such property by opening a gate and removing cattle or other stock therefrom, against the will of the one occupying such property, is a forcible entry under the law.

"The jury are instructed that no one, not even the owner, has the right to forcibly take real estate from the possession of another, no matter how justly he may be entitled to it; and if the jury believe, from the evidence, that the defendant forcibly took from the plaintiff the real estate in controversy, against the will of the plaintiff, the jury should find the issue herein for the plaintiff."

The defendant requested the court to give the following instructions:

"A forcible entry, in the law, means an entry with such force and violence as would amount to a breach of the peace. And in this case, if you believe, from the evidence, that the defendant, in entering on the premises in question, did not use force and violence amounting to a breach of the peace, then his entry was not a forcible one, within the meaning of the law.

"You are instructed that if you believe, from the evidence, that the plaintiff, Randolph, on the 30th day of April, or the 3d of May, 1890, rented the premises in question from the defendant for the period of one year from that time, and paid him the sum of \$100 as rent for said premises for such year, then it became the duty of the plaintiff to surrender up the possession of said premises to the defendant at the expiration of such year, and in such case the plaintiff would not be entitled to any notice to quit and surrender up such possession to the defendant. And if you further believe, from the evidence, that the plaintiff did not surrender up the possession of said premises at the end of such year, then the defendant had the right to peaceably enter into the possession of said premises, even though they were still occupied by the plaintiff; and in such case, if you believe, from the evidence, that the defendant peaceably entered into possession of said premises and peaceably removed the cattle of plaintiff therefrom, this the law gave him a right to do, and you should, in such case, find the defendant not guilty."

But the court refused these and other like instructions prepared by the defendant, and the decision of the court on the instructions is the principal, and, indeed, the only, question of any importance presented by the record.

Our present statute provides, "that no person shall make an entry

into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." Rev. Stat. chap. 57, § 1. The first section of the act of 1845, entitled "Forcible Entry and Detainer," declared: "If any person shall make an entry into any lands, tenements or other possessions, except in case where entry is given by law, or shall make any such entry by force, . . . such person shall be adjudged guilty of a forcible entry and detainer," etc. It will be observed that the two statutes are substantially alike, and hence any decision of the court rendered under the statute of 1845 is applicable under the present statute.

As early as 1837, in *Atkinson v. Lester*, 1 Scam. 407, it was held: "To constitute a forcible entry and detainer, under the statute, it is not necessary that actual force and physical violence should be used." The same doctrine was announced in *Croff v. Ballinger*, 18 Ill. 202. The court said: "To constitute forcible entry and detainer, under our statute, it is not essential that the entry be made with strong hand or be accompanied with acts of actual force or violence, either against person or property. If one enters into the possessions of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible, in legal contemplation. The word 'force,' in our statute, means no more than the term *vi et armis* does at common law, — that is, with either actual or implied force." In *Smith v. Hoag*, 45 Ill. 250, the same question arose. It was there insisted the entry was not forcible, because Scott, the landlord of the appellant, was the owner and had the right to enter; that the owner may use all necessary force to make an entry unless he commits a breach of the peace. But the court held that under our statute of Forcible Entry and Detainer actual violence amounting to a breach of the peace is not necessary in any case. In *Reeder v. Purdy*, 41 Ill. 279, in passing upon the statute, the court held that any entry is forcible, within the meaning of the law, that is made against the will of the occupant.

From the authorities it is plain, under our statute, although Phelps did not use force amounting to a breach of the peace, he is liable under this form of action. Randolph, on going to Chicago on business, left the pasture and his stock in the care of George Bernal, his servant. At seven o'clock in the morning, in the absence of both Randolph and his agent, Phelps, with a force of seven men, went to the premises, and, without the knowledge or consent of Randolph or his agent, entered the premises, drove out Randolph's stock and removed all of his property, and took possession of the pasture and fastened the gates, and upon Randolph's return refused to permit

him to enter upon the premises. In *Wilder v. House*, 48 Ill. 279, where the landlord entered upon leased premises in the absence of the tenant and removed his goods, it was held that such an entry was unlawful, and the landlord was liable in an action for trespass. So in *Chapman v. Cawrey*, 50 Ill. 513, it was held, although a tenant may be holding over, yet if, during his temporary absence from the premises, the entrance is closed against him, he has the right to remove the obstruction by force and re-enter, and is not liable for a criminal prosecution for so doing. In *Doty v. Burdick*, 83 Ill. 473, it was held, to maintain forcible entry and detainer actual or constructive force only is necessary. It was also held that the landlord has no right to employ force and violence to regain possession, although the adverse possession may be wrongful.

Much reliance is, however, placed in *Fort Dearborn Lodge v. Klein*, 115 Ill. 190. There may be expressions in the opinion in that case which might be construed as favoring the position of appellant; but that was an action of trespass where title to the premises involved was in issue, and it was held that the plea of *liberum tenementum* was a good plea in the action. In an action of forcible entry and detainer the question of title does not arise, and cannot be considered, as has been held by this court in numerous cases. What was said in that case in regard to our statute of Forcible Entry and Detainer was *obiter dictum*, as the statute was not involved in the case.

If Randolph's term had expired, which the evidence tends to show it had, Phelps had a complete remedy in an action of forcible detainer, or ejectment, to regain possession of the premises, but he had no right to take the law in his own hands and take possession by force. No breach of the peace was committed, but the entry was a forcible one, — one which the statute forbids. Where a person is in possession of a tract of land, cultivating it or using it for pasture, but not residing upon it, he is entitled to the same protection as against an intruder, as he would be if he resided upon the land. His absence from the land is not a license or invitation for any one to enter, and an entry in the absence of the party in possession, against his will, may be regarded as forcible, and in violation of the statute.

The instructions of the court substantially conformed to the law as indicated, and we regard them correct.¹

¹ For the New York Statute see Code Civ. Proc., §§ 1669, 2233; N. Y. Penal Code, §§ 465-467. Compare *Pharis v. Gere*, 110 N. Y. 336; *Norton v. Avernam Co.*, 14 App. Div. (N. Y.) 581; *Bach v. New*, 23 App. Div. (N. Y.) 548. — ED.

2. THE ESSENTIALS OF AN ADVERSE POSSESSION.

*a. The possession must be actual and exclusive.*SHIRAS, J., IN *WARD v. COCHRAN*.

150 UNITED STATES, 597. — 1893.

No STATE statute has been referred to as regulating or defining title by adverse possession, and, indeed, it is stated in the brief of defendant in error that there is no such statute; but there is a statutory provision that an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of such action shall have accrued.

Our investigation, therefore, into the sufficiency of the special verdict must be controlled by the principles established, in this branch of the law, by the decisions of the courts, particularly those of the Supreme Court of the State of Nebraska and of this court.

In *French v. Pearce*, 8 Conn. 439, 440, it was said that "it is the fact of exclusive occupancy, using and enjoying the land as his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land."

In *Sparrow v. Hovey*, 44 Mich. 63, a refusal of the court to charge that, when the title is claimed by an adverse possession it should appear that the possession had been "actual, continued, visible, notorious, distinct, and hostile," but merely charging the jury that the possession "must be actual, continued, and visible," was held erroneous. In Pennsylvania, it has been repeatedly held that, to give a title under the statute of limitations, the possession must be "actual, visible, exclusive, notorious, and uninterrupted." *Johnston v. Irwin*, 3 S. & R. 291; *Mercer v. Watson*, 1 Watts, 330, 338; *Overfield v. Christy*, 7 S. & R. 173.

In *Jackson v. Berner*, 48 Ill. 203, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and is not to be made out by inference, but by clear and positive proof; and further, that the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

In *Foulk v. Bond*, 12 Vroom, 41 N. J. Law, 527, 545, it was said: "The principles on which the doctrine of title by adverse possession rests are well settled. The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted."

It was held in *Cook v. Babcock*, 11 Cush. 206, 209, that "when a party claims by a disseisin ripened into a good title by the lapse of time as against the legal owner, he must show an actual, open, exclusive, and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim."

In *Armstrong v. Morrill*, 14 Wall. 120, 145, this court, speaking through Mr. Justice Clifford, said: "It is well settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive, and adverse. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee, and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced." *Hogan v. Kurtz*, 94 U. S. 773, is to the same effect.

The authorities in Nebraska are substantially to the same effect on questions of title by adverse possession.

A leading case is *Horbach v. Miller*, 4 Neb. 31, 46, 48, in which it was said that "the elements of a title are possession, the right of possession, and the right of property; hence, if the adverse occupant has maintained an exclusive adverse possession for the full extent of the statutory limit the statute then vests him with the right of property, which carries with it the right of possession, and therefore the title becomes in him. . . . The submission of the case to the jury correctly was that if they believed, from the evidence, that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, continued, and notorious possession, of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error." In *Gatling v. Lane*, 17 Neb. 77, 82, the language used was: "A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive adverse possession for ten years, thereby disseises the owner." In *Parker v. Starr*, 21 Neb. 680, 683, a recovery was sustained where the testimony clearly showed that "the defendant and those under whom he claims have been in the open, notorious, and exclusive possession for ten years next before the suit was brought." In *Ballard v. Hansen*, 33 Neb. 861, 864, the following instructions, which had been given in the trial court, were approved by the Supreme Court: "The jury are instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open,

actual, exclusive, notorious, and hostile occupancy of the land, and claim of right, with the intention to hold it as against the true owner and all other parties; such occupancy, if continuous for ten years, ripens into a perfect title, after which it is immaterial whether the possession be continued or not." "If you find and believe, from a preponderance of the testimony in this case, that the plaintiff was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for ten years, claiming to own and hold them as against all others, as to such lots he is entitled to recover."

Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars; in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title.

Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous. * * *

In the present case, even if the verdict were regarded as a general one, and therefore entitled to be supported by the presumption that sufficient facts existed to sustain it, yet we should feel constrained to reverse the judgment, because of the errors complained of in the eighth, ninth, and tenth assignments.

The plaintiff's counsel requested the court to charge the jury that, in order that possession of land may overcome the title of the true owner, "there must be a concurrence of the following elements: Such possession must be actual, hostile, exclusive, open, notorious, and continuous for the whole period of ten years. Every element in this enumeration is absolutely essential, and if one of these elements does not exist there can be no adverse title acquired;" and the court did so charge; but the court then proceeded to say that, after having disposed of the written instruction, "I propose to go outside of what is there stated and give one on my own motion." Those voluntary instructions given by the learned judge, though correct in most respects, were imperfect in the very particulars in which we have found the special verdict defective. The jury were not told that, to make out the defense, the possession, in addition to certain other features properly specified, must be shown to have been actual and exclusive. * * *

b. It must be open, visible and notorious.

SCATES, C. J., IN McCLELLAN v. KELLOGG.

17 ILLINOIS, 498. — 1856.

THE intent to assert title in himself by his son, may be clear enough from the proof, for this must be shown. *Blunden v. Baugh*, 3 Croke R. 302. But the doctrine of adverse possession is to be taken strictly, and is not to be made out by inference, but by clear and positive proof, *Bonnell et al. v. Sharp*, 3 John. R. 169; *Rochelle ads. Holmes*, 2 Bay R. 491, and proof of actual ouster shown. 2 Espin. N. P. 9, old paging. The possession must be with such circumstances as are capable in their nature of notifying to mankind that he is upon the land, claiming it as his own, in person or by tenant — it must be visible, open, exclusive, *Irving v. Brownell*, 11 Ill. R. 413; it must be hostile in its inception, and so continue, *Turney v. Chamberlain*, 15 Ill. R. 273; and notorious; and not secret, as this cannot answer the purpose of notoriety to adverse claimants, cannot extinguish their claim for not being put in in due time. Adams on Eject. App. 485; Angell on Limit. 400, § 4, p. 416, § 13, p. 427, § 19. For the law proceeds upon the presumption of an acquiescence, which cannot be where the possession and claim are unknown; and the acts of possession are such as not to give notoriety to it. Id.

c. It must be with hostile intent.

AYERS v. REIDEL.

84 WISCONSIN, 276. — 1893.

EJECTMENT. Plaintiff and defendant owned adjoining parcels of land. Defendant built a fence through the forest as he opened up his land lying near the boundary and has occupied up to the fence for more than twenty years. A survey now shows that he had enclosed a portion of plaintiff's land. Judgment for plaintiff. Defendant appeals.

PINNEY, J. — * * * It is contended that the court erred in refusing to direct a verdict for the defendant — first, on the ground that the undisputed evidence showed that the defendant had held continuous and adverse possession of the premises under claim of title for more than twenty years before the commencement of the action; and, second, that it conclusively appeared that the boundary

line in question had been settled by acquiescence more than fifteen years before the action was brought. What constitutes adverse possession is for the court to determine, but the facts which establish it are for the jury, and the question of the character of the possession is generally submitted to them. *Gross v. Welwood*, 90 N. Y. 638. It was for the jury to say what was the real character of the defendant's possession of the strip in dispute, and whether it was taken and maintained with an intention by the defendant to oust the true owner, — whether it was adverse to him in fact. To constitute adverse possession there must be the fact of possession and the hostile intention, — the intention to usurp possession; and, if there be possession of land by one not the true owner, the presumption of law is that such possession is in accord or amity with, and in subservience to, the true title and legal possession of the owner. *Dhein v. Beuscher*, 83 Wis. 316; *Schwallback v. C., M. & St. P. R. Co.*, 69 Wis. 298; *Hacker v. Horlemus*, 74 Wis. 21; *Harvey v. Tyler*, 2 Wall. 349. The whole inquiry is reduced to the fact of entering, and the *intention* to usurp possession. *Probst v. Trustees*, 129 U. S. 191, 192. Permissive possession is never a basis for the statute of limitations, and the rule is that evidence of adverse possession must be strictly construed, and every presumption is in favor of the true owner, and that the defendant entered under his conveyance, and that his possession is only co-extensive with his title, and restricted to the premises granted by it. *Sydnor v. Palmer*, 29 Wis. 252; *Graeven v. Dieves*, 68 Wis. 317; *Fairfield v. Barrette*, 73 Wis. 468. The instructions of the Circuit Court on the question of adverse possession were as favorable to the defendant as the law would justify, and the jury were properly instructed that, “whether the defendant's possession was adverse depended upon the *quo animo* with which he entered upon the land; whether it was to hold it adversely, or whether it was merely tentative or provisional, depending upon where the true line should be afterward ascertained to be.” Whether the entry of defendant, and his continued possession, were an ouster of the plaintiff and his grantor, or were merely in subordination to the plaintiff, or permissive, was a question of fact for the jury. *Hacker v. Horlemus*, 74 Wis. 25. * * *

The jury, in view of all the facts and circumstances, might well say that the old fence was not intended as a permanent boundary, but was built and maintained as a matter of convenience until the true line should be ascertained, and that the defendant's possession of the strip in question had not been adverse for twenty years before the suit was commenced. While possession, occupation, and

improvements for several years, with the knowledge of the true owner, may be *prima facie* evidence of adverse possession, yet they are not conclusive, and may be explained and rebutted by proof of facts showing that the possession was not in fact adverse, *Worcester v. Lord*, 56 Me. 265; *Dow v. McKinney*, 64 Me. 138; *Lamb v. Coe*, 15 Wend. 642; that it was permissive or provisional, and without the intention in fact of claiming or acquiring title.

BARNES *v.* LIGHT.

116 NEW YORK, 34. — 1889.

EJECTMENT. Plaintiff relies on a title acquired by adverse possession. Judgment for defendant. Plaintiff appeals.

VANN, J. — * * * Whether the portion north of the woods was protected by a substantial enclosure, and whether it has been usually cultivated or improved within the meaning of the statute, were questions of fact which the jury should have been permitted to pass upon. The defendant, however, contends that it does not appear that the plaintiff or his grantors ever claimed this strip of land, or any part of it. There is no evidence that any claim of title was made by word of mouth, but it appears that each grantee in taking possession of the farm, under his deed, entered upon, actually occupied and improved the land in controversy, or a part of it, although it was not included in his conveyance. This, if done in good faith, was enough to satisfy the statute. A claim of title may be made by acts alone, quite as effectively as by the most emphatic assertions. As was said by the chancellor, when speaking for the Court of Errors in *La Frombois v. Smith*, 8 Cow. 589, 603: "The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estates, without any payment of rent, or recognition of title in another, or disavowal of title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and unless rebutted by other evidence, will establish the fact of a claim of title. Possession, accompanied by the usual acts of ownership, is presumed to be adverse until shown to be subservient to the title of another.

We think that the refusal of the court to submit to the jury the question "whether the plaintiff had not had such adverse possession of the premises claimed in the complaint, lying north of the woods, as to give him title thereto," as requested by the counsel for plaintiff, was error, and calls for a reversal of the judgment.

DOHERTY *v.* MATSELL.

119 NEW YORK, 646. — 1890.

ACTION to recover the possession of real estate. The city had leased the lands for twenty-five years on account of non-payment of taxes. The tax sale has been held void. Plaintiff seeks now to recover the land. Judgment for plaintiff. Defendant appeals.

Per curiam: It is undoubtedly true that for irregularities in the imposition of the taxes and in the proceedings leading to the tax sale the lease was void. But Matsell entered under the lease, and his right to hold under it does not appear ever to have been disputed. While under such a lease he was not estopped from disputing the title of the real owners, and while during the term he could have originated an adverse possession, yet he did not do so; and the lease, although void, was competent and persuasive evidence that he entered into and held possession of the land under the lease, and that he claimed no other title thereto. In order to establish title by adverse possession, it was incumbent upon the defendants to show that they and their grantors held the land adversely and in hostility to the true owner, claiming the entire title thereto. *Hoyt v. Dillon*, 19 Barb. 644; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108; *Gross v. Wellwood*, 90 Id. 638; *Sands v. Hughes*, 53 Id. 287.

Possession of land is always presumed to be in subordination to the true title, and one who claims that it is in hostility to such title must give evidence showing that fact or from which the fact may properly be inferred.

Here the evidence and circumstances were ample to justify a finding that Matsell, Sr., never, during the time he possessed the land, claimed to own anything more than the estate which the lease purported to give him, and that the land was never possessed adversely and in hostility to the true owners prior to the 1st day of November, 1864. The quitclaim deed to Mickle was an appropriate instrument for the conveyance of Matsell's interest in the term, and the assignment at the same time of the lease, subject to the rents and covenants therein contained, authorizes, if it does not absolutely require, the inference that all that Matsell intended to convey was his term under the lease. The fact that he resumed possession of the premises in 1858, without, so far as it appears, any reconveyance to him, certainly is not conclusive evidence that he intended then to assert an absolute title to the land; but the inference is permissible and most probable that there was either an undisclosed recon-

veyance to him by Mickle or some arrangement between Mickle and him by which he was to resume his former title. It must be presumed, in the absence of other proof, that he occupied the premises then as he did before the conveyance to Mickle, and as Mickle did. He knew the existence of the lease and that he had no right to occupy the premises except by virtue thereof, and there can be no presumption that he intended without any title or right to acquire by simple possession the title to this land, and thus without a shadow of right deprive the true owners thereof.

If the adverse possession of these premises commenced at any time before the expiration of the lease from the city, the evidence authorized a finding that it commenced not earlier than the 1st day of November, 1864, when Matsell conveyed to his son. The defendants admit that at the time of the conveyance of the land to Charles Jones they claimed the adverse possession under that title, and, therefore, it was proper that this action should be commenced in the name of the grantors for the benefit of their grantee, under section 1051 of the Code.

The case of *Sands v. Hughes*, *supra*, is not an authority for the defendants. The case holds that a lessee under such a lease is not estopped from disputing the title of the supposed owner for whose default, in the payment of the taxes, the land was sold by the city, and that, during the term of such a lease, even if valid, an adverse possession may be originated which will ripen into a title within twenty years after the end of the term; and that if the lease is invalid an adverse possession may originate and commence to run at any time which will ripen into a title within twenty years from the time it originated. There the adverse possession under claim of title was found. But the difficulty with the case of the defendants here is that there is no evidence requiring or finding that Mickle or George W. Matsell ever originated an adverse possession or claimed an adverse title earlier than the 1st of November, 1864, and the defendants, therefore, failed at the trial, as they must fail here, on the ground that they did not establish the adverse possession upon which they seek to base their title. But for the lease the evidence was ample to show the adverse possession. But the existence of that, whether valid or invalid, and the entry thereunder characterizes the possession, and must properly dominate this case.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

3. WHAT LANDS WILL BE DEEMED TO BE HELD ADVERSELY.

a. When no color of title in disseisor.¹

PROPRIETORS OF THE KENNEBECK PURCHASE *v.*
SPRINGER.

4 MASSACHUSETTS, 416. — 1808.

PARSONS, C. J. — The demandants sued the tenant in a writ of entry, counting on their own seisin within thirty years, and demanding the northerly half of lot number thirty-two in the second range of lots, of which they had been disseised by the tenant. On the trial, upon the general issue, the jury found a verdict for the demandants; and the tenant moves for a new trial, because, as he supposes, the verdict was against evidence, which is reported by the judge.

The tenant's title was under a release from James Springer, who as the tenant alleges, entered more than thirty years before, and disseised the demandants; for no evidence was given that James entered claiming any title or right to the land.

The statute of 1786, c. 13, limits the time of suing any real action by a corporation, declaring on its own seisin, to thirty years next after such seisin. And the tenant insists that, by virtue of this statute, the demandants are barred by the disseisin done to them by his releasor in 1775, which is more than thirty years before the teste of their writ.

The law upon this subject seems to be very well settled. When a man is once seised of land, his seisin is presumed to continue, until a disseisin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel, to which he has a right; for, in this case, an entry on part is an entry on the whole. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seisin but by the ouster of him who has seised and he is himself a disseisor. To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further than his actual exclusive occupation; for no further can the party seised be

¹ But in some States entry, with claim of title up to certain boundaries, will lay the foundation for an adverse title to the whole tract, though only part be actually occupied and there be no color of title. *Fitch v. Mann*, 8 Pa. St. 503. — ED.

considered as ousted; for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

Let us now consider the evidence as applicable to these principles. The demandants proved a title to the tenements demanded and a seisin in 1769. This seisin must be presumed to be continued until they were disseised, as they continued to claim title to the land. James Springer entered on the front lot, numbered thirty-two, in 1775. He continued in the occupation of that lot, improving and fencing a part, and living on it until he died; having, in the year he entered, cause it to be run round by a surveyor, and trees marked on the lines. This land is not demanded. But the notherly half of lot numbered thirty-two on the second range is demanded. And it appears that when he surveyed the front lot in 1775, he at the same time caused the demanded premises to be run round by the surveyor, and the lines marked. There is no evidence that he ever fenced any part of the land demanded until 1792, which is within thirty years, or exercised any act of ownership on it, except that he sometimes cut the grass on a small meadow which was part of it. Having fenced a part in 1792, he conveyed the premises to the tenant, who entered and has occupied the same under his deed ever since.

On considering the evidence, we are satisfied that the demandants were not disseised until 1792, by the entry of the tenant; that the running round the land by a surveyor, and marking the lines by the direction of one who claims no title to the land, is not such an exclusive occupation of the land, as can amount to an ouster or disseisin of the demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the land, amount to a disseisin.

To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title; otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted.

As the tenant set up no title prior to 1792, but relied entirely on the statute as a bar, and as it appears to us, from the facts reported, that the demandants were seised within thirty years next before the teste of their writ, we are of opinion that the conclusion made by the jury from the evidence in the cause was legal, and that their verdict must stand.

*b. When disseisin is under color of title.*STULL *v.* RICH PATCH IRON CO.

92 VIRGINIA, 253. — 1895.

EJECTMENT by the Rich Patch Iron Co. against Stull.

BUCHANAN, J. — Upon the first trial of this cause, which is an action of ejectment, there was a verdict in favor of the defendant in the court below, the plaintiff in error here. That verdict was set aside upon the motion of the plaintiff, the defendant in error. To this action of the court the defendant excepted. Upon the next trial, the jury failed to agree, and upon the third and last trial the plaintiff company demurred to the evidence. In this demurrer the court required the defendant to join, and, upon consideration, gave judgment in favor of the plaintiff for the land in controversy, except some twenty acres, which the plaintiff admitted it had no right to recover.

From the action of the court in setting aside the verdict upon the first trial, and in rendering judgment in favor of the plaintiff on the demurrer to the evidence upon the last trial, this writ of error was awarded.

The facts were substantially the same upon both these trials, and it is conceded that if the judgment in favor of the plaintiff upon the demurrer to the evidence was erroneous, then its action in setting aside the verdict of the jury upon the first trial was also erroneous.

It is admitted that the plaintiff connected itself with the Commonwealth by a regular chain of title to the land in controversy, and had the right to recover, unless the defendant made good his defense of adverse possession for more than fifteen years prior to the institution of this action.

The defendant, to make out his defense under the statute of limitations, introduced in evidence a deed from R. N. Weir and wife, dated May 26, 1834, to John Deeds, Sr., for the tract of land in controversy, described by metes and bounds, and represented as containing one hundred and seventy-eight acres, though in fact it only contained one hundred and nineteen acres. The defendant connected himself with the Weir title by a regular chain of conveyances, but it does not appear that Weir and wife had any title to the land by their deed, which lies wholly within the boundaries of the plaintiff's survey. Deeds, the vendee of Weir and wife, took possession of the land under his deed, cleared and fenced a few acres, claiming title to the whole boundary embraced by his deed. Additional land was cleared from time to time, so that at the time of the trial there

were about twenty acres cleared and under fence. The defendant, and those under whom he claims, have continuously held and cultivated the cleared land from the time Deeds took possession in 1834, claiming title to the whole boundary embraced by the deed from Weir and wife. They also cut rail-timber upon the wooded land adjoining the cleared land, with which to build and repair fences upon the land; but a large part of the boundary remained entirely in a state of nature.

At the time Deeds purchased the land in controversy and took possession under his deed, no one was in the actual possession of any portion of the plaintiff's 9,000-acre survey, claiming under that title. Afterwards, in the year 1842, David Wilson, who was then the owner of the plaintiff's survey, placed a tenant upon the land, and soon afterwards placed other tenants upon it. From the year 1842 to the institution of this action, the plaintiff, and those under whom he claims, have had one or more tenants upon the large survey outside of the lands in controversy, but never had any one upon, nor exercised any acts of ownership over, the land in controversy.

Upon this state of facts, the Circuit Court was of opinion that the defense of adversary possession had not been made out, except as to that part of the land which was under fence, and which the plaintiff admitted it had no right to recover.

It is settled in this State that when a person, having colorable title, enters upon vacant land, claiming title to the whole tract covered by his title papers, his possession is co-extensive with his boundaries, and this is true although the title conveyed by the writing under which he claims is worthless. *Creekmur v. Creekmur*, 75 Va. 431, 439; 1 Lomax, Dig. 797; 2 Minor's Inst. 481, 4th ed.

In *Taylor v. Burnside*s, 1 Gratt., at pages 191-2, Judge Baldwin says, "that the adverse claimant entering and holding under a colorable title, for example, a patent, deed, or other document, upon a vacant possession, gains the actual possession to the extent of his boundaries," and this doctrine, "is sustained by numerous authorities, and contradicted by none that I have seen."

In *Overton's Heirs v. Davisson*, 1 Gratt. 223-4, the court said "The court is further of opinion that where the land in controversy is embraced by conflicting grants from the Commonwealth to different persons, and the junior patentee enters thereupon and takes and holds actual possession of any part thereof, claiming title to the whole under his grant, that such adversary possession of part of the land in controversy is an adversary possession of the whole, to the extent of the limits of the younger patent; and to that extent is an ouster of the seisin or possession of the older patentee, if the

latter has had no actual possession of any part of the land within the limits of his grant."

In such a case, that is, where the true owner has only constructive possession, never having entered upon his land, "if the junior claimant," says Judge Lee, in delivering the opinion of this court in *Koiner v. Rankin*, 11 Gratt. 427, "settle upon the land within the interlock, claiming title to the whole within his boundary, he thereby ousts the senior patentee of his constructive possession, and becomes actually possessed to the extent of his grant," and cites several Kentucky cases with approval, among them the case of *Fox v. Hinton*, reported in 4 Bibb. 559, which holds that where "two patents interfere in part, and, before possession is taken under the elder patent, the junior patentee enters upon the land within the interference, with an intention to take possession, he shall be construed to be in possession to the extent of his claim." In discussing the question, on page 560, the Kentucky court said: "There is no doubt that, according to the settled doctrine of the common law, a person might, by entering upon a part of a tract or parcel of land in the name of the whole, gain the possession of the whole, where the possession was at the time of making such entry vacant."

In *Cline's Heirs v. Catron*, 22 Gratt., at page 392, this court said upon the subject, that "to be *actual*, the visible occupancy and improvement of a part of the land in controversy is an actual possession of the whole to the limits of the claim under which it is held, and ousts or interrupts the legal seisin incident to the patent of the senior grantee."

The possession thus acquired by the junior claimant when he enters upon the land in controversy, improving and cultivating a part, and claiming title to the whole, is an actual possession of the whole land within his boundary. And whilst such possession, as was said by Judge Baldwin, in *Taylor v. Burnsides*, cited above, may be more manifest as to a part than as to the rest, yet, in reference to the whole, possession of part is possession of the entire tract. Thus the real apparent owner, dwelling on his farm, is as truly in the actual possession of his woods and waters as of his pastures, fields and gardens. What is the whole is to be determined by the limits owned or claimed. An intruder, without color of title, is of necessity confined to his mere enclosure. There must be limits to his possession, and these are all he can have. Such enclosures, however, are not the boundaries of the real or apparent owner; his marked or described abutments show the extent not merely of his claim, but of his exclusive sway. The possession, therefore, of the junior claimant in such a case is both actual and exclusive; and if

such possession be not abandoned during the statutory period by the junior claimant, or he be not actually ousted of such possession by the entry upon and actual possession of some part of the land in controversy by the claimant under the senior grant, during that period, his title becomes perfect.

In this case, when the claimant under the deed from Weir and wife entered, in the year 1834, upon the 119-acre tract of land, enclosing and cultivating a part, and claiming title to the whole, his possession was co-extensive with his boundaries, there being at that time no one claiming under the plaintiff's title in the actual possession of any part of his survey. The claimant under the Weir title having thus ousted or disseised the claimant under the plaintiff's title, he was in the actual adverse possession of the whole boundary claimed by him, and the statute of limitations then commenced to run in his favor, not only as to that part of the land which he had enclosed, but as to all his tract.

Before the period had elapsed necessary to make good the title of the junior claimant under the statute of limitations, those under whom the plaintiff claims entered upon, and took actual possession of, the plaintiff's survey, outside of the land in controversy. This entry and possession, it is most earnestly contended by the counsel of the plaintiff, operated to oust or dispossess the claimant under the Weir title of the whole of the land in controversy, except that part which was enclosed.

We are referred to cases decided by the Supreme Court of the United States and the highest courts of Pennsylvania and of other States, as sustaining this view. The decisions of the Supreme Court of the United States upon questions of land titles follows the decisions of the courts of the States respectively in which the land in controversy is located, and are, therefore, for the most part, based upon local statutes and decisions. For, as was said by Mr. Justice Catron, in *White v. Burnly*, 20 Howard, at page 251, "We have endeavored carefully to follow the doctrine of the Supreme Court of Texas in this opinion, because we are bound to follow the settled adjudications of the State in cases affecting titles of land there." *Supervisors v. United States*, 18 Wall. at page 82; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 187.

If, therefore, the question now under consideration were an open question in this State, we could gain but little aid from the decisions referred to unless we knew that they were based upon statutes similar to § 2740 of our Code, which provides that "in a controversy affecting real estate, possession of part shall not be construed as possession of the whole, where actual adverse possession can be proved."

But the question involved in this case, we think, was raised and decided in this State as far back as 1844, in the case of *Taylor v. Burnside*, reported in 1 Gratt. 165.

The judgment of the court in that case, in which all the judges sitting concurred, beginning at page 209, says: "The court is of opinion that the instruction given by the said Circuit Court to the jury on the trial of the cause ought not to have been given, but that, in lieu thereof, the said Circuit Court ought to have instructed to the effect following." Then follow five instructions which the court declares ought to have been given. The fourth and fifth of these instructions are as follows:

"4. The tenant cannot sustain his said defense of continued adversary possession, if it shall appear from the evidence, that the demandants, or those under whom they claim, did, within said period of twenty-five years, enter upon the land in controversy, and take actual possession thereof by such means as are mentioned in the second instruction.

"5. That such entry of the demandants, or those under whom they claim, upon, and possession of, the land within their older grants, not embraced by the younger grant of the tenant, could not have the effect of an entry upon and possession of the land in controversy."

This latter instruction holds that an entry upon and possession of the land within the older grant, not embraced within the younger grant, does not have the effect of an entry upon and possession of the land in controversy where the junior patentee had, prior to that time, entered upon and was then actually occupying part of the land in controversy by building, clearing, cultivating, or enclosing it, claiming title to the whole.

This view must necessarily follow, since, under our decisions, the entry of the junior claimant upon the land in controversy, and his occupancy thereof by building, clearing, cultivating, or enclosing a part, and claiming title to the whole — the claimant under the senior patent not then being in actual possession of any part of his tract — gives the junior claimant actual and exclusive possession of his whole boundary. The possession of the claimant under the junior title, being an actual adversary possession, to the whole extent of his boundary, the entry and actual possession of the claimant under the senior grant, of lands outside of the lands in controversy would not have the effect of ousting or disturbing the claimant under the junior title as to any part of his tract. The entry, to be good for such purpose, must be made upon the land in controversy; for to oust an actual possession there must be an entry upon that possession. This

was expressly held in *Fox v. Hinton*, 4 Bibb, 559-60, referred to above, and cited with approval by Judge Lee in *Koiner v. Rankin*.

If the subsequent entry of the claimant under the senior grant on his tract, outside of the land in controversy, would have the effect of ousting the claimant under the junior grant of any part of his boundary, then he might be ousted or dispossessed not only without his knowledge, but without any means of acquiring knowledge, and without even knowing that any person other than himself claimed title to the land. Under the loose system of granting lands in force at an early day in this State, it is well known that the same land was frequently granted to two or more persons, without any fault upon their part. The claimant under the junior grant, thinking that he had good title to the land, entered upon and actually occupied a part, claiming title to his whole tract. He afterward sells it for a full price, and his vendee takes a like possession and makes a like claim to the whole tract; and thus the land may be held, as in this case, for fifty years or more. The claimant under the senior grant then brings his action to recover the land embraced in the boundaries of the junior grant. Upon the trial of the case, the claimant under the junior grant learns for the first time that the senior grantee, or those who claim under him, had, before the statute of limitations had run in favor of those claiming under the junior grant, entered upon a part of the land embraced in the boundaries of the senior grant, five or may be twenty miles away, for these grants frequently contained from 100,000 to 500,000 acres, and had cleared and cultivated a few acres, claiming title to the whole tract. To allow a plaintiff to recover under such circumstances would work the grossest injustice to the claimants under the junior title.

The claimant under the senior patent knows, or ought to know, his own boundaries, and that another has settled within them, claiming and exercising dominion over the land in controversy, and if under these circumstances he remains quiet, allows the claimant under the junior grant to believe he is the true owner of the land, and fails to assert his right to the land in controversy by action or entry within the statutory period, he ought not to be allowed to recover. The statutes of limitations in real actions are founded upon a wise and salutary public policy. They require nothing but reasonable vigilance upon the part of the owner, and are necessary for the repose of *bona fide* settlers in the regions of our wild and uncultivated lands.

The question involved in this case is not, as counsel for the plaintiff contends, the question left undecided in the cases of *Taylor v. Burnside*, and *Overton v. Davisson*, 1 Gratt., and in later cases,

The question is this, viz.: Does the adverse possession of the claimant under a junior title extend to the whole of his tract, or only to the extent of his enclosures, where there are conflicting grants or deeds to lands causing an interlock, the claimant under the older title being in actual possession of a part of his land outside of the interlock, when the claimant under junior title entered upon and took actual possession of a part of the interlock, claiming title to the whole extent of his boundary? That is still an open question in this State, and, as it does not arise in this case, we do not wish to be understood as expressing any opinion upon it.

It follows from what has been said that the Circuit Court erred in setting aside the verdict of the jury upon the first trial, and that all proceedings in the case in the Circuit Court subsequent to that verdict must be reversed and set aside, and judgment entered upon that verdict for the defendant.

Reversed.

GRIMES *v.* RAGLAND.

28 GEORGIA, 123. — 1859.

EJECTMENT. — Verdict for defendant. Motion for new trial.

MCDONALD, J. — * * * The next ground is the important one in the motion, and the point is easily extracted from the request of the court to charge the jury, and the charge of the court as given to the jury, viz.: whether a residence upon, and the actual possession and occupation of, one of two tracts of land conveyed to the defendant in the same deed, is such a constructive possession of the other tract, of which there is no actual occupation, as if continued long enough, will bar an action by the rightful owner under the statute of limitations. The court below charged the jury that it would. The defendant resided on the tract of land adjoining that sued for. He claimed both tracts of land under one and the same deed. He had a hog pen on the land in dispute, and had rails split and logs cut on it, but stated that he was not in possession of it, except that he had paid taxes for it.

By our lottery system, lands are divided into tracts by number and district, and ordinarily, there can be but one grantee or one set of grantees, as when the grant is to orphans, so that a careful and guarded purchaser can find but little difficulty in ascertaining whether he has the rightful title. This consideration alone should lead courts to adhere to the strictest rules of construction in favor of the true owner. We have, in the judgment we pronounce, laid

some stress upon this matter, though it was not necessary in order to sustain the case of the plaintiff in error. It is laid down in Adams on Ejectment, 592, that where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of the other parts of the tract, although claimed by the defendant under the same paper title. The author cites in support of the principle the case of *Johnson ex dem. Ten Eyck and Wife v. Richards*, 6 Cowen, 623. "The law deems every man to be in the legal seisin and possession of land, to which he has a perfect right and complete title; this seisin and possession is co-extensive with his right, and continues until he is ousted thereof by an actual adverse possession." *United States v. Arrendo and Others*, 6 Peters' Rep. 743. This court has held repeatedly that the owner of land in this State, having the true title, is in constructive possession of his wild lands wherever situated, and that a possession to be adverse to him so as to create a bar under the statute of limitations, must be open, notorious and continued. That is unquestionably the true and sensible rule. One reason which is assigned why a possession is held to be adverse to the rightful owner of land, is his presumed acquiescence in the right of the possessor. There can be no acquiescence without notice, and there can be no notice if the possession has not been open, visible, notorious and continued. Hence, the reason of the rule, that to create an adverse possession it must be open and continued. If it be not continued, another presumption comes to the aid of the true owner, and every legal presumption is in his favor, and that is, that the possessor, by relinquishing the actual possession, acknowledges the superior title of the true owner. By his abandonment of the possession, the constructive possession of the true owner extends immediately to the premises, and it requires a new ouster or disseisin to fix a starting point for the statute. On this point Ch. J. Shaw said, in the case of *Blood v. Woods*, 1 Met. Rep. Mass. 528, "One point seems to be well settled, which is, that very strong acts of exclusive possession, such as building, inclosing or cultivating, and that for a long time, and openly and notoriously, are necessary in order to create an actual ouster of the true owner, who has no notice of such acts." In regard to the premises now in dispute, if the owner had passed the land and examined it, at any time prior to the clearing of the field in 1852 or 1853, he would have had no notice whatever of an adverse claimant, for the hog pen, which, according to the usage of the country, is no evidence of ownership of the land on which it is put, the splitting of rails or the cutting of logs, which are the ordinary works of trespassers residing

on contiguous lands, would not have advertised him in the absence of an actual occupant.

But again, here are two persons claiming title to the land. One has the actual, rightful, *bona fide* title; the other has a spurious title. Neither of them has the actual possession. In whom is the constructive possession? Surely in him who has the rightful *bona fide* title.

For the reasons here assigned, we think that the court erred in refusing to charge the jury as requested by plaintiff's counsel, and in giving the charge he did to the jury, and on that ground he ought to have granted a new trial.

Judgment reversed.

4. POWER OF DISSEISEE TO CONVEY AFTER THE DISSEISIN.

JACKSON. EX DEM. LATHROP *v.* DEMONT.

9 JOHNSON, 55. — 1812.

EJECTMENT. — Verdict for defendant. Motion for new trial.

KENT, Ch. J., delivered the opinion of the court. Two questions arise on this case: 1. Is the lessor, Nichols, entitled to recover upon the deed from R. Lathrop to him? 2. If not, then can Lathrop himself recover in opposition to his deed to Miller, under whom the defendant holds? Unless we can answer one of these questions in the affirmative, judgment must be rendered for the defendant.

1. At the time of the execution of the deed, from Lathrop to Nichols, the defendant was in possession under Miller, who held the land under a deed from another source. The possession was then adverse to the claim or right of Rufus Lathrop, and it is a well settled principle of law, that if a person out of possession conveys to a stranger, land held adversely by another, the conveyance is void, so that the stranger cannot maintain an action upon it. Nothing passes by such a deed; for a right of entry, or a right in action, was not assignable by the common law. This doctrine is by no means a novel one, for it has been so frequently and uniformly acknowledged; both in England and in our own courts, that it has now grown to be familiar, and cannot be open for discussion. Litt. sect. 347. Co. Litt. *ibid.* and 369a.; Plowd. 88 b.; 2 Sch. & Lef. 65, 105; 2 Caines, 183; *Jackson v. Todd*, 5 Johns. Rep. 489; *Williams v. Jackson*.

Indeed this principle was conformable to the whole genius and policy of the common law, by which a tenant could not aliene his fee

on tenure, without the consent of his lord, nor the lord his seignior, without the consent or attornment of his tenant. Wright on Tenures, 166, 171. A feoffment was void without livery of seisin and without possession a man could not make livery of seisin. Perkins, s. 220. Nor was this principle peculiar to the English law. It was a fundamental doctrine of the law of feuds on the continent of Europe. No feud could be created or transferred without investiture, or putting the tenant into possession. *Feudum sine investitura nullo modo constitui potest. Investitura proprie dicitur possessio.* Feudorum, lib. 1, tit. 25; lib. 2, tit. 2. And Voet says that delivery of possession is still requisite in Holland and Germany, to the transfer of real property. Com. ad Pand., lib. 41, tit. 1, §. 38. It is no doubt the general sense and usage of mankind that the transfer of real property should not be valid, unless the grantor has the capacity, as well as the intention to deliver possession, and actually does it. Blackstone says that it prevails in the codes of "all well-governed nations," for possession is an essential part of the title and dominion over property. 2 Com. 311, 312.

That the possession of Miller was in fact adverse to the right of R. Lathrop, is most clearly made out, because he was in possession under color and claim of title by virtue of a deed from Samuel Lathrop. This amounted to one of the species of disseisins mentioned by Bracton, who says, lib. 4, fol. 161 b., that "disseisin may be not only when the owner, or his family or steward are violently ejected, but also when the owner, having gone abroad and left his possession unoccupied, he is denied entry on his return; and so it is if one uses another's land against his will, claiming it to be his own, *contendendo tenementum esse suum quod est alterius.*"

In the modern case of *Doe v. Prosser*, Cowp. 217, Lord Mansfield gives a sample of what constitutes an adverse possession. "If upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough." It does not seem to be material, as it concerns the operation of the deed, that the knowledge of the adverse possession should be brought home to the parties, though it might be material, if either of them was prosecuted for the penalty given by the statute against selling pretended titles. In *Slyright & Page's Case*, 1 Leon, 166, it was considered that the deed might be void, and yet the party not liable to the penalty of the statute. "The first question in that case was, if the lease, being made by one out of possession, and not sealed and delivered upon the land, and so not good in law as to pass any interest,

be within the statute aforesaid'' But in this case the legal inference is that R. Lathrop knew of the adverse possession of Miller when he sold to Nichols, for he must be presumed to be acquainted with his own right; and the presumption is that Nichols purchased under the same knowledge, for Miller had not only a tenant in actual possession, but his deed from S. Lathrop had been recorded several days before, and the lands lay in a county in which deeds, as well as mortgages, are required to be recorded. It is extremely improbable that Nichols purchased, without having previously inspected the state of the title upon record, and inquired into the claims of the actual occupant. He had, at least, constructive notice, or notice in law.

The title set up by the lessor, Nichols, most undoubtedly fails, and the next point is whether the other lessor, R. Lathrop, is entitled to recover.

2. It might possibly be a question whether the acceptance of the deed from R. Lathrop to Miller was not an act of maintenance in Miller, as it was taken after the suit was brought, at least it was so understood upon the argument, and probably with an intent to defend himself with it in that suit. But as R. Lathrop was one of the lessors of the plaintiff, and had the title of the land in himself, it was not very inconsistent with good policy that he should be enabled to sell, and the tenant in possession to purchase, for it was putting an end to the controversy. We mean not, however, to discuss and decide this point in the present case; for, even admitting the sale to have been an act of maintenance, yet the deed was effectual as between the parties to it. Rufus Lathrop cannot recover in opposition to his deed to Miller. It operates to estop him, and it seems to be a principle which runs through the books that a feoffment upon maintenance or champerty is good as between the feoffer and feoffee, and is only void against him who hath right. Bro. tit. Feoffments, pl. 19; Fitzherbert, J., in 27 Hen. VIII., fol. 23 b., 24 a; Co. Litt. 369a.; Cro. Eliz. 445; Beaumont, J., Hawk. b. 1. c. 86, § 3. The consequence is, that when the question is upon the demise of Rufus Lathrop, his deed to Miller is an effectual bar to his recovery. The only objection that could have been made to the introduction of this deed at the trial, assuming it to have been given after suit brought and issue joined, was that it ought to have been pleaded *puis darrein continuance*, so that it might have been returned as parcel of the *nisi prius* record. This is, no doubt, the general and proper course. Yelv. 180; 2 Rich. Com. Pleas, 13. But it is a sufficient answer to this objection that the deed was admitted in evidence, and went to the jury without opposition. It is, then, to be

considered as admitted by consent, and is to have the same effect as if it had been duly pleaded.

Neither of the lessors of the plaintiff has, then, shown a right to recover. We cannot give effect to the deed to Nichols, because of the adverse possession existing at the time of the sale, and we cannot allow Lathrop to recover, in defiance of his own deed to Miller. To yield to the pretensions of either would be shaking established principles; and though Nichols may, perhaps, have ground to complain of the act of Lathrop in conveying to Miller, instead of lending his name and assistance to recover the possession of the land for him, yet that consideration cannot affect this case. In the action of ejectment, we must look steadily to the legal title. His remedy, if any, must be against Lathrop, for assuming to sell when he was incapacitated to transfer his interest. Nichols cannot interpose in this suit, and prevent the operation of the deed to Miller. As to him, it is *res inter alios acta*. He must stand upon the strength of his own demise.

The motion to set aside the verdict is, therefore, denied.¹

LIVINGSTON v. PROSEUS.

2 HILL (N. Y.) 526. — 1842.

EJECTMENT. — Defendant gave in evidence a lease for life from plaintiff to one Shultis and proved that Shultis was still alive. Plaintiff, under objection and exception, proved that when the life lease was given defendant was in possession of the premises, claiming to hold adversely to plaintiff. Verdict for plaintiff. Motion for new trial.

BRONSON, J. — * * * It is extremely well settled, that a conveyance of lands which are at the time held adversely to the grantor, is inoperative and void. It would seem to follow from this doctrine that the title remains in the grantor, and that he may assert it in the same manner as though the deed had not been made. But it is equally well settled, that as between grantor and grantee, and persons standing in legal privity with them, the deed is operative and passes the title. *Jackson v. Demont*, 9 John. R. 55; *Livingston v. Peru Iron Co.*, 9 Wend. 516, per Savage, C. J.; *Van Hoesen v. Benham*, 15 Id. 164. From these two propositions, to wit, that the owner has parted with his title, and that the grantee cannot assert

¹ See the N. Y. R. P. L., § 225; N. Y. Penal Code, §§ 129-131; Code Civ. Proc., § 1501.—ED.

it on account of the adverse holding which avoids the deed, it has been supposed to result as a necessary consequence that the title was extinguished or lost. But it has been denied that any such consequence follows. *Jackson v. Brinckerhoff*, 3 John. Cas. 101; *Jackson v. Vredenburg*, 1 John. R. 159; *Williams v. Jackson*, 5 Id. 489; *Jackson v. Leggett*, 7 Wend. 377. Indeed, it may be laid down as a maxim in the law, that a title which once existed must continue to reside somewhere; it cannot be annihilated.

The whole apparent difficulty arises from an inaccurate statement of the consequence which results from the adverse holding at the time the deed is executed. It is often said in the books, without any qualification, that the deed is void. But that is only true in relation to the person holding adversely, and those who afterwards come in under him. As to all the rest of the world the deed is valid, and passes the title from the grantor to the grantee. This I think, is sufficiently established by the cases already mentioned and the authorities on which they rest. The deed is void as against the party who might otherwise be injured; but it is good as to all others. If the person who held adversely voluntarily abandon the possession, there can be no doubt that the grantee may enter and enjoy the land. Or, if after such abandonment a stranger enter, the grantee may bring ejectment and oust him. The stranger was in no peril of being injured by the conveyance. His entry was tortious, and he shall not cover himself with a shield which belongs to another, between whom and himself there is no legal privity.

But as against the person holding adversely, the deed is utterly void — a mere nullity. There was an attempt to convey, but the parties failed to accomplish the object. The title still remains in the original proprietor, and he may — indeed, must — sue to recover the land. It is true that the recovery will inure to the benefit of the grantee in the deed; but that is a matter between him and the grantor, and with which the person holding adversely has nothing to do. It is enough for him that the deed does him no injury.

When it has been apprehended that a deed might be attacked on the ground of an adverse holding at the time it was made, it has been usual to insert counts in the declaration on the title of the grantor and the grantee, so that if that suit failed as to the one, it might succeed as to the other. *Jackson v. Leggett*, 7 Wend. 377. But the title is not in both of them, and it is but a poor compliment to the law as a science that it cannot decide which ought to sue. It has, I think, settled the question. When the action is brought against the person holding adversely, or any one who has succeeded to his right, the grantor must sue. But as against a stranger — one

who does not stand in legal privity with him who held adversely when the deed was made — the grantee must sue. In cases where the grantor may sue, he must of necessity be allowed to show the deed void when the defendant attempts to set it up to defeat a recovery. Otherwise, the defendant would first defeat the grantor by showing he had conveyed, and then defeat the grantee by showing the deed void; and thus we might come, in effect, to the result of extinguishing a good title.

IV. Title by prescription.

COOLIDGE *v.* LEARNED.

8 PICKERING, 504. — 1829.

TRESPASS *quare clausum fregit*. — Defendant pleaded that the *locus in quo* had been an open, common, public landing-place from time immemorial. Decision below for defendant. Plaintiff moved for a new trial.

WILDE, J., delivered the opinion of the court. — The plaintiff's counsel except to the direction of the judge, and contend that no usage commencing within the time of legal memory is sufficient to establish a right by prescription; and that it has been long settled that the time of legal memory extends back to the commencement of the reign of Richard I., so that in this country no prescriptive right founded on immemorial usage can be maintained by the principles of the common law.

That the time of legal memory, according to the law of England, extends back to the remote period contended for by the plaintiff's counsel, cannot be denied; but for what reason, or for what purpose, such a limitation should have been continued down to the present day, we are unable to ascertain. Cruise says, "that it seems somewhat extraordinary, that the date of legal prescription should continue to be reckoned from so distant a period." And to us it seems, that for all practical purposes it might as well be reckoned from the time of the creation. The limitation in question, if it can now be called a limitation, was first established soon after the St. Westm. 13 ed. 1, c. 39, and was founded on the equitable construction of that statute, which provided that no writ of right should be maintained except on a seisin from the time of Richard I.

It was held that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession, was sufficient also to give a title to the easement. 2 Roll. Abr. 269; 2

Inst. 238; *Rex v. Hudson*, 2 Str. 909; 3 Stark. on Ev. 1205. Upon this principle the time of legal memory was first limited, and upon the same principle, when the limitation of a writ of right was reduced by the statute of 32 Hen. 8, c. 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This was required, not only by public policy, to quiet long continued possessions, but by a regard to consistency, as it would have been only following up the principle upon which the first limitation was founded.

And of this opinion was Rolle, 2 Roll. Abr. 269, though he admits that at his time the practice was otherwise. Why the opinion of this eminent judge, founded as it was on reasoning so solid and satisfactory, was not adopted by the courts, does not appear. But it does appear that the principle on which his opinion was founded, was respected, and carried into operation in another form. For although the courts continued to adhere to the limitation before adopted, yet the long enjoyment of an easement was held to be a sufficient reason, not only to authorize, but to require the jury to presume a grant. And it has long been settled that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and un rebutted, imposes on the jury the duty to presume a grant, and in all such cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long continued possession should not be disturbed.

The period of twenty years was adopted in analogy to the statute of limitations, by which an adverse possession of twenty years was a bar to an action of ejectment, and gave a possessory title to the land. Thus it appears, that although prescriptive rights commencing after the reign of Richard I. are not sustained in England, yet a possession of twenty years only is sufficient to warrant the presumption of a grant; which is the foundation of a doctrine of prescription. In the one case the grant is presumed by the court, or rather is presumed by the law, and in the other case it is presumed by the jury under the direction of the court. The presumption in the latter case is in theory, it is true, a presumption of fact, but in practice and for all practical purposes, it is a legal presumption, as it depends on pure legal rules; and as Starkie remarks, "it seems to be very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple, and any objection, as to the want

of authority, would apply with equal if not superior force to the establishing such presumptions indirectly through the medium of a jury."

But however this may be, it is clear that when the law became settled as it now is, and a party was allowed to plead a non-existing grant, and the jury were bound to presume it, on proof of twenty years' possession, he would hardly be induced to set up a prescriptive right; and the limitation of legal memory thus became in most cases of very little importance. And this is probably the reason why the period of legal memory, as it was limited soon after the statute of Westm. 1, has been suffered to go on increasing to the present time, although it has long since ceased to be of any practical utility, and is utterly inconsistent with the principle on which the limitation was originally founded.

The question, then, is whether the courts of this country were not at liberty to adopt the English law of prescription, with a modification of the unreasonable rule adhered to by the English courts in regard to the limitation of the time of legal memory. Certainly the law without the rule of limitation might have been adopted, and the courts here had competent authority to establish a new rule of limitation suited to the situation of the country. They had the same authority in this respect, that the courts in England had to establish the English rule of limitation. This rule could not be adopted here without a modification, and it was modified accordingly; and in conformity with the principle of the English rule of limitation. This cannot be ascertained with certainty, but it is evident that the English rule could not have been adopted, and it is to be presumed that the period of sixty years was fixed upon as the time of limitation, in analogy to the statute of 32 Hen. 8, c. 2, and in conformity with the opinion of Rolle. At what period of our history the law of prescription was first introduced into practice in the courts of Massachusetts, cannot now be determined, but certainly it was before the time of legal memory, as we understand the limitation of it; and innumerable pleas of prescriptive rights are to be found in the records of our courts. So the cases reported by Dane show that the doctrine of prescription has been repeatedly recognized and sanctioned by this court. 3 Dane, 253, c. 79, art. 3, §19. The only question has been, whether our time of legal memory was limited to sixty years, or whether it was to extend to a period beyond which no memory or record goes as to the right in question. The general opinion, we think, has been in favor of the limitation of sixty years; and we think it decidedly the better opinion. This seems to us a reasonable limitation, and, as before remarked, it is founded on the

principle of the English rule of limitation, which was adopted in reference to the limitation of the writ of right by the statute of Westm. 1. Whether since the writ of right has been limited to forty years, a similar limitation of the time of legal memory ought to be adopted is a question not raised in this case, and upon which we give no opinion.

The case of *Ackerman v. Shelp*, 3 Halst. 125, has been cited, to show that the doctrine of prescription has not been adopted in New Jersey; but this is no reason why it should be rejected in Massachusetts, where it has long since been adopted, and is now familiar in practice; adopted, too, not only by the authority of our courts, but with the implied sanction of the Legislature. As early as the year 1641, it was ordered and decreed by the Colonial Legislature, that no custom or prescription should prevail in any moral case, that is, as it was declared, "to maintain anything that could be proved to be morally sinful by the word of God." *Ancient Charters, etc.*, 177. This provision, it is true, manifests great ignorance of the principles of the common law, and for the purpose for which it was framed was useless and inoperative. It serves, nevertheless, to show that when afterwards the doctrine of prescription was introduced into practice, it was not done without the countenance of the Legislature; although certainly no legislative authority was necessary to give it validity.

But it has been argued, that the right set up by the defendant cannot be maintained, by the principles of the common law, as a right by prescription, or as a custom. The cases, however, cited in support of this argument, refer either to private rights or local customs. The right in question is a public prescriptive right, and as such it is well pleaded. It is similar to the easement which the public has in highways, and may well be prescribed for. In pleading such a public right to an easement, it is sufficient to aver that the *locus in quo* is a public highway or public landing-place, etc., without showing how it became so; for it cannot be presumed that every party has knowledge of the origin of a public right. *Aspindall v. Brown*, 3 T. R. 265; 3 Chit. Crim. Law, 570; 3 Dane, 248; *Commonwealth v. Manning*, S. J. Court, Essex County, 1795, in 3 Dane, 19, c. 71, art. 5, §§ 8, 9, 10; *Gateward's Case*, 6 Co. 60, 61.

HUBBARD v. TOWN.

33 VERMONT, 295. — 1860.

[Reported herein at p. 840.]

V. Title by the statute of limitations.

I. ESSENTIALS FOR SUCH TITLE.

*a. A disseisin and an adverse possession.*¹

*b. The adverse possession must be continuous for the term fixed by the statute.*² *Tacking.*

HUGHS *v.* PICKERING.

14 PENNSYLVANIA STATE, 297 — 1850.

EJECTMENT. — Judgment for plaintiff. Defendant brings error.

ROGERS, J. — The plaintiff exhibits in evidence a perfect legal title to the premises in controversy. This is admitted, but the defendant relies on the act of limitations. The suit was instituted the 19th March, 1847; the title under which the defendant claims commenced in May, 1825, so that more than twenty-one years elapsed from the commencement of the title until the institution of the suit.

To acquire a right by the act of limitations requires a possession of twenty-one years, actual, visible, continued, notorious, distinct, and hostile. The plaintiff contends he is not barred because the possession was not a continued possession; but that the possession was interrupted in its transmission from Mason, the first intruder, to Hughs, the defendant. On this point the cause mainly turns. Mason proves that he made the first improvement in May, 1825; that he deadened trees in May, grubbed six acres in June, chopped logs and saplings on four acres, burnt brush, chopped logs in July, and that he had a shanty on the place, about ten by twelve feet square. That, being about to leave the property, he told his sister, the widow of Israel Bartlett, that she might take his right and sell it, and if she could get anything for it, well and good. Whether we consider this transaction as a parol sale, or gift, or an authority to sell, is, perhaps, of but little consequence. But that it was the latter, in the estimation of the parties, at least, would appear from their subsequent conduct; for, after selling to Hughs, who took possession in pursuance of the contract, she paid over to her brother one-half of the purchase money. Coupling this with the words used, it indicates rather a power of sale than a gift or sale to her. But be that as it may, is the agreement between Mrs. Bartlett and Hughs, subsequently ratified by Mason receiving half the purchase money, possession taken in pursuance of it, to be viewed as a separate, dis-

¹ See above, pp. 1013-1023. — ED.

² See N. Y. Code Civ. Proc., §§ 362-375. — ED.

tinct trespass, or is it a continuation of the original trespass? In other words, has Hughs the right to tack Mason's possession, for which he paid value, to his own, so as to bar plaintiff's right? Had Mason abandoned the property absolutely, or had Hughs taken possession without authority, these would present such a want of continuity as would be fatal to the defense. But does this appear? These are points which the jury must decide. 4 Watts, 409; *Simpson v. McBeth*, 5 Watts, 441; *Fish v. Brown*. In *Cunningham v. Patton*, 6 Barr. 355, it is ruled that when adverse possession is proved by parol testimony only, it is a question for the jury whether it is continuous. Indeed, when there is a spark of evidence, a question of fact must be submitted to the jury as the legitimate triers of it. *Bank of Pittsburgh v. Whitehead, et al.*, 10 Watts, 397. The facts which particularly bear on this point are these: Under authority derived from Mason, Mrs. Bartlett sells to Hughs; Mason receives one-half of the purchase money, and, under this contract, Hughs enters, and ever since has been in the actual possession of the land. That Hughs was a trespasser as to the plaintiff, may be admitted; but was he a trespasser as to either Mason or Mrs. Bartlett, who sold their right in the property, whatever it was, and received the purchase money? Under such a state of facts, it is clear that no action of trespass could be sustained by either of them. The court would seem to be under the impression that unless Mason was in the actual possession at the time of the contract, the law would not unite the possession to the title; that the continuity of possession which the law requires cannot be preserved, unless there is actual, continued possession of the premises. So I understand the court, and, if so, the point is ruled in direct opposition to *Sailor v. Hertzog*, 4 Whar. 272. In that case it was insisted the continuity of possession was destroyed by the interruption of the actual possession; that the premises had been vacant about the year 1815, an important period in the title, bearing directly on the defense under the statute. But the judge who tried the cause at *nisi prius*, afterwards affirmed by the Supreme Court, says: "That in order to destroy the continuity of possession, the vacancy must not be merely occasional, such as occurs in every case where a party, for some cause, unable to obtain a tenant, shuts up his property for a short, or, indeed, for a long time. When the possession is abandoned for any time, or when a person takes possession of the property in dispute, or is totally unconnected with the previous holder, it prevents the operation of the act, because the continuity of possession, which is essential to a title under the act of limitation, is broken. It is a principle of law, it is true, that when the possession is vacant, the law casts the posses-

sion on the legal owner. But the question is, what is such a vacancy of possession as produces this effect? And when we have seen that the vacancy must be not merely occasional, but the title of the subsequent holder must be unconnected with the title of the previous holder. There must be a want of privity of contract, for, when the subsequent holder enters with the assent and permission of the previous holder, the former has the right to tack one possession to another. That actual possession is not required, is also shown in *Porter v. McGinnis*, 1 Barr. 413.

HAYNES v. BOARDMAN.

119 MASSACHUSETTS, 414. — 1875.

WRIT OF ENTRY. — Plea *nul disseisin*. Verdict for demandant. Tenant alleges exceptions which appear below.

COLT, J. — There was evidence tending to show adverse possession of the demanded premises, commencing with the occupation of Mrs. Atwood in 1832, and continued until her death in 1847. She devised all her real estate to Susanna Gage for her life, remainder in fee to the demandant. The possession was continued in Susanna until her death in 1863, and by the demandant until shortly before the commencement of this action. // The principal question is whether there was that privity of estate between the testatrix and her devisees which is required to establish title by continuous adverse possession.

It is settled that the disseisin of an heir, devisee or grantee may be tacked to that of an ancestor, deviser or grantor, to create title by adverse possession. *Leonard v. Leonard*, 7 Allen, 277; *Melvin v. Proprietors of Locks and Canals*, 5 Met. 15, 32. Such adverse possession continued for twenty years affords a conclusive presumption of grant to the first occupant.

It is claimed that there is no such privity between the life tenant and the remainderman, because the latter in no sense claims under the former. But the answer is, that both claim under the same will by one title. The disseisin, which was commenced by the testatrix, is continued by each in accordance with that title, and is referred by each only to the entry of the testatrix. There has been no loss of possession; no restoration of the seisin to the true owner; no new entry. // The disseisin which commenced with the testatrix has been continuous in her devisees, and establishes her title by lapse of time. It is plainly distinguished from a case of successive entries and new disseisins by different and independent parties. // It does not follow, because no act of the life tenant in disparagement of his title, and

no disseisin of him, will be permitted to injure the remainderman, that an adverse possession maintained by the tenant, under his title, will not inure to the benefit of the former. The test of title is that there has been no interruption of possession, and no new entry required. If the possession ends before the expiration of the time required to establish the presumption, the seisin of the true owner is restored, and he comes in by right, and not by disseisin, as against all parties.

The other question relates to the effect to be given to the alleged payment of rent to the owner made by tenants of the demandant, and those in privity with him, in occupation of the demanded premises. There was evidence that some of the acts of those who occupied under the testatrix and life tenant were permissive, and the jury were told that the demandant could not have the benefit of such acts, unless they were satisfied that they were under the authority or direction of Atwood or Gage. Full instruction was also given as to what constituted adverse possession. And it cannot be stated as matter of law that the payment of rent, or an admission of title, by a tenant of the demandant or his grantor, without the knowledge of his landlord, would alone operate to interrupt an otherwise continuous adverse occupation.

Exceptions overruled.

c. Exceptions in favor of persons under a disability.

HOWELL *v.* LEAVITT.

95 NEW YORK, 617. — 1884.

FINCH, J. — In February, 1856, Roberts became the owner of the premises in dispute, having good title thereto, but subject to a purchase-money mortgage of \$5,500 given by him to Leech. A few months later Roberts conveyed to Tasker, subject to the \$5,500 mortgage, the latter executing also his own mortgage to Roberts for \$1,800. Still later in the same year Tasker conveyed to Ephraim Howell, subject to the Leech mortgage of \$5,500, but the deed making no reference to the \$1,800 mortgage. On the 18th of September, 1857, Roberts filed a complaint for the foreclosure of the \$1,800 mortgage, naming Tasker and Howell and wife as defendants, and Mrs. Howell was served November 17th of that year. In the previous month of October, Howell died, although the fact of his death was for some time after unknown. An order of publication was made, and in the end, judgment of foreclosure was rendered;

the property was sold to Roberts, the mortgagee, who by the aid of a writ of assistance, put Tasker out and got into possession. At this date, and at the date of the commencement of the foreclosure action, Howell being dead, the title had descended to his five children, who were all infants, the eldest being about fourteen years of age, and the youngest only about one. The possession of Tasker after his deed to Howell must be assumed to have been as tenant under Howell, and upon his death as the tenant of his children, so that Tasker's possession was theirs. When he was expelled their possession was taken away. But the judgment of foreclosure did not affect them, for they were in no manner parties to it, and as to them it was an absolute nullity. Possession of their property was taken from them, not only without their consent, but against their will, and by a force which had no right or authority behind it, but was in all respects a trespass. After thus forcing out the true owners, Roberts paid off and discharged the \$5,500 mortgage, and then sold the property, and the present defendants are his grantees and seek to defend the ejectment brought by the true owners, who were thus dispossessed by unlawful force, upon the alleged right of Roberts as mortgagee in possession. In most of the cases which have upheld the right of the mortgagee, his possession was obtained with the consent, express or implied, of the owner of the land, although in some of them the mode of acquiring possession did not distinctly appear, and in many the rule is stated quite broadly and with little of restriction or limitation. *Van Duyne v. Thayre*, 14 Wend. 233; *Phyfe v. Riley*, 15 Id. 248; *Fox v. Life*, 24 Id. 164; *Olmsted v. Elder*, 5 N. Y. 144; *Mickles v. Dillaye*, 17 Id. 80; *Mickles v. Townsend*, 18 Id. 575; *Chase v. Peck*, 21 Id. 581; *Waring v. Smyth*, 2 Barb. Ch. 135; *Pell v. Ulmar*, 18 N. Y. 139; *Robinson v. Ryan*, 25 Id. 320; *Winslow v. Clark*, 47 Id. 261; *Madison Avenue Baptist Church v. Ol. Street Baptist Church*, 73 Id. 82; *Gross v. Welwood*, 90 Id. 638.

It is scarcely necessary to review the authorities and consider them in detail, for none of them have ever gone so far as to hold that a possession of the mortgagee acquired by either force or fraud, against the will and consent of the rightful owner, and without even color of lawful authority as it respects such owner, and amounting only to a pure trespass, was sufficient to defend an action of ejectment. The possession requisite for such a defense must have about it at least some basis of right as against the owner evicted. Often his assent or acquiescence may be inferred from slight circumstances, but the right cannot be founded upon an absolute wrong. To hold that one who has merely a lien, and but an equitable right, can get a legal one by the commission of a trespass would be neither

logical nor just. It is easy to understand how some of the very broad statements of the right of the mortgagee in possession originated. Before the Revised Statutes, and in the earlier consideration of mortgage relations, the mortgagee, after condition broken, was deemed to have the legal estate in the land. Of course his entry upon the premises would be the entry of an owner and both rightful and lawful if effected without a breach of the peace. His possession, however acquired, unless by actual violence, was lawful as that of an owner taking possession of his own. But when the Revised Statutes denied him an action of ejectment, and the progress of judicial decision deprived him of the least estate in the land, and left him with only a lien, it followed that after as well as before condition broken the mortgagor remained owner, and could not be lawfully deprived of his possession, except by a valid foreclosure or his own consent, express or implied. And yet the old rule, founded upon and fitted to a different state of the law, kept its hold somewhat upon the later opinions when the reason which led to it was gone.

But we need not determine its present extent beyond the exigency of the case before us. Here the infant owners, without even a suit instituted against them; so far as we know without notice or warning or the least opportunity to protect their rights; were expelled from their property against their wills by a force which their tenant could not resist. The expulsion was not only unlawful as to these plaintiffs, but without the least shadow or pretense of right, since the judgment under which the writ issued was not against them and was absolutely a nullity so far as their rights were concerned. A possession thus acquired by Roberts could not be maintained against the ejectment of the owners because he was mortgagee. In this respect we think the decision of the General Term was correct.

It is further contended that the statute of limitations barred the right of Louise M. Howell. The facts were, that she became of age December 31, 1864; that Roberts got possession claiming title as owner March 15, 1858; and the action was begun November 7, 1878. The appellants' construction of the Code (§ 88, Code of Civ. Pro. § 375), is in substance that where there is a disability the action must be brought within ten years after its termination; and Louise Howell, having reached full age December 31, 1864, had only until December 31, 1874, in which to sue. The effect of this contention would be to cut down the twenty-years' limitation to a little over sixteen years by reason of a disability of infancy. In a case where the cause of action accrued to an infant twenty years of age the limitation would be cut down to eleven years; and that which was intended for the relief and benefit of a person under disability is

made to operate as a positive injury. We have already declined to adopt that construction. *Acker v. Acker*, 16 Hun, 174; 81 N. Y. 143. The exception of the Code relates to the extension of the time limited, and puts restraint only upon that extension. It means that the disability shall not add more than ten years to the time limited after the disability has ended. Practically, in a case of infancy, it makes the extreme possible limitation a period of thirty-one years. If the cause of action accrues to an infant on the day of its birth for twenty-one years the running of the statute is suspended; then it begins to run; but the time limited — that is, the twenty years considered as a period — having in fact elapsed, it is an extension of that period which is in progress, and the exception limits that added time to not more than ten years after full age, that is, until the expiration of thirty-one years. But for the exception the infant would have had forty-one years. In the present case Louise Howell had twenty years from December 31, 1864, in which to sue, because giving her the full time of twenty years after that date did not extend the whole time from the accruing of the cause of action more than ten years added after she arrived at full age. Giving her till 1884 made the whole period from the entry of Roberts less than twenty-seven years, so that her infancy extended the twenty years, the time limited, only about seven years, and so did not violate the exception. What there is of difficulty in the section lies in the phrase “after the disability ceases.” That relates only to the extended time, and has no effect in any case to cut down or lessen the limitation of twenty years. To that the party is always entitled, and, in case of a disability, to as much more as the period of disability would add, except that such addition must not be longer than ten years added after the disability has ended. Any unexpended part of the period or time fixed by the general rule of limitation belongs to the party entitled to sue, after the disability has ended, and so much added time as will not extend the original limit beyond ten years more after the end of the disability. The right of Louise M. Howell was, therefore, not barred.

Judgment affirmed.¹

¹ See § 375, N. Y. Code Civ. Proc. On the construction of the statute this case is followed in *Darrow v. Calkins*, 154 N. Y. 503 (512). — ED.

DEMAREST *v.* WYNKOOP.

3 JOHNSON'S CHANCERY (N. Y.), 129. — 1817.

THE CHANCELLOR. — This is a suit to redeem a mortgage, executed as early as 1771. Persons claiming an estate, in fee, under the mortgagee, have been in possession of the mortgaged premises since May, 1788, or twenty-seven years before the filing of the bill.

Several objections have been taken to the suit.

1. The length of possession is set up, and relied upon, in the answer, as a bar to the claim.

It is a well-settled rule, that twenty years' possession, by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. This proviso saves the rights of infants, *femes covert*s, etc., if they bring their action within ten years after their disability removed. The analogy between the right to redeem in this court, and the right of entry at law, is presumed complete and entire throughout, so that the mortgagor who comes to redeem, after the twenty years, must show himself within one of the exceptions that would save his entry or ejectment at law; and he must, likewise, show that he had filed his bill within ten years after his disability ceased. The cases which I have looked into, and to which I now refer, are uniform in support of this just and necessary rule; and the construction of the statute is the same here as at law. The same limitations are adopted, with the allowance of the same time for disabilities. *Jenner v. Tracey*, note to 3 P. Wms. 287; *Belch v. Harvey*, *Ib.* and in app. No. 12 to Sugden's Law of Vendors, 3d ed.; Lord Kenyon in *Bonny v. Ridgard*, cited in 17 Vesey, 99; Lord Camden, in 3 Bro. 639, note; Anon. 3 Atk. 313; *Aggar v. Pickerell*, 3 Atk. 225; Lord Rosslyn, in *Lytton v. Lytton*, 4 Bro. 458; *Hodle v. Haley*, 1 Vesey & B. 536; *Reeks v. Postlethwaite*, Cooper's Eq. Rep. 161; *Bairon v. Postlethwaite*, Cooper's Eq. Rep. 161; *Bairon v. Martin*, *Id.* 189; *Moor v. Cable*, 1 Johns. Ch. Rep. 385.

In this case, Daniel Ludlow, who claimed the mortgage, took a deed, in fee, on the 7th of May, 1788, from Banta, one of the mortgagors, and from Nagel and his wife, who was one of the heirs of Banta's wife, the other mortgagor. From that time, we are to consider the representative of the mortgagee in possession, claiming to hold the land, not in trust, or mortgage, but adversely, and in his own right. At that time, the plaintiff, Hannah Demarest, was an infant of the age of seven years, and entitled to all the equity of redemption which she now sets up. She was of age in 1802, and

her bill was not filed till 1815, so that not only the twenty years had elapsed since the mortgagee's possession, but the ten years since her disability of infancy ceased. She had then lost her equity of redemption by lapse of time. It is true she has not had twenty full years, free of disability, to redeem, but she has had ten years free of disability, and more than twenty years in the whole have elapsed, and this is all that the statute allows. For this purpose I may refer to the observations which I made in the Supreme Court, in the case of *Smith v. Burtis*, 9 Johns: Rep. 181, and which appear to me to be founded on a sound construction of the statute of limitations. The party has in every event twenty years to make his entry; and if under disability during any part of that time he has ten years and no more after the disability ceases. It may so happen that the twenty years, and more, will elapse during the disability, and then ten years will be afterwards allowed cumulatively; or the disability may cease, so far within the period of the twenty years, as to allow of only twenty years in the whole, though part of that period be covered by the disability. This construction does not give to persons laboring under disability, the same number of years after they become of competent ability, as it allows to other persons who were under no such disability. Such is the policy, and the very language of the statute, for it did not mean, as in the case of the limitation of personal actions, that the party should, at all events, have the full period of time after the disability had ceased, because the words of the act are explicit, that the extension of the time of making the entry beyond the twenty years, is in no case to exceed ten years after the disability is removed. This is also the amount of the doctrine contained in the case of *Doe, ex. dem. George and Frances, his wife, v. Jesson*, 6 East, 80, for there the whole period, from the time that the right descended or accrued, to the time of bringing the suit, was but twenty-seven years, and above eight of the first years of that time had been consumed by an acknowledged disability; yet the right of entry was held to be tolled by lapse of time.

In the case of *Belch v. Harvey*, one of the cases above referred to, the cause was ended by consent of parties, after argument, but Lord Talbot, who had studied the case thoroughly, then observed, that if he had made decree, his opinion would have been, that after the disability of infancy was removed, the time fixed for prosecuting, in the proviso, which is ten years, should also have been observed. The proviso, as he said, contained an exception of several cases out of the purview of the statute, and if the parties at law would avail themselves of the proviso, they must take it under such restrictions as the Legislature hath annexed to it, and that is, to sue within ten

years after the impediment ceases. Lord Talbot also adds, "Why should not the same rule govern in equity? I think that there is great reason that it should. The persons who are the subjects of the proviso are not disabled from suing; they are only excused from the necessity of doing it during the continuance of a legal impediment; therefore, when that difficulty is removed, the time allowed for their further proceeding should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms on which such excuse is given?"

But another difficulty may be started in this case; during the infancy of the plaintiff, a second disability ensued, by means of her marriage; and it has been made a question, whether a succession of disabilities, thus closing on each other, can be permitted as an excuse within the statute. Upon one construction she would have the whole period of her coverture, and ten years afterwards.

I am clearly of opinion, that the party can only avail himself of the disabilities existing when the right of action first accrued.

If several disabilities exist together, at the time the right of action accrues, the statute does not begin to run until the party has survived them all. 1 Plowd. 375. But the case of *Doe v. Jesson*, already referred to, is an authority to show that cumulative disabilities cannot be allowed. There the disseisin happened when the right owner was an infant, and he died in infancy, leaving his infant sister his heir; and the court of K. B. held that she was bound, notwithstanding her infancy, to bring her ejectment within ten years after the death of her brother, as more than twenty years had, in the whole, elapsed since the death of the person last seised.

The policy of the statute of limitations is to quiet possessions, and extinguish dormant claims. There is much wisdom in the general provision, and though courts of equity are not within the letter of those statutes, they have generally followed the rule, and held equitable rights concluded by the same bar, and subject to the same exceptions. If there are instances to the contrary, they are special cases, as those of direct trusts, or as that of *Bond v. Hopkins*, 1 Sch. and Lef. 413, where lapse of time was attempted to be set up manifestly against conscience, or where there is fraud in the transaction. 1 Johns. Ch. Rep. 594. If disability could be added to disability, claims might be protracted to an indefinite extent of time, and to the great injury and oppression of the country. According to an expression of Lord Eldon, "a right might travel through minorities for two centuries." It would be impolitic, as well as contrary to established rule, to depart from the plain meaning and literal expression of the proviso in the statute of limitations. We

cannot well misapprehend the meaning of the Legislature. The party bringing himself within the proviso must be, "at the time such right, or title, first descended, or accrued, within the age of twenty-one years, *feme covert*, insane or imprisoned," and he must bring his action within ten years "after such disability removed."

The case of *Eager v. The Commonwealth*, 4 Tyng's Mass. Rep. 182, is another, and a very weighty decision on this point. The plaintiff was an infant, and before the termination of her infancy, the disability of coverture occurred, but the Supreme Court of Massachusetts held, that the latter disability not existing when the right first accrued, was not within the proviso, and that the party was bound to have brought her writ within the given time after the first disability had ceased. The Supreme Court of Connecticut did, indeed, in the case of *Eaton v. Sanford*, 2 Day's Rep. 523, recognize a right which had floated through successive disabilities, for near sixty years. But no reasons of the court are assigned in the case, and the decision itself was afterwards disregarded, and the question treated as an open one by the Supreme Court of the same State, under a new organization of the court in the case of *Bush v. Bradley*, 4 Day's Rep. 298. In the last case, there was no decision upon the point, but I may refer to the opinion of one of the judges (Mr. Justice Smith), vindicating the construction given in 6 East, by a plain and unanswerable argument.

The construction which excludes from the benefit of the proviso, in all our statutes of limitations, successive or cumulative disabilities, is within the reason and spirit of the decision in the celebrated case of *Stowel v. Zouch*, Plowd. 353. The principle of that case decidedly governs this question, and for the purpose of showing this, it may not be amiss to give a short review of it.

Stowel being seised in fee of certain lands, was disseised by Zouch, who levied a fine with proclamations. Three years afterwards, Stowel died, without entry or claim to avoid the fine, leaving his heir-at-law, an infant of the age of six years. The infant made no claim during his minority, but entered within one year after he came of age. It was determined, by a great majority of the judges, in the exchequer chamber, after several solemn arguments (for the case was argued twice in the C. B. and twice in the exchequer chamber, before all the judges of England), that the demandant was barred, by reason of not making his claim before the expiration of the five years, which had begun to run in the time of his ancestor, and expired in the time of his infancy. No point was, perhaps, ever more fully, ably, and profoundly argued. The discussion was aided by illustrations drawn from reason, convenience, policy, precedents,

and the principles of the common law; in short, it was adorned by all the learning and eloquence of Westminster Hall. The argument and decision established the doctrine, that the exceptions in the statute of fines of 4 Hen. VII., in favor of infants and others, extended only to such infants, etc., to whom the right accrued, or who actually possessed a right when the fine was levied, and that no such right had at that time descended, or accrued to the demandant, for his ancestor was then alive; that the circumstance of the demandant being an infant when his ancestor died, was of no avail, because the exception in the statute gave the excuse of infancy to those only to whom a right first accrued, or who had a right at the time of the fine levied, and, therefore the plea of infancy did not apply to the case; that no new right accrued after the fine was levied, as the demandant's title was as heir to his ancestor, in whom the right attached when the fine was levied; that public tranquillity was more to be favored than the nonage of an infant, and that if infancy, closing on infancy, was to be allowed in succession, "the matter might possibly be delayed many hundred years;" that the statute intended to limit a certain time for the first right, and which was not to be exceeded by exposition or equity, though particular persons might suffer by it; "that the public repose was more to be regarded than the private convenience of any particular person, whether he be an infant, or of unsound mind, or in other degree;" that if a disability terminates, and a party within one month thereafter, becomes disabled by a new disability, as imprisonment, unsound mind, etc., and so continues all the five years, or, if at the end of the first month of the five years, he dies, leaving an infant heir, the statute continues to run, notwithstanding the subsequent disability.

The great principle of this case, that the disability within the proviso must exist when the right of entry accrues, and that a subsequent disability is of no account, was recognized and confirmed in *Doe v. Jones*, 4 Term Rep. 300. Lord Kenyon said, that one uniform construction of all the statutes of limitations had prevailed, down to that moment, and that "it would be mischievous to refine, and to make nice distinctions between the cases of voluntary and involuntary disabilities; (as one of the counsel, without any sufficient warrant, had attempted) but in both cases, when the disability is once removed, the time begins to run." It runs, said another of the judges, notwithstanding any subsequent disability, either voluntary or involuntary. The case of *Doe v. Shane*, M. 28, G. 3 (cited in the note to 4 Term Rep. 306), is also a very strong case on this point. The plaintiff, against whom a fine was set up in bar, was of sound mind when the fine was levied, but he became insane about two

years afterwards, and the question was, whether the time continued to run against him while he was in that state. Erskine, for the plaintiff, found the current of authorities so strong against him, that he would not pretend to argue the question, and the K. B. said the point was too plain to be disputed, and the rule for a nonsuit was made absolute.

The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and, I believe, uniformly exploded. General words in the statute must receive a general construction, and if there be no express exception, the court can create none. It was agreed, without contradiction, in *Stowel v. Zouch*, Plowd. 369 b, 371 b, that the general provision in the statute of fines would have barred infants, *feme covert*s, and the other persons named in the proviso, equally with persons under no disability, if they had not been named in the exception or saving clause. So in *Dupleix v. De Roven*, 2 Vern. 540; the Lord Keeper thought it very reasonable that the statute of limitations should not run when the debtor was beyond sea, but as there was no saving in the case, he could not resist the plea of the statute. The same doctrine is declared, in explicit and impressive terms, by Sir Wm. Grant, in *Beckford v. Wade*, 17 Vesey, 87, and who refers to the opinion of Sir Eardly Wilmot, in *Lord Buckinghamshire v. Drury*, Wilmot's Opinions, 177, § 194, and to the decision in the common law courts (*Hall v. Wybourn*, 2 Salk. 420; *Aubry v. Fortescue*, 10 Mod. 206), that though the courts of justice be shut by civil war, so that no original could be sued out, yet the statute of limitations continued to run.

The opinion of Lord Redesdale, in *Hovenden v. Annesley*, 2 Sch. & Lef. 630, 640, and of Lord Manners, in *Medlicott v. O'Donel*, 1 Ball and Beatty, 156, are remarkably elaborate in tracing the authorities, and in enforcing the duty of a court of equity to render entire obedience to all the provisions of the statutes of limitations.

Before I leave this point, I ought to notice the case of *Lamar v. Jones*, 3 Harris and M'Henry's Rep. 328, in which the late Chancellor Hanson, of Maryland, adopted the English rule, and held that the equity of redemption was barred after twenty years' possession by the mortgagee, without interest paid, or an account, and when the lapse of time was relied on in the answer, and ten years had expired after the disability had ceased. This would have been a case perfectly in point, but it was reversed on appeal, on the ground, that the Court of Chancery in England had not adopted that part of the statute of limitations which allows only ten years to infants, after they come of age, to bring their actions, and the Court of Appeals

considered what Lord Talbot had said in *Belch v. Harvey*, as only a *dictum*. But, I apprehend, that the opinion of Lord Talbot, formed as it was, after argument, and ready for delivery, has all the weight due to his very enlightened judgment. Lord Camden, in *Smith v. Clay*, 3 Bro. 639, note, cites that very case and opinion, to show that the statute of limitations, in all its provisions, had been adopted, and become the "settled" law in equity. The case was also cited by the counsel in *Lytton v. Lytton*, 4 Bro. C. C. 458, and Lord Rosslyn admits, that a similar proviso in the statute of limitations of 10 and 11 W. III., limiting infants to five years after they become of age, to bring error, was to be adopted with the provisions of that statute, as applicable to the analogous case of bills of review. This is a clear judicial sanction to the doctrine of Lord Talbot, and, therefore, as well upon authority as upon the reason and policy of the rule, I conclude, that the Court of Appeals in Maryland was, in this instance, mistaken; and with respect to the learned Chancellor's opinion, notwithstanding the reversal, I trust I may, without offense, be permitted to say, *Scevolæ assentior*.

I conclude, accordingly, that the lapse of time is here a bar to the right of redemption. The plaintiff has not excused her laches, and the length of adverse possession being insisted on by the answer, the defendant is entitled to the benefit of it equally as if it had been pleaded. 1 Atk. 494.

2. NATURE OF THE TITLE.

BAKER *v.* OAKWOOD.

123 NEW YORK, 16. — 1890.

ACTION to recover an undivided quarter of lands in the possession of the defendant. One Raynor was the owner in fee of the entire premises and placed a mortgage thereon, and thereafter the title to one-fourth passed to plaintiff's father, Chas. B. Hargin. After Hargin's death the mortgage was foreclosed without any notice to his heirs or widow, and Mrs. Raynor got title under the mortgage sale and conveyed to defendant. Further facts appear in the opinion. Judgment for defendants. Plaintiffs appeal.

O'BRIEN, J. — The findings of the court below are to the effect that, upon the death of Charles B. Hargin in 1840, the undivided quarter of the lands in question descended to his three children, of whom the plaintiff is one, subject to the widow's dower. By the subsequent death of two of the children, without issue and intestate,

the estate which the ancestor had at the time of his death became vested in the plaintiff as the surviving child, subject to a life estate in two of these shares in the widow. But it is also found that since 1849, when Lucy Maria Raynor purchased the whole farm from Hovey, and went into possession, the whole premises have been held adversely, first by Mrs. Raynor under her deed, and since 1859 by the defendant under its conveyance from Mrs. Raynor. The heirs of Hargin became tenants in common with the other owners, and the finding of adverse possession implies that the possession of Mrs. Raynor was such as to amount to an ouster of her co-tenants. Whatever may be said in regard to the nature of Mrs. Raynor's possession, whether hostile or not, there can be no doubt that the possession of the defendant from the time that it purchased the land in 1859 to the time of the commencement of this action was of such a character as to justify the conclusion that it commenced in an ouster of the heirs. It was the case of the purchase by a public corporation, organized in perpetuity, of lands to be devoted to the burial of the dead, followed by enclosing, improving and laying out the land in such manner and devoting it to such use as was utterly inconsistent with every other claim of title, and this was a termination of the joint tenancy, if it was not terminated before. *Zapp v. Miller*, 109 N. Y. 51; *Millard v. McMullin*, 68 Id. 345; *Florence v. Hopkins*, 46 Id. 182. The effect of this adverse possession upon the life-estate of Mrs. Hargin is the most important question in this case. The courts below have held that its effect was not only to cut off her remedy for its recovery, but to extinguish the estate itself and vest it in the defendant. If the contention be correct that the defendant in virtue of its adverse possession took to itself the life estate, then Mrs. Hargin, when she executed to the plaintiff the deed of October, 1885, had nothing to convey and that deed was ineffectual. The learned counsel for the plaintiff, perceiving the importance of this point, has addressed himself to its solution with most commendable learning and industry. Perhaps the highest praise that can be awarded to his argument is to record the fact that it drew from his distinguished adversary a generous but well-deserved compliment at the bar. We cannot, however, assent to the proposition that adverse possession of land for a period sufficient to bar an action merely cuts off the owner's remedy without affecting the estate. While this principle is not without the sanction of judicial authority, and that of text-writers, we think that the tendency of modern decisions in this and most of the States, as well as in the federal tribunals, is against it. It was held that the effect of the English Statute of Limitations, 21 Jac. I, chap. 16, was to bar the remedy, but not to

divest the estate. *Davenport v. Tyrrel*, 1 Wm. Black, 679; *Beckford v. Wade*, 17 Ves. 87; *Scott v. Nixon*, 3 Dru. & War. 388, 403; *Incorporated Soc. v. Richards*, 1 Id. 258, 289; *Trustees of Dundee Harbor v. Dougall*, 1 Macq. H. L. Cas. 317; Digley's Hist. Real Prop. 159; 3 Cruise on Real Prop. 430. But the construction placed by the English courts upon that statute was not acceptable to a more liberal and enlightened age. The commission of 1828 appointed to reform the anomalies and abuses of the law reported, and parliament enacted a new statute in respect to the possession of land (3 and 4 Wm. IV., chap. 27), the thirty-fourth section of which not only barred the remedy in case of adverse possession, but in terms extinguished the estate. Angell on Lim. chap. 2, 10; App. (5th ed.) 15. Since the passage of this statute it is held that adverse possession for a period sufficient to bar the action divests the estate of the true owner, and transfers it to the party holding adversely. 49 Hun, 420, and cases there cited.

But the doctrine of the English courts, giving construction to the Statute of James, does not seem to have been followed in this State. It is true that Judge Cowen, in the course of a long and able opinion in the case of *Humbert v. Trinity Church*, 24 Wend. 587, remarked that it was of the nature of the statute of limitations, when applied to civil actions, "to mature a wrong into a right by cutting off the remedy;" and, again, when speaking of actions brought by the true owner after the bar of the statute, "his title remains, but he has lost his remedy." The question in that case was whether the long-continued adverse possession of the defendant barred the plaintiff's action, and it was held rightly that it did. The effect of an adverse possession as a means of acquiring title was not, however, involved in the case. The doctrine that a statute of limitations merely extinguishes the remedy has been frequently applied to contract obligations. As thus applied, the principle cannot be disputed. Time may bar an action upon the promise or contract, but it does not pay the debt. That remains as a moral obligation at least, and is a good consideration for a new promise. Adverse possession of tangible property implies not only the lapse of time, but the occupation and enjoyment by the possessor, and the acquiescence of the true owner in a hostile claim of title. The idea that the title to property can survive the loss of every remedy known to the law for reducing it to possession and enjoyment would seem to have but small support in logic or reason. Enactments which are appropriately termed statutes of repose when applied to the adverse possession of land, have, as it seems to us, a broader and deeper effect than simply to destroy the remedy of the true owner for its recovery.

One of the earliest cases in this State upon the question is *Jackson v. Dieffendorf*, 3 Johns. 269, decided nearly a quarter of a century before the change made in the English Statute, 21 Jac. 1, chap. 16. In that case a party who could show no other title to land than an adverse occupation for thirty-eight years, was at the end of that period put out of possession by another, who had the paper title, under a judgment in ejectment obtained by default, and the party recovering the judgment, and in whose deed the premises were included, went into possession. The dispossessed party then brought another action of ejectment against the person who had turned him out, and who had a deed of the land, for the purpose of repossessing himself of what he had lost. The court held that he was entitled to recover upon the ground that the adverse possession was conclusive evidence of his title. The doctrine of that case on this point has never been disturbed, and the case itself has frequently been cited with approval in this court. *Baldwin v. Brown*, 16 N. Y. 364; *Reed v. Farr*, 35 Id. 117.

The case of *Cahill v. Palmer*, 45 N. Y. 478, was an action to recover money paid to the defendant for certain lands taken for Central Park. Both parties claimed to own the land for which the money was paid by the city. A statute provided that when the money was paid to the wrong person the real owner of the land might bring and maintain an action to recover it from the party to whom paid. The plaintiff had the paper title to the land, and the defendant, to whom the money was paid, showed an adverse possession for more than twenty years prior to the time the land was taken by the city. This court held that the money was properly paid to the defendant and that the plaintiff could not recover. Grover, J., referring to the point now under consideration, said: "The counsel for the appellant insists that an adverse possession, although for the length of time required by statute to bar the owner, is available only as a defense to a suit brought by such owner for the recovery of the land. In this the counsel is in error. When the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all other for the time prescribed by statute, such possession establishes title. To uphold it, a grant from the true owner to such party may be presumed." In *Reformed Church v. Schoolcraft*, 65 N. Y. 134, it was held that adverse possession for the period prescribed by the statute to bar an action was sufficient proof of title upon which to maintain an action of ejectment against parties in possession without title. The policy upon which the Statute of Limitations was based when applied to real property was examined and the conclusion reached in that case that the real owner's title is lost by

acquiescence in adverse possession by another, and that the title lost is gained by the party in possession.

In *Barnes v. Light*, 116 N. Y. 34, it was held that an action of ejectment, founded upon adverse possession alone, may be maintained by the party in whose favor the adverse possession has run, even against the true owner. This case was decided mainly upon the authority of *Sherman v. Kane*, 86 N. Y. 58; *Carleton v. Darcy*, 90 Id. 566; *Mayor, etc. v. Carleton*, 113 Id. 284, in all of which the principle is recognized that title may be obtained by adverse possession alone.

In *Millard v. McMullin*, 68 N. Y. 345, it is held that such a title is sufficient to uphold the lien of an execution. A clear adverse possession for twenty years constitutes a title, which a purchaser at a judicial sale may not refuse. *Seymour v. DeLancey*, 1 Hopk. Ch. 436; *Mott v. Mott*, 68 N. Y. 246; *Shriver v. Shriver*, 86 Id. 575; *O'Connor v. Huggins*, 113 Id. 511

The Supreme Court of the United States has repeatedly asserted the recognized rule of the Roman law that adverse possession is one of the modes of acquiring title to property. In *Campbell v. Holt*, 115 U. S. 620, Mr. Justice Miller, delivering the opinion of the court, said: "By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of prescription, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which in the Roman law, and the codes founded on it, is applied to property of all kinds." After pointing out the fact that possession was the earliest mode known to mankind for the appropriation of anything tangible to the use of one, and to the exclusion of all others, and that it was always a means of acquiring title, he adds: "The English and American Statutes of Limitations have in many cases the same effect, and if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition, that where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership for the period which, under the law would bar an action for its recovery by the real owner, the

former has acquired a good title, a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has repeatedly been asserted in this court. *Leffingwell v. Warren*, 2 Black. 599; *Croxall v. Shererd*, 5 Wall. 268, 289; *Dickerson v. Colgrove*, 100 U. S. 578, 583; *Bicknell v. Comstock*, 113 Id. 149, 152. It is the doctrine of the English courts, and has been asserted in the highest courts of the States of the Union."

The principle has also the sanction of two eminent authors on the law of limitations. Judge Cooley, in his recent work referring to this question, says: "When the period prescribed by statute has once run so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance." The learned author, admitting that there is controversy in regard to the point, has collected in a note the decisions of the highest courts in several of the States sustaining the doctrines stated in the text. Cooley on Const. Lim. (5th ed.) 449.

In the other treatise on this subject, which is of highest authority, it is said: "As a general doctrine, it has too long been established to be now in the least degree controverted that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independently of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest, and upon this acquiescence is founded the presumption of the existence of some substantial reason, though perhaps not known, for which the claim of an adverse interest was forborne." Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be very strong, if not of conclusive force." Angell on Lim., chap. 31, 373. The same learned author seems to treat prescription and adverse possession, so far as this question is concerned, as practically the same thing. Id., chaps. 1, 2.

These authorities, and others that might be cited, show that title to an estate in land may be acquired by one and lost by another by means of adverse possession. This principle has become a rule of property that cannot now be disturbed without grave injury to titles.

There is no serious claim that the plaintiff can recover the share which she took direct from her father, and as to the other two shares the plaintiff's remainders are limited upon her mother's life estate which the defendant has absorbed in its adverse possession, and is not yet terminated, as under the principles above stated she had nothing to convey, and nothing passed to the plaintiff under the deed of October, 1885. Hence, the plaintiff's rights are to be determined in this case in the same way as if the deed had not been executed at all. This point is, we think, decisive of the case, and it is not necessary to examine the questions so ably discussed, whether the conveyance offends against the champerty statutes; whether the defendant is entitled to the rights of a mortgagee in possession, or when, and under what circumstances a defendant in ejectment can protect his possession by an outstanding title in another.

The judgment should be affirmed.

SCHOOL-DISTRICT No. 4, IN WINTHROP, *v.* BENSON.

31 MAINE, 381. — 1850.

WELLS, J. —The jury were instructed, that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood-house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe, will have that effect if not controlled or explained by other testimony. *Little v Libbey*, 2 Greenl. 242; *The Proprietors of Kennebec Purchase v. John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same is barred by limitation. Stat., c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by disseisin or by deed, it vests the fee simple, although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will. Stat., c. 91, § 30.

The exceptions are sustained, and a new trial granted.

VI. Title by estoppel.**1. ESTOPPEL IN DEED.****PIKE v. GALVIN.**

29 MAINE, 183. — 1848.

SHEPLEY, J. — The title of both parties to the demanded premises is derived from Artemas Ward, who, by his agent Robbins, made a contract in writing on October 26, 1820, to convey a tract of land including the premises to Theodore Jellison upon the performance of certain conditions therein stated. Jellison appears to have entered into possession, but does not appear to have performed the conditions. On July 7, 1823, Jellison assigned that contract to the demandant, and on the same day made a deed of release purporting to convey the same tract of land to the demandant. Artemas Ward, on October 27, 1825, by a deed containing covenants of warranty, conveyed a larger tract of land including the tract before named, to Jones Dyer, Jr., who, on July 11, 1829, conveyed to Theodore Jellison the tract of land described in his deed to the demandant. Jellison, on May 9, 1833, conveyed the premises demanded to Stephen Emerson. These conveyances were all duly recorded. The defendant is the tenant of Joseph Wyeth and Stephen G. Bass, who have exhibited a title derived from Stephen Emerson. The demandant has never been in possession of the land described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison have always been in possession.

As Jellison had no title when he made his deed on July 7, 1823, the demandant can have none, unless that acquired by Jellison on July 11, 1829, inured to him.

The deed from Jellison to the demandant contains no covenants but the following: "So that neither I, the said Jellison, nor my heirs or any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will, by any way or means, have, claim or demand any right or title to the aforesaid premises or to any part or parcel thereof forever."

Without entering upon a discussion of the doctrine or the different aspects of it presented in the very numerous cases which have been decided respecting the effect of covenants contained in a conveyance of land to transfer to the vendee by inurement, estoppel, or otherwise, a title subsequently acquired, it will be sufficient for the present purpose to state a couple of positions which appear to have been asserted or admitted in many of them.

1. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it. Such is the doctrine in this State. *White v. Erskine*, 1 Fairf. 306; *Lawry v. Williams*, 13 Maine R. 281; *Baxter v. Bradbury*, 20 Maine R. 260. In New Hampshire, *Kimball v. Blaisdell*, 5 N. H. R. 533. In Vermont, *Middlebury College v. Cheney*, 1 Vermont R. 336. In Massachusetts, *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324. In New York, *Jackson v. Matsdorf*, 11 Johns. R. 91; *Jackson v. Bradford*, 4 Wend. 619; *Pelletreau v. Jackson*, 11 Wend. 110. In Ohio, *Hill v. West*, 8 Ham. 222. In the courts of the United States, *Terrett v. Taylor*, 9 Cranch, 53; *Mason v. Muncaster*, 9 Wheat. 455; *Stoddard v. Gibbs*, 1 Sum. 263.

Against these and other decisions to the same effect, it has been contended, that "the old common-law warranty has no practical operation under the system of conveyancing employed in this country, except in the single case of release with warranty to a party in adverse seisin of an estate, and of a subsequent descent of the right of entry or action to the warrantor." And that "the doctrine of estoppel in deeds cannot be based upon that of warranty." *Doe v. Oliver*, Smith's L. C. 460, in note. If the question could be considered as open to discussion, it might be worthy of deliberate consideration. But it would seem to be too late to entertain it.

2. Where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

There is an irreconcilable difference in the decided cases respecting this proposition. It is believed, however, to be fully established by the better-considered opinions, and to be in accordance with well established principles.

It is sustained in this State by the cases of *Allen v. Sayward*, 5 Greenl. 227, and *Ham v. Ham*, 14 Maine R. 351; and opposed by the case of *Fairbanks v. Williamson*, 7 Greenl. 96. In New Hampshire it is sustained by the case of *Kimball v. Blaisdell*, 5 N. H. R. 533. In Massachusetts it is sustained by the cases of *Somes v. Skinner*, 3 Pick. 61; *Blanchard v. Brooks*, 12 Pick. 47; *Comstock v. Smith*, 13 Pick. 116; and opposed by the case of *Trull v. Eastman*, 3 Metc. 121. In Connecticut it is sustained by the case of *Dart v. Dart*, 7 Conn. R. 250. In New York it is sustained by the cases of *Jackson v. Wright*, 14 Johns. R. 193; *Jackson v. Bradford*, 4 Wend.

619; *Pelletreau v. Jackson*, 11 Wend. 110; *Jackson v. Waldron*, 13 Wend. 178. And it may be considered, as opposed by the cases of *Jackson v. Bull*, 1 Johns. Cas. 81, and *Jackson v. Murray*, 12 Johns. R. 201. If they be so considered, they were overruled by the case of *Pelletreau v. Jackson*. In Ohio it is sustained by the case of *Kinsman v. Loomis*, 11 Ohio, 475.

The only suitable inquiry to be entertained in this State is, whether our own case of *Fairbanks v. Williamson*, although the doctrine asserted in it may have been approved elsewhere, as well as in the case of *White v. Erskine*, can, upon sound principles, be sustained. The deed in that case, contained no covenant but that of non-claim. The ground, upon which it was decided that a title subsequently acquired inured to the vendee appears to have been that the covenant of non-claim was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto."

Covenants which relate to the land, are said to run with the land. *Sale v. Kitchingam*, 10 Mod. 158; *Norman v. Wells*, 17 Wend. 136. But a covenant, which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance. *Spencer's Case*, 5 Coke, 17 b; *Lucy v. Livingston*, 2 Lev. 26; *Lewes v. Ridge*, Cro. Eliz. 863; *Bickford v. Page*, 2 Mass. 460; *Slater v. Rawson*, 1 Metc. 456; *White v. Whitney*, 3 Metc. 81; *Clark v. Swift*, 3 Metc. 390; *Chase v. Weston*, 12 N. H. 413; *Garfield v. Williams*, 2 Verm. 327; *Beardsley v. Knight*, 4 Verm. 471; *Mitchell v. Warner*, 5 Conn. 497; *Kane v. Sanger*, 14 Johns. 89; *Beddoe v. Wadsworth*, 21 Wend. 120; *Garrison v. Sandford*, 7 Halst. 261; *Randolph v. Kinney*, 3 Rand. 394; *Backus v. McCoy*, 3 Ham. 211; *Allen v. Wooley*, 1 Blackf. 149. The cases of *Kingdon v. Nottle*, 1 M. & S. 353, and 4 M. & S. 53, are denied to have been correctly decided in *Mitchell v. Warner*, 5 Conn. 497, and in *Clark v. Swift*, 3 Metc. 390. Kent, also, in speaking of covenants which run with the land, says: "They cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate." 4 Kent's Com. 472, note b.

Admitting the covenant in the deed alluded to in *Fairbanks v. Williamson*, to be a covenant that might run with the land, it could not run or be transferred by law to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed by which the releasor had asserted some matter to be true,

which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one who has in such a solemn manner admitted a matter to be true, to allege it to be false. "This," says Kent, "is the reason and foundation of the doctrine of estoppels." 4 Kent's Com. 261, note d.; where he also says, "A release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise." The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct.

One who acquires no title by a release without covenants respecting the title cannot recover back the purchase money which he paid for it. *Emerson v. The County of Washington*, 9 Greenl. 88. To permit him to acquire a title subsequently purchased by his releasor would often enable him to obtain in another and less direct mode property of more value than the purchase money.

The conclusion is that the doctrine asserted in the case of *Fairbanks v. Williamson* cannot, upon sound principles, be admitted, and that the decided cases in this and other States are opposed to it.

When Jellison made his deed of release to the demandant, he was in possession in submission to the title of Ward, and was but a tenant at will to him. Not being seised of a fee simple, he could not convey it. The demandant must have known, when he received that deed, that Jellison had no title and could convey none, for he at the same time took an assignment of Jellison's contract to purchase that land of Ward. He subsequently acted as an appraiser to make a levy and to pass the title to a part of that land from a grantee of Jellison to a creditor of that grantee. There is no allegation in the deed of Jellison to the demandant respecting the title which it would be necessary for Jellison or his grantee to deny or contradict by setting up a title subsequently acquired.

Demandant nonsuit.

2. ESTOPPEL IN FACTS—EQUITABLE ESTOPPEL.

BLAKESLEE v. SINCEPAUGH.

71 HUN, 412. — 1893.

ACTION to recover real estate.

MERWIN, J. — Upon the trial of this action it was shown on the part of the plaintiff that Havilla D. Blakeslee, by deeds dated September 25, 1834, and September 22, 1838, became the owner of a

quantity of land, and thereafter, by deed dated December 3, 1880, and duly recorded December 4, 1880, he, with his wife, conveyed the same to the plaintiff, excepting sixteen acres theretofore conveyed to the plaintiff. The premises in dispute are a part of the lands described in these deeds. The consideration of the deed of December 3, 1880, as stated in the deed is the sum of one dollar and the maintenance and support of the parties of the first part during their natural lives. It was then shown on the part of the defendant, that Havilla D. Blakeslee and wife, by warranty deed dated December 1, 1882, and recorded December 5, 1882, conveyed the premises in dispute to the defendant for the consideration therein named of \$680, which defendant at the time paid to the grantor or the person acting for him. Havilla D. Blakeslee was the grandfather of plaintiff, and evidence was given tending to show that plaintiff at this time lived with his grandparents, on the farm of which the premises in question were a part; that he knew of the negotiations for the purchase by defendant of the grandfather; that during these negotiations the defendant saw the plaintiff, told him he was talking about buying a piece of land of his grandfather, and had heard that he, the plaintiff, had an interest in it, and asked him whether that was so, and whether he had any deed or mortgage against it; and he, the plaintiff, replied that he had no deed or mortgage against it, and had no interest in his grandfather's premises; that the plaintiff at the time knew that he was the legal owner of the property, and made the statement to defendant with intent to deceive him and induce him to buy of his grandfather; that the defendant thereupon, in reliance upon the truth of the plaintiff's statement, and in ignorance of the true state of the title, made the purchase of the grandfather.

The plaintiff denied making the representations or that he knew that his deed covered the property conveyed to defendant. It was also shown that plaintiff was then a minor, having been born March 6, 1862.

At the close of the evidence the counsel for plaintiff asked the court to direct a verdict for the plaintiff upon several grounds, chiefly that the evidence upon the part of the defendant was not sufficient to constitute an estoppel; that at the time of the alleged statements the plaintiff was an infant, and that if he made the statements he did not know at the time whether or not he owned the land, and that no fraud was shown upon his part, and that the defendant was guilty of negligence in not causing the records to be searched. The court denied the motion and stated that in its opinion the better way to dispose of the case was to submit it to the jury on four questions:

"First, whether these statements were made by the plaintiff to the defendant; second, whether the plaintiff had knowledge at the time he made them that he was the legal owner of this land; third, whether they were made by the plaintiff with the intention that they should be acted upon by the defendant in the purchase of the land; fourth, whether they were acted upon, and relied upon by the defendant when the land was purchased by him." The plaintiff's counsel duly excepted to such ruling and to the denial of the motion. The case was thereupon submitted to the jury upon the line suggested by the court, and a general verdict rendered for the defendant. There was no exception to the charge and no request that any other question should be submitted to the jury.

1. The first proposition now presented by the plaintiff is, that the plaintiff, being an infant at the time of making the alleged statements, was not estopped thereby.

Assuming, as we must, that the facts, so far as warranted by the evidence, were found against the plaintiff, we have here a case of intentional fraud. In *Spencer v. Carr*, 45 N. Y. 406, where, as here, it was claimed that an infant was barred of her title by an equitable estoppel, it was held that in the absence of intentional fraud upon her part she would not be estopped, and that as that was not found she would not be deprived of her legal rights. The inference is, that if there was intentional fraud, the doctrine of equitable estoppel would apply notwithstanding infancy. The opinion of the court in the case strongly supports this inference, in cases where the infants are of sufficient age to appreciate their rights and duties. We are referred to no case in this State where the views suggested in *Spencer v. Carr* are criticised. In *Brumfield v. Boutall*, 24 Hun, 457, the question of fraud on the part of the infant was not up, nor was it in *Sherman v. Wright*, 49 N. Y. 231. The same may be said as to *Ackley v. Dygert*, 33 Barb. 176. In *Brown v. McCune*, 5 Sandf. 224 decided in 1851, it was held that fraudulent representations as to his age did not bind an infant. This case was criticised, and the opposite rule held in *Eckstein v. Frank*, 1 Daly, 334. In *Green v. Green*, 69 N. Y. 553, a father had taken a deed from his minor son and paid him the consideration, and the question was whether the son, on becoming of age, could repudiate the deed without restoring the consideration. It was held that he could, it appearing that the money was spent and he had no other property with which to replace it. There was no question of fraud in the case.

In 1 Story's Equity, § 385, it is said in reference to cases like the present, that "cases of this sort are viewed with so much disfavor by courts of equity, that neither infancy nor coverture will constitute

any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice deceptions or cheats on other innocent persons." In 2 Sugden on Vendors (8th Am. ed.), 507, chap. 23, § 1, pl. 17, it is said: "If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert, or under age." In 2 Pomeroy's Equity, § 815, it is said: "An equitable estoppel arising from his, the infant's conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act." Numerous cases are cited to each of the quoted propositions. The same rule is stated in Bigelow on Estoppel, 448. See, also, note in 44 Am. Dec. 386; Bispham's Eq. § 293. There is no doubt in the present case that the infant was of sufficient age to appreciate his rights and duties. He lacked only a few months of being of age. The rule to be inferred from the *Spencer Case*, as to the application of the doctrine of equitable estoppel to infants, while it may not be entirely consistent with the supposed disability and need of protection of infants, has, I think, the weight of authority in its favor, and it should be followed by us in this case. The court below, therefore, properly held that the fact that plaintiff was an infant did not of itself relieve him.

2. The plaintiff further claims that he should not be estopped because he had no knowledge that he owned the land in dispute. This, however, upon the evidence was a question of fact and was found adversely to plaintiff.

3. It is further claimed that the burden of proof is on the defendant, and that the testimony being evenly balanced defendant must fail. It is true that the burden of proof was on the defendant, and that statements testified to by the defendant were denied by the plaintiff. It was, however, for the jury to determine where the truth was, and there were many surrounding circumstances that bore upon the question.

4. It is further claimed that the defendant was guilty of laches in neglecting to consult the records in the clerk's office, and the case of *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, is cited in support of the proposition. In that case the plaintiff, who sought the benefit of an estoppel, neither looked at the record nor made any inquiry of anybody as to the ownership of the property, and it was held that its failure to examine the record and make inquiry prevented its recovery. The present case is materially different. So in *McCul-*

loch v. Wellington, 21 Hun, 5, there were no representations by the owner, but, as said in the opinion at page 14, it was the case of a purchaser who, from his confidence in the vendor, or from other circumstances, not imputable to the claimant, has purchased property and omitted to make the necessary and ordinary examination of title. In *Lyon v. Morgan*, 19 N. Y. Supp. 201, the effect of failure to examine the record was not determined, and the case was decided upon other grounds.

If the present case was one where the owner was simply silent, it may be that the constructive notice from the record would prevent the defendant from receiving any benefit from the doctrine of estoppel. But assuming that there were false representations and intentional fraud, the rule would be different. *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Fisher v. Mossman*, 11 Ohio St. 47. As said by Judge Strong in *Hill v. Epley*, 31 Penn. St. 334: "It should never be forgotten that there is a wide difference between silence and encouragement."

"A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth." 2 Story Eq. (12th ed.) § 1553b. Whether the defendant in that respect was negligent under the circumstances of the present case was a question of fact. *Moore v. Bowman*, 47 N. H. 494. The court below was, therefore, correct in holding that it should not be said, as a matter of law, that the defendant was guilty of negligence.

5. The appellant claims that incompetent testimony was admitted to his prejudice, but we find no ruling that supports this contention.

No other question is presented. It follows that the judgment should be affirmed.

CHAPTER II.

TITLE BY DERIVATIVE ACQUISITION.

I. From the state.

LEWIS, C. J., IN THE MAYOR *v.* THE OHIO AND PENNSYLVANIA RAILROAD COMPANY.

26 PENNSYLVANIA STATE, 355. — 1855.

IT MUST be remembered that the ground was public ground, owned and in charge of the public municipal authorities, for public uses. It may also be inferred that the grant was made on the application of the railroad company, and on their own representation of the quantity of ground which they deemed it necessary to occupy. In the construction of a grant it is important to have respect to the estate of the grantor, to the consideration which leads the estate, and to the recompense and loss which is sustained. *Gough v. Howard*, 3 Bulst. 125. Where a grant is made by the king at the suit of the grantee, it is to be taken most beneficially for the king and against the grantee. 2 Bl. Com. 347; Hob. 243; Hard. 309. A grant made by the commonwealth, or by a municipal corporation under authority derived from the commonwealth, at the instance and for the convenience of a railroad company, is governed by the same rule of construction, and nothing is to be taken by implication against the public, except what necessarily flows from the nature and terms of the grant.

II. From individuals by involuntary alienation.

I. TITLE BY EMINENT DOMAIN.¹

EATON *v.* B. C. & M. RAILROAD.

51 NEW HAMPSHIRE, 504. — 1872.

[*Reported herein at p. 1.*]

¹ The cases illustrate the exercise of the power by corporations under the authority of the state. See also pp. 141 and 120, note. The matter is largely regulated by statute. For the New York Law, see Code Civ. Proc., §§ 3357-3384. — Ed.

WHEELER *v.* KIRTLAND.

27 NEW JERSEY EQUITY, 534. — 1875.

*[Reported herein at p. 698.]*2. TITLE BY MARRIAGE.¹RILEY'S ADMINISTRATORS *v.* RILEY

19 NEW JERSEY EQUITY, 229. — 1868.

*[Reported herein at p. 26.]*BABB *v.* PERLEY.

1 MAINE, 6. — 1820.

*[Reported herein at p. 27.]*HOUGHTON *v.* HAPGOOD.

13 PICKERING (MASS.), 154. — 1832.

*[Reported herein at p. 24.]*FEARS *v.* BROOKS.

12 GEORGIA, 195. — 1852.

*[Reported herein at p. 571.]*3. TITLE BY BANKRUPTCY.²JOHNSON *v.* GEISRITER.

26 ARKANSAS, 44. — 1870.

McCLURE, J. — On the 3d of September, 1867, Geisritter executed and delivered his note to W. W. Johnson, for \$600, payable one year

¹ Dower inchoate is rather a lien or charge than a title. Curtesy initiate is an estate except in those States where the wife can, by her separate deed, convey the land free and clear of her husband's claim. Dower assigned and curtesy consummate are of course estates. — ED.

² This is governed by statutory regulations in the various States except when there is a general bankruptcy act in force, in which case the federal courts may

after date. W. W. Johnson assigned said note to one Ben S. Johnson, the plaintiff in this action, who brought suit on the same.

Geisritter answered, setting up that W. W. Johnson had filed his petition in bankruptcy; that, at the time of filing said petition, said Johnson was the owner of the note sued on; that said note was not included in Johnson's schedule of assets, and that he had no right or authority to assign the same; that said W. W. Johnson, long after the filing of said petition in bankruptcy, was the owner of said note; that the assignment to Ben S. Johnson, the plaintiff, was and is null and void, and that said plaintiff acquired no legal title by reason of said assignment.

To this answer the plaintiff demurred on the ground that "the answer does not state facts sufficient to constitute a defense."

The court overruled the demurrer, the plaintiff rested, and judgment was for the defendant. The plaintiff appealed.

The question presented is whether a bankrupt can assign property that ought to have been scheduled, after having filed a petition.

The demurrer admits the filing of the petition of bankruptcy, by W. W. Johnson, the ownership by him of the note at the time of filing the petition, that it was not included in the schedule of assets of said Johnson, and that long after the filing of the petition in bankruptcy, Johnson was the owner of the note.

The appellant urges that a bankrupt's assets do not pass to the assignee until the assignee has been appointed and qualified.

The bankrupt act requires the petitioner to make a schedule of his assets and liabilities. It also declares that, upon the appointment of the assignee and his qualification, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the interest, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of said proceedings in bankruptcy; and therefore, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, * * * and shall dissolve any attachment made within four months next preceding the commencement of said proceedings. The 11th section of the act declares: "The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt."

The appellant urges that the answer does not disclose that the petitioner had been adjudged a bankrupt, or that an assignee had

restrain the state courts from proceeding in such cases. *In re Miller*, 6 Biss. 30, Fed. Cases No. 9551. See the National Bankruptcy Act of 1898, for the present law. The provisions of the New York statute are to be found in the Code Civ. Proc., §§ 2149-2218. — ED.

been appointed and qualified. The language of the 11th section is, that "the filing of the petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." We construe this language to mean that a petitioner shall be deemed a bankrupt from the day on which he files his petition.

The moment the petition is filed the bankrupt is civilly dead. During the interval existing between the filing of the petition and the appointment of the assignee, a condition of things exists not unlike that in the case of a person dying intestate, and before the appointment of an administrator. On the death of a person intestate, no one is authorized to dispose of or assign his assets. A bankrupt is *civiliter mortuus*, from the day on which he files his petition, and during the interval, between the filing of the petition and the appointment of the assignee, no assignment of his assets can be made. A judgment rendered against a bankrupt, after the filing of the petition, and before the appointment of an assignee, is as much a nullity as a judgment rendered against a deceased person, who has no legal representative. If no valid judgment can be rendered against a bankrupt at such a time, it is not at all probable that the law gives him the power to make a valid assignment of assets that should, and which the appellant admits, ought to have been placed in the schedule.

The judgment of the Jefferson County Court is affirmed with costs.

4. TITLE BY SALE UNDER AN EXECUTION.¹

NORTHERN BANK OF KENTUCKY *v.* ROOSA.

13 OHIO, 335. — 1844.

[Reported herein at p. 10.]

WEBSTER *v.* PARKER.

42 MISSISSIPPI, 465. — 1869.

[Reported herein at p. 42.]

¹ These sales are regulated by statute. Usually a period of some months is allowed for redemption before the sheriff gives the deed. For the New York Statute see Code Civ. Proc., §§ 1430-1478. Homestead rights are exempt from execution sale. *Id.*, §§ 1397-1401. — ED.

5. SALES BY GUARDIANS, EXECUTORS, ADMINISTRATORS, ETC.¹

HOUGHTON *v.* HAPGOOD.

13 PICKERING (MASS.), 154. — 1832.

[*Reported herein at p. 24.*]

MARCH *v.* BERRIER.

6 IREDELL'S EQUITY (N. C.), 524. — 1850.

[*Reported herein at p. 70.*]

6. SALES BY JUDICIAL DECREE.

LANE *v.* KING.

8 WENDELL (N. Y.), 584. — 1832.

[*Reported herein at p. 197.*]²

7. TAX SALES.³

III. From individuals by voluntary alienation *inter vivos*.

I. COMMON LAW CONVEYANCES.

*a. Primary.*⁴

*b. Secondary.*⁵

¹ Executors may be empowered by the will to sell. In all other cases they can sell only when duly authorized by the proper court. New York Code Civ. Proc., §§ 2749-2801. For the N. Y. statutory proceeding for the disposition of the real property of an infant, lunatic, idiot or habitual drunkard, see Code Civ. Proc., §§ 2345-2364. — ED. *

² In many States a sale on foreclosure does not cut off the equity of redemption until the expiration of a certain time (fixed by statute) after the sale has taken place. — ED.

³ These are regulated wholly by statute. See for New York the "Tax Law" of 1896. — ED.

⁴ These are feoffment, gift, grant, lease, exchange and partition. — ED.

⁵ These are release, confirmation, surrender, assignment and defeasance. Examples of many of the forms of common law conveyances will be found in the cases already reported. — ED.

2. CONVEYANCES OPERATING UNDER THE STATUTE OF USES,¹VERDIN *v.* SLOCUM.

71 NEW YORK, 345. — 1877.

EARL, J. — The appellant Thompson, the purchaser, at a mortgage foreclosure sale, seeks to be released from his purchase upon the claim that the proceedings in the foreclosure action above entitled, are so defective as not to give him a good title. He insists upon several defects, but one of which it will be necessary to consider, and that is, that a judgment-creditor of William B. Slocum should have been made a party to the action. Hiram Slocum died seised of the mortgaged premises subject to the mortgage. He left a will in which he devised his estate, including these premises, to his executors upon trust that they should divide the same into three parts; and, as to one-third part, he provided as follows: "I direct my said trustees to permit and suffer my son William B. Slocum to have, receive and take the rents, issues and profits thereof for the term of his natural life; and after his decease, I give, devise and bequeath the same part or share to the heirs-at-law of my said son." It is claimed on the part of the plaintiff, that these provisions created a valid, express trust, and hence that the legal title was vested in the trustees, and that the judgment did not become a lien upon the one-third thus devised, and hence that the judgment-creditor was not a necessary party, and this was the view taken in the court below. On the part of Thompson it is claimed that the trust was invalid, and hence that William B. Slocum took a life estate in the land upon which the lien of the judgment attached, and hence that the judgment-creditor should have been made a party, and this claim we believe to be well founded. The trust attempted to be created is a passive one, and condemned by the statute. The trustees had no active duties to discharge. They were not "to receive the rents and profits of lands, and apply them to the use" of William B. Slocum, or to pay them over to him. 1 R. S. 729, § 55. But they were directed "to permit and suffer" him "to have, receive, and take the rents" and profits. They had no discretion to exercise. They could not refuse the permission, and they could in no way exercise any control over the rents and profits. That such a trust is condemned by the statute has never been doubted. *Parks v. Parks*, 9 Paige, 107; *Jarvis v. Babcock*, 5 Barb. 139; *Beekman v. Bonsor*, 23 N. Y. 298, 314, 316. William B. Slocum was entitled to the possession of the land and to the rents and profits

¹ For the origin of these, see p. 854 *supra*. — ED.

thereof, during his life, and hence the statute vests the legal title in him for the same term. 1 R. S. 727, §§ 47, 49; *Craig v. Craig*, 3 Barb. Chy. 77. It follows, therefore, that the judgment was a lien, and that the life estate was affected thereby; and for this defect the motion should have been granted.¹

WYMAN v. BROWN.

50 MAINE, 137. — 1863.

[Reported herein at p. 909.]

3. GRANTS.²

4. MODERN TRANSFERS.³

a. *By deed or by parol?*⁴

b. *Requisites for (and of) a deed of conveyance.*⁵

(I.) COMPETENT PARTIES.⁶

THOMAS v. WYATT.

31 MISSOURI, 188. — 1860.

EJECTMENT. — Plaintiff claims under the "Samuel Johnson" certificate which appears to have been assigned to him the same day it

¹ The above case illustrates the direct form of a conveyance operating under the statute of uses. The practical conveyances of this sort, however, are the covenant to stand seised, the deed of bargain and sale, and the deed of lease and release. Most of these forms of conveyances are now construed as "grants." § 211, N. Y. R. P. L. — ED.

² Originally the common-law method of conveying interests not lying in livery, grants are now by statute in England and most States, the customary form of conveyance of corporeals in possession. — ED.

³ The case of *Wyman v. Brown*, reported *supra*, p. 909 contains on pp. 916-917 a discussion of the nature of transfers by virtue of our modern statutes. — ED.

⁴ See N. Y. R. P. L., §§ 207, 208. The express requirement for a seal to a grant, contained in 1 R. S. 738, § 137, is omitted here, and, as will be seen from the report of the commissioners, purposely. It would seem, however, from the forms in § 223, R. P. L., that grants are still to be made by deed. See for old rule, *Jackson v. Wood*, 12 Johns. 73. An instrument without seal will carry the equitable title, at least. *Todd v. Eighmie*, 4 App. Div. (N. Y. Supreme Ct.) 9. — ED.

⁵ No special cases are here given to illustrate the subject of signing, acknowledging, witnessing or registering a deed. See supplementary cases. — ED.

⁶ See under part V. *supra*. — ED.

was issued — Aug. 19, 1829. The patent was issued on this certificate in 1843. Thomas thereafter brought a suit in equity against "Samuel Johnson" and obtained a decree vesting Johnson's legal title in him. Service of process in this suit was by order of publication.

In 1845 another patent was issued for the same premises and on the same certificate to one Samuel M. Coleman as assignee of "Samuel Johnson." Coleman conveyed part of the tract to defendant who is in possession. Judgment for plaintiff. Defendant appeals.

SCOTT, J. * * * The ground, on which the defendant repelled the plaintiff's right to a recovery, was that Johnson was a fictitious person; that there was no such man in being, and therefore the patent was void, and the plaintiff could not derive any title from it or the patentee. There is no doubt that a patent issued to a person not in existence is void. This was the view taken of this case when it was formerly here. But now we have more light upon it, and although we adhere to the opinion then expressed, we doubt whether it is applicable to the case as it is now presented. The only theory that will solve the question involved in this litigation (and we think there is sufficient evidence to put it to a jury) is, that Samuel Johnson is an assumed name of James Coleman, and not a fictitious person. If we regard Coleman as usurping the name of Johnson when it suited his purposes, we have a clue by which we may be guided to the justice of this case. We have no doubt that this was the light in which this matter was viewed in the court below, but as the case was tried by a jury we do not conceive that the language of the instruction was sufficiently pointed to direct their attention to the matter really in issue. If James Coleman used the name of Samuel Johnson to designate himself, when he thought proper, and made the entry in the name of Samuel Johnson for himself, merely using that name as he would the one by which he was usually known, and endorsed it in the name of Samuel Johnson with the same view, then the transaction is to be regarded as though James Coleman had used instead of the name "Samuel Johnson" the name of "James Coleman." So the patent to Samuel Johnson is to be regarded as to James Coleman and not to a fictitious person. I knew an individual once, who was sued in an action in which heavy damages were claimed, and during its pendency he entered a great quantity of land in his name reversed or spelt backwards. Now no one supposed that, if a judgment had gone against him, that the title had not passed from the United States so that the land would have been subject to the claim of the creditor. So we suppose it is competent to

the party here to prove that James Coleman was Samuel Johnson or James Coleman, just as it suited his purposes; that he was a man who used two names; that to effect his ends he endeavored to make it appear that he was two different persons. It matters not whether it was generally known that he went by two names or not. The law is the same, though he was known by one name only, as though he was known by both. If a man signs a bond by a name by which he was never called or known, or which he had never used before, he would be bound by it. *Carpenter v. Williams*, 28 Mo. 460. * * *

This case, then, depends on facts to be determined by a jury. These facts are whether James Coleman and Samuel Johnson were not the same identical person, and the name Samuel Johnson was assumed by Coleman to carry out his fraudulent designs. If these facts are found, the plaintiff will be entitled to recover. If, on the other hand, the jury believe from the evidence that the government, in issuing the patent, intended it for another person distinct and separate from James Coleman, and that there was no such person ever in existence, then, in the nature of things, no title could pass by the patent.

Reversed and remanded.

(2.) REAL PROPERTY TO BE CONVEYED.

DART *v.* DART.

7 CONNECTICUT, 250. — 1828.

EJECTMENT to recover an undivided fifth-part of certain land. Roger Dart devised the demanded premises to his sons William and Solomon, their heirs and assigns forever, upon certain conditions and with the following limitation: "My will further is that my sons shall not either of them sell or dispose of the lands, which I have herein given to each of them, from their lawful male issue; and in case either of my sons should die without lawful male issue, in such case, his land hereby given shall revert, and become the estate of my surviving sons or their male issue." Solomon entered on the land and in 1794, together with his son Solomon, Jr., quitclaimed to defendants. Later by a separate deed his other son, Caleb (the plaintiff), quitclaimed to the same parties. Solomon, Senior, died in 1825.

The judge charged the jury that Solomon, Senior, took an estate in tail male and not a life-estate. That title did not vest in Caleb till his father's death, and that plaintiff is not estopped by his deed.

PETERS, J. — This case presents three questions. 1. What estate did Solomon Dart the elder take under this devise? 2. What estate passed from the plaintiff to the releasees? 3. Is the plaintiff estopped by his deed to them?

To answer the first question, we must ascertain the intention of the devisor; and this can be learned only from his will. His first object seems to have been, to provide for his sons, during their lives; the second, to perpetuate his estate in his name and family. This, according to the notions of those days, could be effected only by an entailment. He therefore used expressions, which have always been understood to create an estate tail. In the first place, he created an estate of inheritance in his sons. He then forbade their selling it away from their lawful male issue. And lastly, he provided, that if either of his sons should die without such issue, his land should revert, and become the estate of his surviving sons, or their male issue. This completed the entailment in perpetuity, according to his views; though not according to the modern decisions. *Chappel v. Brewster*, Kirby, 175; *Hamilton v. Hempstead*, 3 Day, 332.

But the defendants claim, that Solomon, the devisee, took an estate in fee simple conditional or in remainder. I am satisfied, upon the authority of many adjudged cases, both English and American, that he took an estate in tail male general. * * *

2. What estate passed from the plaintiff, by his deed to the releasees? By the common law, a release is a secondary conveyance, and is a discharge of a man's right in land or tenements to another, who hath some former estate in possession. *Shep. Touch.* 318; 2 *Bl. Com.* 328. But in this State, a release is considered as a primary conveyance, and passes all the right of the releasor to the releasee, provided no other person be in possession adversely; and operates as a conveyance without warranty. 1 *Sw. Dig.* 133. But if he have no right, nothing passes, not even a chose in action. What estate, then, had the issue of the first donee in tail, during his life? My answer is, none. The plaintiff could, therefore, convey none. Such issue is only an heir apparent or presumptive. His title is the bare possibility, a mere chance, of becoming eventually the heir in tail; for the maxim is, "*nemo est hæres viventis.*" And it is a well-settled rule, that a mere possibility cannot be released or conveyed; and the reason thereof is, that a release supposes a right in being. *Shep. Touch.* 319; *Bac. Abr.* tit. Release, H. Hence, it is holden, that an heir-at-law cannot release to his father's disseisor, in the lifetime of the father; for the heirship of the heir is a contingent thing; for he may die in the lifetime of his father. *Ibid.* This question was inde-

feasibly answered, by our great master Littleton, nearly four centuries ago. "If there be father and son, and the father be disseised, and the son (living the father) releaseth by his deed to the disseisor, the right which he hath, or may have, in the tenements, without clause of warranty, and after the father dieth, this son may lawfully enter upon the possession of the disseisor; for that he hath no right in the land in his father's life-time, but the right descended to him after the release made, by the death of his father; for no right passeth by a release, but the right which the releasor hath, at the time of the release made; and if he hath no right, the release is void." Littleton, § 446; *Lampet's Case*, 10 Rep. 51 a. "And in some cases, saith Sheppard (Touch. 321), "a release, like a confirmation, doth enure by way of abridgment. But a man cannot bar himself of a right that shall come to him hereafter; and therefore it is held, that these words used in releases, *quæ quovis modo in futuro habere potero*, are to no purpose." This is a mere quotation from the text of Littleton (*ubi supra*) which is there sanctioned, by the commentary of Sir Edward Coke. "But here, in the case which Littleton puts, where the son releases in the lifetime of his father, this release is void, because he hath no right at all, at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the son shall enter into the land against his own release. 1 Inst. 265 a. And we are informed, by Lord Chief Justice Trevor, in delivering his opinion in *Arthur v. Bokenham*, Fitzgib. 234, that this text of Littleton had never been contradicted. Hargrave's Notes on Co. Litt. 265, a. n. 212. The same doctrine was recognized, by the Supreme Court of New York, in *McCrakin v. Wright*, 14 Johns. Rep. 193, wherein it was decided, that no title, not *in esse*, would pass by a deed of bargain and sale and quitclaim, unless it contain a warranty, in which last case, it will operate as an estoppel. And in *Davis v. Hayden et al.*, 9 Mass. Rep. 514, it was decided, that nothing passes by a conveyance of land, of which the grantor is only heir apparent.

3. Is the plaintiff estopped to claim against his own deed? This question is already answered, by the citations from Littleton, § 446, and the case in 14 Johns. Rep. 193. "If there be a warrantie," saith Lord Coke (1 Inst. *ubi supra*) "annexed to the release, then the sonne shall be barred; for albeit the release cannot barre the right, for the cause aforesaid, yet the warrantie may rebut and barre him and his heirs of a future right." But the deed in question is a mere release or quit-claim, and contains no warranty, express or implied.

New trial not to be granted.

(3.) WORDS OF CONVEYANCE.

McKINNEY *v.* SETTLES.

31 MISSOURI, 541. — 1862.

EJECTMENT. — The case was by agreement made to depend upon the question whether an instrument executed and delivered to plaintiff amounted to a conveyance *in presenti*. The court below held it did not.

BATES, J., delivered the opinion of the court. — It is difficult to determine what was intended by the maker of the instrument under which the plaintiff claimed title. In the memorandum attached to the instrument, and signed by John McKinney, it is called a codicil or supplement to his last will and testament, whilst in the certificate of acknowledgment the whole are called "the foregoing deeds of gift." It may not be necessary to define what is the character of the instrument, for if it be not a deed of conveyance *in presenti*, the plaintiff cannot recover upon it. In order to determine whether it be such a deed, the whole instrument must be taken together, and effect given, if possible, to every part of it. It does not contain the usual operative words of conveyance, and it contains an obligation to make (in the future) "a good, sufficient right and title to the said described tract of land, clear from me or any of the rest of my heirs, to the whole, sole right and property of my said son, James H. McKinney, and his heirs, forever." It appears to be reasonable, upon consideration of the whole instrument, to suppose that John McKinney believed that he had no power then to convey, and, therefore, he, in order to make a sort of partition of lands among his children, bound himself under a penalty to convey to each one a particularly described tract of land, so soon as he should have power to do so. Taking this to be the view and intention of John McKinney, we must see that he used words apt for that purpose. The only words which might by any construction be deemed operative words of present conveyance are the words "sign over." We cannot, however, think that they import more than an assignment of John McKinney's interest in the land, the title to which was then imperfect and inchoate, and, therefore, not operating as a present conveyance of the land itself sufficient to maintain an action of ejectment in the name of James H. McKinney.

In the manner in which this case comes up no question arises whether an after-acquired title by James McKinney would inure to the benefit of James H. McKinney.

The judgment below is affirmed.

(4.) A DESCRIPTION OF THE PREMISES SUFFICIENT TO IDENTIFY THEM.

(a) *The sufficiency of the description.*

HOBAN v. CABLE.

102 MICHIGAN, 206. — 1894.

EJECTMENT. — Judgment for plaintiff. Defendant brings error.

MONTGOMERY, J. — * * * 2. As the deed to Laurie McLeod was first recorded, and as defendant claims it in fact read when executed, the description of the land was as follows:

“Beginning on Market street, between the lot hereby intended to be conveyed and a lot confirmed by the Government of the United States to Ambrose R. Davenport; thence north, 62 degrees 15 minutes west, 158.96 feet; thence south, 31 degrees west, 60 feet; thence south, 62 degrees 15 minutes west, 158.96 feet, to Market street; thence along said street north, 27 degrees 55 minutes east, to the place of beginning.”

Was this a sufficient description, or must the deed be treated as a nullity? The starting point is definite. The first line, to point b, is also certain, as is the line between points b and c. But if the direction of the next line is followed as given in the instrument, the terminus is at e, and the line named in the succeeding portion of the description would end at f.¹ But the course given after reaching point c is not the only means of identification adopted. That line is described as terminating at Market street. If we exclude the words indicative of the direction of the line, and carry the line in the most direct course to Market street, we have not only a line answering to the other terms of the deed, but one which, with its extension, incloses something, which is, by the terms of the deed, “a lot intended to be conveyed,” and which, to answer the terms of the portion of the description relating to the starting point, must lie next to “a lot confirmed by the Government of the United States to Ambrose R. Davenport.” To make this clearer, the deed contains the statement that from the terminus of the third line named in the description the boundary shall extend along Market street to the place of beginning. We think the intent of the grantor is clear, and that the deed is not a nullity for want of a sufficient description. See *Anderson v. Baughman*, 7 Mich. 69; *Cooper v. Bigly*, 13 Id. 463; *Dwight v. Tyler*, 49 Id. 614.

¹ The case in the official report is accompanied by a map. If the student will draw a rough design, he will easily identify the points, a, b, c, and will see that the courses and distances as given do not make an enclosure. — ED

A number of defendant's points depend upon this, and it becomes unnecessary to treat in detail some of his assignments of error. The deed being valid to convey the land, the record was notice to subsequent purchasers.

3. One of the conveyances under which plaintiff claims contained a description as follows:

"A lot 60 feet wide on Market street and 128.90 feet deep, being the north end of lot 293 in the village of Mackinac."

This is claimed to be insufficient, but we think there is no mistaking the land intended to be conveyed.

b. What will pass as appurtenant to the lands described.

OGDEN *v.* JENNINGS.

62 NEW YORK, 526. — 1875.

TRESPASS. — Defendant pleaded title to the *locus in quo* in the trustees of the school district, and that defendant entered thereupon by order of one of the trustees. Judgment for defendant. Plaintiff appeals.

ALLEN, J. — The effect and extent of the grant from Rufus Jennings to the school district was, by the charge of the judge at the Circuit, made to depend upon the solution of the question of fact, whether the use of the *locus in quo* was necessary to the district in order to a reasonable enjoyment of the granted premises for school purposes, rather than the terms of the grant and the description therein of the lands granted. The defendants prevailed at the Circuit, and had judgment, from which the present appeal is brought, upon the finding of the jury that the disputed parcel of land was a necessary adjunct of the schoolhouse as a playground for the children attending the school and essential to a reasonable enjoyment of the property conveyed. If this playground was not included within the description of the premises granted, the grant could not be enlarged by the necessities, actual or supposed, of the grantee. It is urged that if the reasonable necessity of these grounds was established, the case would be within the familiar rule, that by the grant or demise of a house or messuage, without further description, the curtilage and garden belonging to it passes with it as part and parcel of it, and as embraced within the more worthy name of the principal thing granted or demised. But only the garden, curtilage, and close, adjoining to the house and on which the house is built, passes under the general description. Other lands, although

occupied with the house, will not pass except particularly described. *Smith v. Martin*, 2 Saund. 400, and n. 2. A devise of a house, with its appurtenances or lands appertaining thereto, may have a more extensive effect and carry other land, depending upon the intent of the testator as manifested by the entire will. *Blackburn v. Edgley*, 1 P. Wm. 600; *Doe v. Collins*, 2 T. R. 498; *Buck v. Newton*, 1 B. & P. 53; *Bodenham v. Pritchard*, 1 B. & C. 350.

In a grant or demise, the addition of the word "appurtenances" will not vary the effect of the grant or extend it so as to include other lands not parcel of the house and close mentioned. *Bettisworth's Case*, 2 Coke, 516. The rule stated does not result from the necessity of a garden or curtilage to the reasonable occupation and enjoyment of the house, but from the fact that they are regarded as in fact and in law parcel of it, and as technically within the grant and the description of the thing granted. If a grant is made of a house, and there is no garden, curtilage or close annexed to and a part of it, the grantee cannot claim, as incident to the grant, a garden and curtilage such as twelve men may say is reasonably necessary to the proper occupation and enjoyment of the house as a dwelling. Whether a garden is or is not necessary to a dwelling is wholly immaterial in interpreting and giving effect to a grant of the messuage and determining what lands pass by the conveyance. So here, whether any or what extent of playground was convenient or necessary in connection with a schoolhouse, was entirely immaterial in construing and determining the boundaries of the grant.

It is also urged that, by reason of the reasonable necessity for these lands as a playground for the pupils, the title passed as "appurtenant," and under the clause "*cum pertinentes*" in the deed; and the case in which easements "of necessity" have been sustained, are referred to by the court below, and the learned counsel for the respondents.

The principle was carried in this case beyond the creation of a mere easement, and was made to effect a change of title to lands other than those included within the grant. It is well settled that, in a deed, the word appurtenances will not pass any corporeal real property, title to lands, but merely incorporeal easements or rights and privileges. It cannot include a strip of land adjacent to that granted. A title to land will not pass by implication. *Jackson v. Striker*, 1 J. Ch. 284; *Jackson v. Hathaway*, 15 J. R. 447; *Buzzard v. Capel*, 8 B. & C. 141; s. c. in Ex. Ch. 6 Bing. 150.

Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as inci-

dent or appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill every right necessary to the full and free enjoyment of the mill passes as incident to the grant; and the necessity measures the extent and duration of the right. When the necessity ceases, the rights resulting from it cease. It must be an actual and a direct necessity. A mere convenience is not sufficient to create or convey a right or easement, or impose burdens on lands other than those granted, as incident to the grant. In all cases the question of necessity controls. *Holmes v. Seely*, 19 Wend. 507; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Oakley v. Stanley*, 5 Wend. 523; *Tabor v. Bradley*, 18 N. Y. 109; *Le Roy v. Platt*, 4 Paige, 77; *French v. Carhart*, 1 Comst. 96; *Voorhees v. Burchard*, 55 N. Y. 98; *N. Y. L. Ins. and T. Co. v. Milnor*, 1 Barb. Ch. 353; *Warren v. Blake*, 54 Maine, 276; *Pierce v. Sellick*, 18 Com. 321. The necessity of a proper head of water for the profitable operation of a mill, a mill-yard to a saw-mill, of a way of access in order to the occupation of any granted premises, is palpable, but the necessity of a playground or an open court, except for light and air, about a schoolhouse is not apparent. There was no evidence that appurtenances of that character were either usual or necessary for any purpose connected with the proper conduct of the school, or to the health or welfare of the children. That such appendages are not a universal necessity is very evident. Indeed, there was no evidence that a space for a playground was even a convenience for any proper school purpose. It, doubtless, may be a source of pleasure to the children, but that will not suffice to create an easement by implication, or as appurtenant to the granted lands. The law will not imply that a space of ground set apart for the exercise and diversion of the children, is a necessity for a country schoolhouse, or that for all recognized school purposes the district may not have and enjoy the schoolhouse and premises fully without such an adjunct, and it would require very cogent evidence to establish a right to such grounds as passing by implication and as an incident to a conveyance of a schoolhouse. Here there was no evidence to warrant the submission of the necessity of such an incident to the jury.

It was error for the judge to submit it as the pivotal question of fact in the action, for two reasons: 1st. It was, under the circumstances, an immaterial question, and neither the cause of action or defense properly depended upon its determination. And 2d. There was no evidence that any necessity existed for the possession by the district of this or any other parcel of ground as a playground. This

would lead to a reversal of the judgment unless on examination of the grant, in connection with the evidence and the plaintiff's title, it is evident that the action cannot be maintained.¹

(5.) DELIVERY AND ACCEPTANCE OF THE DEED.

MILLER v. MEERS.

155 ILLINOIS, 284. — 1895.

PLAINTIFFS bring this action to get possession of the deed described in the opinion, and to establish and confirm their title to the property described in the deed.

CARTER, J. — * * * But the question still arises whether or not, after considering all proper evidence and rejecting all held to be improper, the decree of the trial court can be sustained. "No particular form or ceremony is necessary to constitute a delivery" of a deed. "It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered, that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." *Bryan v. Wash*, 2 Gilman, 557; *Cline v. Jones*, 111 Ill. 563, and cases there cited. It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death, provided the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed. *Bryan v. Wash*, and *Cline v. Jones*, *supra*; *Reed v. Douthit*, 62 Ill. 348; *Walker v. Walker*, 42 Ill. 311; *Otis v. Beckwith*, 49 Ill. 121; *Masterson v. Cheek*, 23 Ill. 72; *Soaverbye v. Arden*, 1 Johns. Ch. 242; *Bunn v. Winthrop*, Id. 329; *Scrugham v. Wood*, 15 Wend. 545; *Perry on Trusts*, § 103; *Urann v. Coates*, 109 Mass. 581; *Thompkins v. Wheeler*, 16 Pet. 114. And it was said in *Weber v. Christen*, 121 Ill. 91, that "the crucial test, in all cases, is the intent with which

¹ The transfer of land carries with it all easements appurtenant thereto. *Kuhlman v. Hecht*, *supra*, p. 819. — ED.

the act or acts relied on as the equivalent or substitute for actual delivery were done." The deed in question must have taken effect at once upon its acknowledgment and delivery to Grinton, or not at all, and the real question is, with what intention was the deed placed in the hands of Grinton? *Blackman v. Preston*, 123 Ill. 381; *Hayes v. Boylan*, 141 Ill. 400; *Bovee v. Hinde*, 135 Ill. 137; and cases *supra*. Nothing was said by the grantor at the time to indicate an intention that the deed should not take effect. His instructions were to take the deed, and take care of it — whether for himself or the grantees, he did not say. The grantees were his nephews and nieces, seven in number, the adults living in different places, and the minors with their father, his brother, on the premises conveyed. Under the circumstances it may have been a question of some difficulty, in his mind, to determine to whom the deed should be delivered. Instead of delivering it to either of the grantees he could lawfully deliver it to a third person for their benefit. He did deliver it to a third person, and whether for their benefit or only as custodian for himself, is a question of fact to be determined from the evidence. Defendants insist that Grinton was the grantor's clerk, and that his possession was the possession of the grantor. It is not clear from the evidence what the business relations were between Grinton and Martin C. Bissel. Grinton testified that he was not employed by the day, week, month, or year; that he always had a partnership contract with Bissel in the profits, and that that was the case when these papers were executed; that the "partnership papers," as witness called them, as well as his individual papers and those of Martin C. Bissel, were all kept in the safe. Whether he was responsible for the losses and expenses of the business is not disclosed by the evidence. From the evidence given he may have been a partner in business with Bissel, or merely an employee receiving a share of the profits as a measure of his pay for his services. In *Lockwood v. Doane*, 107 Ill. 235, this court held that: "Where parties agree to share in the profits of business, the law will infer a partnership between them in the business to which the agreement refers; but this presumption may be disproved. It is *prima facie* evidence, and will control until rebutted." *Niehoff v. Dudley*, 40 Ill. 406. Under the evidence and these authorities, it would seem that the relation between Grinton and Martin C. Bissel, at the time of the transaction in question, must be treated as that of a partnership. If so, the transaction not pertaining to their partnership affairs, possession of the deed by Grinton was not, by virtue of their relation, the possession of the grantor, but was the possession of a third person. Grinton took this deed, and placed it in an envelope, and put it in

the safe, and kept it in his possession for 15 years thereafter, until the trial in the Circuit Court. Had Martin intended to retain control of it, he could as well have placed it with his own papers in the safe. This he did not do, nor did he ever assume or assert any control over the deed afterwards. Grinton was a notary public, and as such took the acknowledgment. By this acknowledgment the grantors acknowledged that they signed, sealed, and delivered the instrument as their free and voluntary act, for the uses and purposes expressed in it. Whether, on an issue as to the delivery of a deed, otherwise left in doubt by the proofs, such an acknowledgment would be sufficient evidence of a delivery, it is not necessary in this case to decide for, as we conceive, the intention of the grantor is otherwise disclosed by the evidence with sufficient clearness, and this, too, whether Grinton was a partner or a mere employee of Martin C. Bissel. We find nothing in the attending circumstances denoting an intention on the part of the grantor that the deed should not take effect; but, on the contrary, there is sufficient evidence that he intended the deed to become presently effective. He at the same time executed and delivered to his brother, the father of plaintiffs in error, and to his brother's wife, who were already in possession of the property, a life lease therefor. The deed was, on its face, made subject to the lease. By the lease the lessees were required to insure the property for the benefit, in part, of themselves and in part of the grantees. The lease recognized the grantees as the owners of the property, and for breach of any of the covenants in the lease they were authorized to declare the term ended, and to enter and expel the lessees. The lease and deed were executed together, and were parts of the same transaction whereby Martin C. Bissel disposed of all his interest in the possession of and title to the property. He reserved nothing in either the lease or deed. The delivery of the lease to, and the possession of the property by, William, are not disputed. The right to declare a forfeiture and to re-enter was not reserved to the lessor, but to plaintiffs in error, the grantees in the deed. It would seem, from this provision that, at the time of the transaction Martin C. Bissel intended that the title should vest in appellants, and that he understood it did so vest. Then, again, it was clearly proved that after William had left the property, and Martin had taken possession and made repairs, he leased it, paid the taxes, and, to all outward appearances, acted as the owner, he told two witnesses that the property belonged to his brother's children, and that he could not, for that reason, sell or dispose of it, but would attend to it — evidently meaning that he was taking care of it for his brother and his

brother's children. It may be that after the lapse of years he concluded that he was entitled to and would retain the property as his own. In other words, he may have changed his mind in reference to making a gift of the property to these beneficiaries, honestly concluding that under the circumstances he had a right to do so; but if he did so conclude he was simply mistaken as to the legal effect of what had been done. The facts are somewhat similar to those in *Douglas v. West*, 140 Ill. 461, 31 N. E. 403. See also *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. 1050. We are satisfied from the evidence that Martin C. Bissel intended that the deed should take effect when he executed and acknowledged it and delivered it to Grinton, and it must be so held. The decree of the Circuit Court is reversed, and the cause remanded, with directions to dismiss the cross-bill, and to enter a decree in accordance with the prayer of the bill of plaintiffs in error. Reversed and remanded.

COKE, J., IN TUTTLE *v.* TURNER.

28 TEXAS, 759. — 1866.

A DEED takes effect only from the date of its delivery, which may be either actual or constructive. It is essential to the operative force and validity of a deed, if not actually delivered to the grantee or his agent authorized to receive it, to prove notice to him of its execution, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. The presumption that a party will accept a deed because it is beneficial to him, it is said, will never be carried so far as to consider him as having accepted it. 4 Kent Com. § 454; *Hulick v. Scovill*, 4 Gilm. 159. But possession of a deed by the grantee raises a presumption of its due delivery. *Chandler v. Temple*, 4 Cush. 285; *Trust Co. v. Cole*, 4 Fla. 359. This presumption may be rebutted by proof to the contrary.

THE CHANCELLOR IN ARNOLD *v.* PATRICK.

6 PAIGE'S CHANCERY, 310. — 1837.

FROM the facts stated in the answer of Arnold, in connection with those stated in the further answer as having been derived from the information of J. Ricketson subsequent to the assignment of the mortgage, which under the stipulation in this case must be taken to be correct, I am inclined to think that there was such a delivery of the deed of August, 1829, as was sufficient at law to pass the lega

title to the premises in question; subject, however, in equity, to the payment of the unpaid purchase money. It is evident from the facts stated that it must have been the intention of both parties that if the purchase money was paid the deed should take effect without any new delivery; as the grantee had, under the agreement of 1825 an unquestionable right to a conveyance of the premises upon payment of the amount due. Had this deed been intrusted to the clerk merely as an escrow to be delivered to George upon condition that the purchase money was actually paid to the grantor within a certain prescribed time, but not otherwise, the legal title would still have remained in the grantor, although the deed might have gotten into the hands of the grantee, without a performance of the condition upon which it was to take effect. That does not appear to have been the case here; but the parties acted upon the erroneous supposition that the deed might be delivered to the grantee himself, upon the condition that it should not be proved and recorded if the purchase money was not paid, and that the legal title would not pass by such a delivery. The legal rule, however, is, as was insisted upon by the counsel for Patrick, that a deed or any other sealed instrument cannot be delivered to the grantee or obligee himself as an escrow, to take effect upon a condition not appearing upon the face of such deed or instrument; but that if so delivered it becomes absolute at law. Coke Litt. 36, a; Touchstone, 59; *Thoroughgood's Case*, 9 Coke's Rep. 137, a.

PRICE *v.* PITTSBURGH, FORT WAYNE AND CHICAGO
RAILROAD CO.

34 ILLINOIS, 13. — 1864.

BREESE, J. — The principal point, however, which is made in the case is as to the right of the plaintiffs below to recover at all for use and occupation. Of this we think there can be no doubt. By express agreement, when the plaintiffs purchased the lots of the former owner, under whom the defendant held as tenant by the year, it was agreed and understood, if the plaintiffs consummated the trade by delivering the bonds and mortgages by the fall of 1860, the deeds they had executed on and prior to the first day of May, 1860, and placed in the hands of the attorney and solicitor of the plaintiffs, were to take effect and be in force on the first day of May, 1860. The defendant insists that the delivery of these deeds to the solicitor of the company, was, in effect, the same as a delivery to

any third person not connected with the company; that they were delivered to a stranger, and were, therefore, escrows; and being so, the title to the lots remained with the grantors, subject to be transferred on the delivery of the bonds and mortgages. It is generally true, and is the old doctrine of the books, that if a deed is delivered to a stranger to be delivered to the grantee, on the performance by him of certain conditions, and they are fully performed, and the deed delivered, that the deed takes effect from the second delivery, and to be considered the deed of the party from that time.

This rule, it is said, does not apply where justice requires a resort to fiction. 4 Kent's Com. 454.

The instances usually put are when the grantor, after the deposit of the deed as an escrow, dies, or becomes insane, or, if a *feme sole*, marries before the grantee has performed the conditions. In such cases the law will make the second delivery relate back to the time of the deposit of the escrow. 1 Shep. Touch. 123. What effect the agreement of the parties should have upon the time of the delivery is not there discussed, nor is it said these are the only instances in which there shall be this relation back.

The case of *Lessee of Shirley v. Ayres*, 14 Ohio, 307, was an ejectment, where it was held a deed delivered as an escrow should take effect on its first delivery, on the performance of the condition, if it was necessary to protect the grantee or those claiming under him against intervening rights.

The case of *Beekman v. Frost*, 18 Johns. 543, in the Court of Errors, holds the same doctrine. A very strong case is to be found in 9 Mass. 307, *Hatch et al. v. Hatch et al.*, where the court held that a writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, the court say, being almost entirely nominal when we consider the rules of decision which have been resorted to for the purpose of effectuating the intentions of the grantor or obligor in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the consideration is performed upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intentions of the parties.

The case of *Hall v. Harris*, 5 Ired. Eq. R. 303, is to the same effect.

The question in this case was, whether a deed took effect on the second day of March, the date of its execution, or on the tenth, the

day on which full payment for the land was paid. The trade was made on the second of March, on which day part of the price was paid, and the vendor was to make a deed and hand it to one Morgan, to be by him handed to the vendee when he paid the price. On that day the vendor made the deed and handed it to Morgan. Afterwards, on the tenth of March, the vendee paid Morgan the balance due and received the deed. The purpose, the courts say, for which the deed was delivered to a third party instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid the plaintiff had a right to the deed. The purpose for which it was put into the hands of a third person being accomplished, the plaintiff then held the deed in the same manner he would have held it if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way. Though the plaintiff might have avoided the purchase, his rights cannot be affected by that fact.

The court remarks if the vendor had died after the delivery to the third person, and before the payment, the vendee, upon making the payment, would have been entitled to the deed, and it must have taken effect from the first delivery, or it could not have taken effect at all. The intention was, it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide*, and not a contrivance to interfere with the right of creditors, the deed must be allowed to take effect. The court conclude by saying, we are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another, upon a condition which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed.

In the case before us the proof was that the deeds were delivered, as deeds, to the solicitor of the company, with the understanding, when the bonds and mortgages of the railroad company to be given in payment of the lots, and which had to be executed in a distant state, were returned from there, the deeds were to take effect as of May 1, 1860; and if the bonds were not returned, the deeds were not to take effect at all; that the bonds were not returned until the fall of 1860, and that he, the witness, should not have delivered or recorded the deeds until the bonds came; that the bonds and mort-

gages are dated and bear interest from May 1, 1860, and interest has been paid on them from that date.

It is a case quite like the case of *Hatch v. Hatch*, decided by the Supreme Court of Massachusetts, and the case in Iredell decided by the Supreme Court of North Carolina.

In all such cases the intention of the parties is to be considered, and it seems quite manifest these parties intended those deeds should have effect from the day of their execution, if the conditions were performed; and they were fully performed.

But were these deeds delivered to a stranger, so as to constitute an escrow? The proof is, they were delivered to the solicitor of the company. Now, since a corporation can only act through its officers and agents, a delivery of a deed to one of its officers would be a delivery to the company, and therefore would take effect immediately. *Foley v. Cogwill*, 5 Blackf. 20; *Worrall v. Munn et al.*, 1 Seld. N. Y. 229.

The case cited by appellant from 4 Fla. 359, *Southern Life Ins. and Trust Co. v. Cole*, holds, that a delivery to an officer or servant of a corporation, is delivery to the corporation, with the addition that such delivery is for the use and benefit of the corporation, and with an intent to pass an absolute property or interest in the deed delivered. That court did not think there was such a personal identity between the corporation and its officers, that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition. The court, however, in that case refused to permit the deed to take effect in favor of the company from its date, because it would do wrong and injustice to the rights of other parties.

The question of intention in the case before us was left to the jury, and they have found the deeds, by agreement of the parties, were to take effect on the first day of May, 1860, and it is not pretended any rights or interests have intervened to be injuriously affected by such an agreement. Justice is done by it, because the plaintiffs have paid the interest on these bonds and mortgages from the first day of May, 1860, at which date, all claim and interest of their vendors ceased, and so ceasing the plaintiffs became entitled to the rents and profits of the tenancy then existing and theretofore created. A suit brought by these vendors, for the rent of these premises, could not, under the facts proved, be maintained. They sold the premises on a condition which has been fully performed with an express agreement, when performed, their deed should take effect on the first day of May. They could not afterwards retract

this, nor could any other person, except, perhaps, creditors, gainsay the validity of such an agreement in the absence of fraud. We are inclined to think the delivery of these deeds, under the circumstances, was absolute in the first instance.¹

¹ The following quotations appear in the argument of counsel at p. 28 of the official report:

"The fifth thing required in every well-made deed is, that there be a delivery of it. And for this it must be known that the delivery is either actual, i. e., by doing something and saying nothing or else verbal i. e., by saying something or doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed.

* * * "And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority, precedent, or assent, or agreement subsequent, for *omnis ratihabitio mandata equiparatur*. And so also a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him; or it may be delivered to any stranger for and in the behalf and to the use of him to whom it is made, without authority. * * *

"The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. But in this case two conditions must be heeded: 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made." * * *

"But when the conditions are performed and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He, therefore, that is intrusted with the keeping and delivery of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed he ought not to keep it, but deliver it to the party. For it may be made a question whether the deed be perfect before he hath delivered it over to the party according to the authority given him. Howbeit it seems that the delivery is good, for it is said in this case that if either party to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the lifetime of the parties; and *postea consummata existens* by the performance of the conditions it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery." — ED.

*c. Covenants in conveyances.*¹

(1.) COVENANTS FOR TITLE.

(a.) *Covenant of seisin.*MOTT *v.* PALMER.

1 NEW YORK, 564. — 1848.

[Reported herein at p. 286.]

MITCHELL *v.* WARNER.

5 CONNECTICUT, 497. — 1825.

HOSMER, Ch. J. — The case made by this motion presents two questions for determination.

The first is, whether the plaintiff, claiming to be the assignee of the covenant of seisin can maintain an action on that covenant.

This covenant, from its nature, is broken instantaneously on the delivery of the deed, or it is never broken. It runs in the words of the present tense, and asserts, that the grantor is well seised. Now, if he is well seised according to his covenant, the agreement is fulfilled; and if he is not well seised, the covenant is false, and immediately broken. It follows from this, that it is a personal covenant, which, most clearly, never runs with the land, and that the grantee, in whose time the breach existed, can alone sue upon it; for, after a breach the cause of action can never be assigned. It would be the assignment of a chose in action, which the common law will not permit. That the covenant of seisin, if false, is broken as soon as it is made, appears from *Shep. Touch.* 170; from *Bickford v. Page*, 2 Mass. Rep. 460; from *Marston v. Hobbs*, 2 Mass. Rep. 437; from *Bennett v. Irwin*, 3 Johns. Rep. 365; from *Abbott v. Allen*, 14 Johns. Rep. 253; from *Greenby et al. v. Wilcocks*, 2 Johns. Rep. 1; from *Pollard et al. v. Dwight et al.*, 4 Cranch. 430; from 1 Swift's Dig. 370; and from *Mitchell v. Hazen*, 4 Conn. Rep. 495. From its nature, it does not run with the land, as none but real covenants do; and these are always suspended on some act *posterior* to the delivery of the deed. Hence, as I have said before, having been broken, the covenant has become a chose in action, and therefore cannot be assigned. 1 Swift's Dig. 370. In *Bickford v. Page*, 2 Mass. Rep. 455, it was said by the court: "This covenant being

¹ For the old forms of covenants, with short statutory equivalents, see N. Y. R. P. L., § 223. — Ed.

broken before the release was, at that time, a mere chose in action, and unassignable." The court, in the case of *Greenby et al. v. Wilcocks*, 2 Johns. Rep. 1, determined that the assignee of a covenant of seisin could not recover. The opinion was delivered by Spencer, J., in which he says: "Choses in action are incapable of assignment at the common law; and what distinguishes these covenants, broken the instant they were made, from an ordinary chose in action? The covenants, it is true, are such as run with the land; but here the substratum fails, for there was no land whereof the defendant was seised, and of a consequence, none that he could alien; the covenants are, therefore, naked ones, uncoupled with a right to the soil." The same point was adjudged as far back as the reign of Queen Elizabeth, in *Lewes v. Ridge*, Cro. Eliz. 863; and the case, so far as I can find, has never been overruled. The principle settled in that case, was this; that an assignee shall not have an action upon a breach of covenant before his own time. The same principle was recognized in *Marston v. Hobbs*, 2 Mass. Rep. 439; in the determination of which case, it was said by Parsons, Ch. J., when delivering the opinion of the court; that "no estate passed, to which these covenants (*i. e.*, of seisin and right to convey) could be annexed, because in fact broken before any assignment could be made, they were choses in action, and not assignable." In Com. Dig. tit. Covenant, B. 3, it is asserted, that "covenant does not lie by an assignee, for a breach done before his time." It cannot run with the land; for nothing having been conveyed, what land is there for it to run with? To the same effect is *Lucy v. Levington*, 2 Lev. 26, s. c. 1 Vent. 175, in which it was decided, that for a breach of the covenant of quiet enjoyment in the testator's time, the executor was authorized to recover; and of his opinion was that eminent judge Sir Matthew Hale. Similar doctrine is to be found in the Digest of Baron Comyns, tit. Covenant, B. 1.

In relation to principles so well established, one or two modern decisions in Westminster Hall in opposition to them, however they might there be regarded, ought not here to be considered as of any authority. Such decisions have been cited. The first of them is the case of *Kingdon exr. v. Nottle*, 1 Mau. & Selw. 355. The defendant had conveyed to Richard Kingdon, the testator, certain property, and covenanted that he was seised of it, and had good right to convey. It was averred as a breach, that he was not seised of the premises; and the court adjudged, that the executor could not sue on the covenant, without showing special damage to the testator, but that the heir might. It was said by Lord Ellenborough, that "the covenant, it was true, was broken, but that there was no damage

sustained in the testator's life-time." To this observation of that learned and able judge I cannot subscribe. The covenant being broken the instant it was made, the damage, most obviously, was the whole consideration paid; and I am at a loss to conceive what other or further damage could arise. In the surrounding States, as well as in our own, it is unquestionably established, that the damage is the consideration paid; and that this is immediate on the delivery of the deed. This, then, is the first objection to the determination, that whatever may be the law of Westminster Hall, the damage, in the case alluded to, is justly considered as not nominal, but real, and indeed all that the party can experience. It is the whole consideration paid. This principle alone shows, that the determination in *Kingdon v. Nottle*, is inapplicable to us; and it likewise authorizes the assertion that Lord Ellenborough and his associates, had they resided in Connecticut, and there pronounced their opinion, would have decided the case before them differently from what they have.

To the determination in *Kingdon v. Nottle* there is a sound objection. It is opposed to principles, uniformly, and for centuries, established in Westminster Hall. It was said by Lord Ellenborough, in the case alluded to, that "if the executor could recover nominal damages, it would preclude the heir, who is the party actually damaged, from recovering at all!" The force of this reasoning depends entirely on the assertion that the heir is "the party actually damaged;" and if this is an incorrect position, the argument wholly fails. Now, it is not true, that the heir is the party damaged. The damages arise entirely by the breach of the covenant in the lifetime of the testator; and the testator is the only person who receives damage. Thus were all the determinations before the last mentioned decision. To this effect was *Lewis v. Ridge*, *Lucy v. Levington*, and the law was laid down in Comyn's Digest; and not a case or dictum was there to the contrary. Indeed, the admission of Lord Ellenborough, that the covenant was broken in the lifetime of the testator, most conclusively shows that the heir was not damaged. His own damage must result from his title to the land, and not from the covenant broken, to which he was no party. Now, as to the land, the heir never had title; nor had his ancestor. The complaint is, that the grantor was not seised, and had conveyed no title. How, then, is it possible, that the heir should inherit land, to which his ancestor had no title? If, then, he had no title to the estate supposed to be conveyed, and he was no party to the covenant, and the breach happened before his ancestor's death, what is the ground of his claim? In my opinion, none. On the other hand, as the covenant was broken in the testator's lifetime, and the damage

resulting from the breach was due to him; after his death, his executor, standing in his place, had the right of suit. For the principle is incontrovertible, that where the testator can maintain covenant in his lifetime, on a cause of action then existing, his executor may support the same action after his death. 1 Swift's Dig. 371; Toll, Ex. 158, 432.

Another writ of covenant was brought by Kingdon, as devisee, against Nottle (4 Mau. & Selw. 53) upon the covenant of seisin before mentioned, on the ground that the covenant ran with the land, and that the breach happened to the devisee. Consistently with the former determination, the court decided in favor of the plaintiff. It required some ingenuity to sustain an action on a covenant, for a breach happening in the time of the testator, before the devisee (the plaintiff), could have any interest in the covenant; and more especially, as no special damages were laid. For it was not stated in the case, that the plaintiff was, at any time interrupted, or disturbed in the enjoyment of the premises; or that he sustained any damages, by the breach of covenant, in the testator's lifetime. Accordingly, this point was met, by Lord Ellenborough, who said: "The covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title, there is a continuing breach, and it is not like a covenant to do an act of solitary performance, but it is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require." From this opinion I am compelled to dissent *in omnibus*. First, I affirm, that the novel idea attending the breach in the testator's lifetime, by calling it "a continuing breach," and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, to whom does it continue as a breach? The only answer is, to the person who had title to the contract when it was broken. It remains, as it was, a breach to the same person, who first had a cause of action upon it. If it be anything more, it is not a continuing breach, but a new existence. In the next place, I assert, that it is like a covenant to do an act of solitary performance; and for this plain reason, that it is, in its nature, a covenant for a solitary act, and not a successive one. If the covenant is broken, that is, if the grantor was not seised, it is infracted to the core; and a second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act, at different times, which may undergo repeated breaches. It has no futurition; and cannot

be partly broken and partly sound; but the grantor is seised or not seised; and therefore, the covenant is inviolate, or violated wholly. Not further to pursue the subject, I remark, that, in my judgment, the case of *Kingdon v. Nottle* may justly be said to authorize the assignment of a chose in action by devise; a supposition as unfounded as it is novel.

I, therefore, conclude, that the determinations in the above mentioned cases of *Kingdon v. Nottle*, are against the ancient, uniform and established law of Westminster Hall; against well settled principles and decided cases in the surrounding States; and that the judges pronouncing them would have been of an opinion different from the one expressed had they recognized the principle here well established, that the breach of the covenant of seisin is, in its nature, total, and the measure of damages the whole consideration money paid for the land. As a consequence, I am of opinion that the plaintiff cannot sustain his action on the covenant of seisin.

2. The next question relates to the covenant of freedom from incumbrances.

The deed of the defendant to George Welton contains a covenant of this description; and the plaintiff claims title to the covenant, and a right to recover for a breach of it, by virtue of a deed of quitclaim from the defendant and Welton. Without a further statement of fact, it is sufficient to remark that the plaintiff has no right to recover for the breach of this covenant; and if he had, no breach of it is assigned.

First, he has no title to the covenant of freedom from incumbrances, nor right to recover for the breach of it. His only claim is founded on the principle that this covenant runs with the land. In opposition to this claim, I observe, that the covenant above mentioned was personal, and not a real covenant; that it was broken in the testator's lifetime, and could not run with the land, — a peculiarity attending real covenants only; and of consequence, that George Welton is the only person who can sue on this unassignable contract.

This covenant is classed, by the late Chief Justice Swift (in the first volume of his Digest, p. 370), with the covenant of seisin and of good right to convey; and in relation to them all, he correctly says: "These covenants must be all broken at the time of executing the deed, or they never can be; for if at that time, the grantor is not well seised of the premises, as an indefeasible estate, or if he had no right to sell, or if any incumbrance existed, then the covenants are broken. But if the grantor is seised, has a right to sell, or there are no incumbrances at the time of making the deed, then these covenants can never be broken; for no subsequent act can be done,

by the grantor, which will amount to a breach of them; as he can do no act, that will affect or incumber the estate. These covenants, of course, cannot be real covenants; for being broken at the instant of their creation, they are choses in action, and cannot be assigned. The distinguishing feature of the real covenant is, that it may be broken at a future time; and it is this quality which renders it assignable; but it must be assigned before it is broken; for when once broken, the right to recover damages, is a chose in action, which cannot be assigned." With these observations, I entirely concur. The fundamental question, on which the whole doctrine depends, is, when is the covenant of freedom from incumbrances broken? It is a covenant for a fact, existing; or said to exist, not *in futuro*, but in *presenti*; at the moment when the deed is delivered. The phraseology of the covenant is, that the premises are free from incumbrances; not that they shall in future be free; just like the expression the grantor is seised, and has good right to convey. If the covenant be true, it can never be broken; if it be false, it is broken immediately, in which event it is a chose in action, and cannot be assigned. The doctrine contended for was adjudged by the supreme judiciary of Massachusetts, in *Prescott v. Trueman*, 4 Mass. Rep. 627, and by the Supreme Court of New York, in *Delavergne v. Norris*, 7 Johns. Rep. 358.

Secondly, no breach of the covenant in question has, by the plaintiff, been assigned. The averment is merely this — that the estate "is not free from all incumbrances." It is sufficient to say, that the law requires the incumbrance to be specially named and set forth; or the defendant will always be taken by surprise. Incumbrances, in their nature, are numerous. A mortgage, a way, a right to dig turf, to pasture cattle, or to have dower assigned, and in short, an easement of any kind, is an incumbrance, because it is a load or weight on the land, and must lessen its value. *Prescott v. Trueman*, 4 Mass. Rep. 630. It is opposed to the fundamental principles of pleading (which are to inform the court, the jury, and, above all, the party, by the altercations in writing), to authorize a general allegation that there are incumbrances, without declaring what they are. The point is settled, by first principles, and is too clear for controversy. In *Marston v. Hobbs*, 2 Mass. Rep. 433, it was said, by Chief Justice Parsons, that the breach of the covenant against incumbrances, like that for quiet enjoyment, must be specially assigned, showing its nature, and the interruption complained of. The same point was adjudged, by the same court, *Bickford v. Page*, 2 Mass. Rep. 455; and in *De Forest v. Lete*, 16 Johns. Rep. 122, it was said, by the Supreme Court of New York, that under

a general assignment of a breach of the covenant against incumbrances, the plaintiff cannot give evidence of his having bought in an incumbrance, because it was not specifically alleged in the declaration; and for the admission of such evidence, a new trial was granted.

The charge of the judge to the jury, in this case, is free from exception. The covenant in question, as was said by him, is broken instantaneously, if ever; and under the negative averment of not free from incumbrances, the jury were correctly instructed, that proof of a particular incumbrance was inadmissible, because it should have been set forth specifically, to apprise the defendant of its nature, and give him the means of preparation for his defense.

(b.) *Covenant against incumbrances.*

MITCHELL v. WARNER.

5 CONNECTICUT, 497. — 1825.

[Reported herein at p. 1094.]

STEWART v. DRAKE.

9 NEW JERSEY LAW, 139 — 1827

[Reported herein at p. 1100.]

(c.) *Covenants of warranty and of quiet enjoyment.*

STEWART v. DRAKE.

9 NEW JERSEY LAW, 139. — 1827.

THE CHIEF JUSTICE delivered the opinion of the court:

John Sharps, Jr., of the county of Sussex, being the owner of two farms in that county, mortgaged them to secure the payment of a large sum of money. Afterwards, on the first of April, 1818, he sold one of those farms to Imla Drake, for \$7,287.87, and conveyed it to him, by deed of bargain and sale, containing covenants of seisin, of freedom from incumbrances, for quiet enjoyment, and of general warranty. Drake entered into possession. In the year 1823, upon a bill filed in the Court of Chancery, on the mortgage, against Drake and others, a decree was made for the sale of the two farms, to satisfy the mortgage debt, then amounting to \$9,569.96. On this decree an execution was issued, and the other farm being

first sold by the sheriff, produced \$5,300, leaving a balance of \$4,269.96. On the 7th July, 1823, in order to raise the balance, Drake's farm was sold, and conveyed by the sheriff, for \$2,800, to Joseph Drake, the son-in-law of Imla Drake, and at the time in possession of the farm, as his tenant. Joseph Drake, in September following, sold and conveyed the farm, for \$3,200, to John Howell, who immediately went into possession. On the 13th of February, 1823, Sharps made an assignment for the benefit of his creditors, and within the time prescribed by the statute, Imla Drake exhibited his claim for the purchase money of the farm, \$7,287.87. Upon exceptions, and a hearing in the Court of Common Pleas, the claim was admitted to a dividend. And this decision is brought here by *certiorari*.

It is admitted on all hands, that if Drake is entitled to exhibit a claim under this assignment, which will in the sequel be examined, the amount on which he is to be admitted to a dividend is the same as he would be entitled to recover in an action against Sharps.

On the part of the exceptants below, the plaintiffs in *certiorari*, it is insisted that Drake could not recover on the covenant of seisin, because the existence of a mortgage is no breach of that covenant; that on the covenants of quiet enjoyment and warranty he could not recover, because there had been no ouster or eviction, which is indispensable; and that on the covenant against incumbrances, he should be admitted to claim, at the utmost, not more than the balance, \$4,269.96, unsatisfied by the first sale.

In the first place, as to the right of Drake to recover on the covenants contained in the deed. If a breach of any one of the covenants is shown, the right of recovery is established, and it will remain only to ascertain the amount. One of the covenants is, that the farm, at the execution of the deed, was free from incumbrances. There was, however, upon it a subsisting incumbrance, the mortgage made by Sharps. This covenant, therefore, was broken as soon as it was made, in the same manner as the covenant of seisin is said to be broken as soon as made, if the grantor is not then seised. *Hale v. Dean*, 13 John. 105; *Prescott v. Trueman*, 4 Mass. 627; *Wyman v. Ballard*, 12 Mass. 304; *Funk v. Voneida*, 11 Serg. & Rawle, 109. Moreover, the facts in this case establish a breach of the covenants for quiet enjoyment and of warranty. The rule in respect to these covenants was correctly stated by the plaintiff's counsel. To constitute a breach, there must be a lawful eviction, or a disturbance of the possession. By the effect, and usually by the terms, of the decree of the Court of Chancery, the parties defendants therein are forever barred and foreclosed of all equity of redemption, of so much

of the mortgaged premises, as may be sold by virtue of the decree. In this case, a sale under the decree, and a conveyance by the sheriff, was made. The purchaser was actually in possession. From the time of the conveyance by the sheriff he held, and rightfully held, the possession as his own, and shortly afterwards sold to another person, whom he placed in possession. Joseph Drake, the purchaser, had previously been the tenant of Imla Drake. But from the sheriff's conveyance the tenancy ceased. Imla Drake could legally claim neither rent nor possession against Joseph Drake. Both his title and possession ceased, and by legal means. A more complete disturbance of his possession, a more thorough eviction, could not readily be devised. The cases cited by the plaintiff's counsel, from Johnson's Reports, do not impugn, but accord with, this conclusion. The principle which pervades the whole is, that there be a disturbance in, or deprivation or cessation of, the possession, by the prosecution and operation of legal measures. * * *

We find no cause of reversal in the proceedings of the Court of Common Pleas.

(d.) Covenants for further assurance.

DEADY. J., IN LAMB *v.* BURBANK.

1 SAWYER (U. S. Cir. Ct.) 227; NO. 8012 FEDERAL CASES. — 1870.

UPON the amended bill, the legal title is in the heirs of Daniel H. as tenants in common. If the writing of March 8 was executed by authority of Daniel H., and bound him and his heirs, still the legal title is in these heirs, and Burbank only has a right in equity to have a conveyance of such legal title. At the date of the writing of March 8, 1850, none of the parties had any interest in the land, except the bare possession — the legal title was in the United States. The first covenant in the writing is a special or limited covenant of warranty, "against the claims of all persons claiming by, through, or under the grantors," and only operates upon the estate which Daniel H. then had in the premises. It is well settled that such a covenant only refers to the existing title or interest granted, and does not bar the covenantor from claiming the same premises against his own covenantee or grantee by title acquired subsequent to the making of his own deed. 2 Washb. Real Prop., p. 665.

So in this case Daniel H. acquired the title to this property from the United States long after the date of the writing which contains this covenant, and he or his heirs hold it unaffected by it. The second covenant that if "the grantors obtain title from the United

States they will convey the same to the grantees by deed of general warranty" is a covenant for further assurance, and was intended to meet the contingency which afterwards happened — that the United States should grant the premises to Daniel H. Assuming, then, for the present, that it should be determined upon the final hearing of the cause that the writings and conveyances under which Burbank claims are valid and sufficient for the purposes and intent expressed therein, the heirs would have the title, and Burbank would be entitled in equity to a conveyance of the same. But in the meantime it is charged in the bill that these writings are fraudulent, informal and void, and are only a cloud upon the title of the plaintiffs. The inquiry involves the question of whether Burbank is entitled in equity to have a conveyance of the land from the heirs of Daniel H. — whether by virtue of the second covenant he has an equitable estate in the premises or not. To determine this question is the proper province of a court of equity.

COLBY *v.* OSGOOD.

29 BARBOUR (N. Y. Supr. Ct.) 339. — 1859.

By the Court, ROOSEVELT, J. — In 1853 — after the code went into operation — Osgood, the defendant, in consideration of \$30,000, conveyed a certain house and lot, with the furniture, in Seventeenth street, to one Smith, with full covenants of seisin, warranty, right to convey free from incumbrances, and for further assurance. The covenants, as usual, were made in terms, not only with Smith, but with "his heirs and assigns." In the following year, to wit, in May, 1854, Smith, the grantee, for the same consideration and with the same covenants, conveyed the premises to Colby, the plaintiff in this suit. Osgood, it appears, before his sale to Smith, had mortgaged the lot to one Snyder, for \$10,000, who, in December, 1854, commenced a foreclosure against Colby, and compelled him to pay the \$10,000, besides a large amount in addition for interest and costs, which Colby now seeks to compel Osgood to refund. Colby, it is conceded, has a remedy against Smith, and Smith against Osgood, for reimbursement. The question is, can Colby, passing by Smith, sue Osgood, Smith's grantor; or must he sue Smith, and let Smith sue Osgood?

The referee held that Osgood's covenant was broken the moment it was made; and that it was competent, under the code, to assign a broken covenant; but that in this case no such assignment had been made. In these views the referee, we think, partially erred.

First. The answer itself alleges that, simultaneously with the execution of the first deed a sealed agreement was entered into, which recognized the mortgage, and qualified the effect of its existence as an immediate incumbrance by allowing it to remain, by consent, unpaid till the 1st of November, 1854. There was therefore no breach in that respect of the covenants, or either of them, until after Smith's conveyance to Colby.

Second. The complaint sets forth the whole deed of the defendant, *verbatim*, including the covenant for further assurance. It therefore lays the foundation of a claim for a release of the mortgage, or payment of its equivalent in damages. A release of a mortgage is a "further assurance;" and the right to further assurance, when stipulated for, passes to the successive grantees. In other words, it is a covenant that "runs with the land," and as a consequence is assigned by a conveyance of the land. It may be that in this view of the cause of action a demand should first have been made. No objection, however, was taken in the answer or on the argument for the want of such demand. The defense was placed on the single position that the plaintiff had no right to make any demand, whether before suit or by suit; that the cause of action had never been assigned to him, but belonged still to the original covenantee; that the conveyance to him, by the covenantee of the lands, did not pass the right of action on the covenants, which, it was assumed, had been previously broken. The covenant for further assurance appears to have been overlooked. That clearly had not been broken before the conveyance. In its nature it was prospective; and although in its legal effect it might, in the present case, give to the party injured the same amount of damages as the covenant against incumbrances, it still was not the same covenant. 4 Kent, 473. It ran with the land, even if the other covenant did not; and it carried the other covenant with it.

On both grounds, the dismissal of the complaint was erroneous, and the judgment should be reversed, and a new trial ordered; costs to abide the event.

Ordered accordingly.

(c.) *Special covenants as to title.*

LAMB *v.* BURBANK.

1 SAWYER, 227; NO. 8012 FEDERAL CASES. — 1870.

[Reported herein at p. 1102.]

(2.) SPECIAL COVENANTS.

(a.) *Restrictive covenants.*BLAKEMORE *v.* STANLEY.

159 MASSACHUSETTS, 6. — 1893.

[*Reported herein at p. 387.*]ROWLAND *v.* MILLER.

139 NEW YORK, 93. — 1893.

[*Reported herein at p. 388.*]¹3. TRANSFER BY WAY OF SECURITY: MORTGAGE.²a. *Nature of a mortgage: at law; in equity.*TRYON *v.* MUNSON.

77 PENNSYLVANIA STATE, 250. — 1874.

[*Reported herein at p. 538.*]LANE *v.* KING.

8 WENDELL (N. Y.), 584. — 1832.

[*Reported herein at p. 197.*]³WILLIS *v.* MOORE.

59 TEXAS, 628. — 1883.

[*Reported herein at p. 201.*]b. *What constitutes a mortgage: at law; in equity.*TRYON *v.* MUNSON.

77 PENNSYLVANIA STATE, 250. — 1874.

[*Reported herein at p. 538.*]¹ There are naturally a great variety of special covenants; the above are given merely as illustrations. — ED.² See N. Y. R. P. L. §§ 205-235, for New York statutory rules as to mortgages. — ED.³ For the modern New York doctrine, both at law and in equity, see *Howell v. Leavitt, supra*, p. 1043. — ED.

HORN *v.* KETELTAS.

46 NEW YORK, 605. — 1871.

ALLEN, J. — The action is for equitable relief, and especially for an accounting by the defendant for the rents and profits and the avails of the sale of lands in Brooklyn, conveyed by the plaintiff to the defendant by deed absolute upon its face, but which, the plaintiff claims, was intended as a mortgage, to secure a loan of money. In 1859 the plaintiff applied to the defendant for a loan of \$10,000, upon the security of the property named, and after some negotiation, the sum required was advanced to the plaintiff, upon the delivery of an absolute deed of the property; the defendant, by an agreement, executed and delivered simultaneously with the deed, but bearing date a day or two later, covenanting to sell and convey the same property to Mr. Pelton, upon the payment by him, within one year, of \$12,500 and interest thereon, together with all taxes and assessments upon the premises, which the defendant should have paid.

The premises greatly exceeded in value the consideration paid for the deed; the grantor, Horn, was embarrassed and straitened for money. Mr. Pelton, the covenantee in the defendant's agreement, was counsel for the plaintiff in the transaction, aiding him in procuring the loan; and his testimony, as well as that of the plaintiff, was that the agreement was taken by him for the use and benefit and as the agent of the plaintiff, and to avoid the question of usury which, it was supposed, Horn could make, if the agreement to reconvey was directly to him; and the judge has found, that the transaction took that form for that reason and no other, which is one circumstance tending strongly to show that the parties regarded the advance of the money as a loan, and the conveyance a mortgage.

The judge has found, upon testimony somewhat conflicting, but greatly preponderating, in connection with surrounding circumstances, in favor of the findings, that the advance of money was a loan, to be repaid at the end of one year; that the deed was delivered to and accepted by the defendant as a security for the repayment of the loan, with an additional sum agreed upon, and not as an absolute sale and conveyance of the property; and that the agreement for a conveyance to Pelton was for the benefit of the plaintiff, and in place of an agreement to reconvey directly to him, and for the reasons before stated, and that the papers were delivered simultaneously, and as parts of one transaction; and as a conclusion of law, it was adjudged that the plaintiff was entitled to the account demanded, the property having been sold, and a redemption impossible. It is now too late to controvert the proposition that a deed,

absolute upon its face, may, in equity, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation or as to the form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this State are fully committed to the doctrine, and, whatever may be the rule in other States, here in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact, that the adjudications have entered into and controlled business transactions, and become a rule of property, to authorize a reconsideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common-law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from. The principle was recognized by the chancellor in *Holmes v. Grant*, 8 Paige, 243, although it was not applied in that case, and had been before asserted under like circumstances in *Robinson v. Cropsey*, 2 Edw. Chy. R. 138; affirmed 6 Paige, 480.

It was expressly adjudged in *Strong v. Stewart*, 4 J. C. R. 167, that parol evidence was admissible, to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is *Clark v. Henry*, 2 Cow. 324, which was followed by this court in *Murray v. Walker*, 31 N. Y. 399. In *Hodges v. Tennessee Marine and Fire Insurance Co.*, 4 Seld. 416, the court says, that "from an early day in this State the rule that parol evidence is admissible for the purpose named, has been established as the law of our courts of equity, and it is not fitting that the question should be re-examined," and the cases in which it has been so adjudged are cited with approval. In *Sturtevant v. Sturtevant*, 20 N. Y. 39, the same judge pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust, and it was decided, that while a deed absolute, in terms, could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see *Despard v. Walbridge*, 15 N. Y. 374. The rule does not conflict with that other rule, which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties.

It is not objected that the agency of Pelton for the plaintiff in the transaction could not be shown by parol; and that fact being established the only question was, whether the agreement with Pelton, which was, in truth, with the plaintiff, was intended simply as an agreement to resell the premises at an advanced price, or a defeasance giving a right of redemption. The fact being established by competent evidence that the money advanced by the defendant was advanced as a loan, and not on the purchase of the lands, the relation of debtor and creditor was established, and that relation being established, it necessarily followed that the conveyance in connection with the agreement to re-convey, was intended by the parties as, and was a security for the debt, and the maxim, "once a mortgage, always a mortgage," secured the debtor a right of redemption until his equity was foreclosed by the judgment of a court of competent jurisdiction. *Newcomb v. Borham*, 1 Vern. 7; *Clark v. Henry*, *supra*.

That there was no agreement in the defeasance for the payment of the debt, is a circumstance entitled to considerable weight, as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist. But it is only one of several circumstances to be considered, and is not conclusive; and the judgment of the court below upon the question of fact, the decision of which involved the consideration of this and the other circumstances, and the whole evidence, is conclusive. In *Conway's Exr's v. Alexander*, 7 Cranch, 218, Ch. J. Marshall says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." And see *per Putnam, J., Flagg v. Mann*, 14 Pick. 467. The question in this as in every case was, whether the contract was a security for the repayment of the money, or an actual sale, and the evidence fully sustains the judgment of the court below that it was a mere security. The judgment is favorable to the defendant. The security might properly have been invalidated for usury, and the plaintiff had judgment for the proceeds of the sale of the lands without deducting the money lent. But equity has been done. The defendant has been repaid the money loaned, with interest, and the plaintiff has judgment for the residue of the purchase-money for which the mortgaged premises were sold, and the plaintiff does not complain.

Judgment affirmed.

MACAULEY *v.* SMITH,

132 NEW YORK, 524.—1892.

LONDON, J. — The agreement, which antedated the deeds by one day and expressed their intent and purpose, should be read in connection with them. Thus read, the deeds are shown to have been given by Lucilia Tracy to Howland, Smith and Tracy “for the purpose of securing and in consideration of said loan of \$8,240” made by the grantees to the grantor, and “that the said deed . . . is a security for the said loan for a term not exceeding one year from the date of said deed, . . . and that upon the payment of said sum of \$8,240, with interest, within or at the expiration of one year by the said Lucilia . . . the said Howland, Smith and Tracy are to reconvey said premises to said Lucilia, . . . and in case said sum of \$8,240 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed . . . is to become and be a deed absolute, and the said Howland, Smith and Tracy are to become and be the owners in fee simple absolute.”

The deeds are thus clearly shown to have been intended as mortgages. This conclusion is also inferable from the facts. The premises at the date of the deeds were worth \$30,000. The judgments against the premises were by the terms of the agreements to be paid from the money loaned, and presumably were either paid or their amount retained by the grantees from the \$8,240. The amount of the outstanding mortgages against the premises was \$7,000. It is not presumable that Lucilia Tracy intended to sell property worth \$30,000 for \$15,240. The grantor remained in possession of the premises for about two years after the delivery of the deeds. She was embarrassed and straitened for money. Stress is laid by the defendants upon the fact that the grantor did not expressly covenant to repay the money. The cases are to the effect that this is one of several circumstances to be considered; *Horn v. Keteltas*, 46 N. Y. 605; *Morris v. Budlong*, 78 Id. 552; *Brown v. Dewey*, 1 Sand. Ch. 57; and here it is to be considered in connection with the repeated statement that the money to be advanced by the grantees is a loan and that “said deed is a security for said loan for a term of not exceeding one year,” and that upon repayment the grantors should reconvey to the grantor. It is plain that repayment of the loan was contemplated; nothing is said of the repayment of purchase-money, and there is nothing in the agreement indicating that the money advanced by the grantees was purchase-money, except that in case said sum of \$8,240, previously termed a loan, should not be repaid

at the expiration of one year, "then it is understood and agreed that the said deed is to become and be a deed absolute," thus clearly indicating that at the date of the transaction said sum was not purchase-money and said deed was not a deed absolute, but was to become so in case of nonpayment of the loan. Clearly upon the undisputed facts the deeds were a mortgage to secure the money loaned, and the trial court erred in refusing the plaintiff's request to so find. The agreement that the nonpayment of the loan within the time specified should convert the mortgage into an absolute deed did not have that effect. The agreement to turn a mortgage into an absolute deed in case of default is one that finds no favor in equity. The maxim "once a mortgage always a mortgage" governs the case. *Horn v. Keteltas*, *supra*; *Murray v. Walker*, 31 N. Y. 400; *Carr v. Carr*, 52 Id. 251; *Remsen v. Hay*, 2 Edw. Ch. 535; *Clark v. Henry*, 2 Cow. 324; *Morris v. Nixon*, 1 How. (U. S.) 118; *Villa v. Rodriguez*, 12 Wall. 323, 4 Kent's Com 143. Since the deeds were a mortgage the title did not pass to the grantees, but remained in Lucilia Tracy. *Barry v. Hamburg B. Fire Ins. Co.*, 110 N. Y. 1; *Thorn v. Sutherland*, 123 Id. 236; *Shattuck v. Bascom*, 105 Id. 39.

The levy under the plaintiff's attachment was, therefore, upon Mrs. Tracy's land, to which she had the legal title. It was not merely an attempted levy upon her equitable right to obtain title. As against Howland, Smith and Tracy the levy was valid and the judgment and execution which followed the attachment became a specific lien upon the land itself, and the land could be sold upon execution.

Howland, Smith and Tracy conveyed the premises before the attachment was issued to the defendant, the New York Baptist Union for Ministerial Education. This defendant by its answer admits that \$3,000 of the purchase-money, with interest from January 1, 1883, remains unpaid, and that \$1,550 of the principal of one of the mortgages upon the premises given by Mrs. Tracy also remains unpaid. This defendant in order to maintain the defense that it is a *bona fide* purchaser without notice of plaintiff's rights, must have paid all the purchase-money. *Sargent v. Eureka S. A. Co.*, 46 Hun, 19; *Harris v. Norton*, 16 Barb. 264; *Jewett v. Palmer*, 7 Johns. Ch. 61; *Jackson ex dem v. Cadwell*, 1 Cow. 622; *Boone v. Chiles*, 10 Peters, 179; *Patton v. Moore*, 32 N. H. 382.

In equity it has not completed its purchase, but to the extent of its payments, innocently made before notice of plaintiff's claim, is entitled to protection. It may, therefore, retire from the transaction without actual loss and without further impairing the rights of the plaintiff.

The action is in aid of plaintiff's execution. Its object is not to reach any equitable assets of Mrs. Tracy, but to strip from her legal title to the premises in question the obstructions created by the deed by which such title, apparently but not in fact passed from her to Howland, Smith and Tracy, and from them to the Baptist Union, and thus to show that the lien acquired by plaintiff's attachment of the premises and perfected by her judgment and execution was valid, and, therefore, may now be enforced free from the obstructions which seemed to defeat it. Such an action is within the equitable jurisdiction of the court. *Beck v. Burdett*, 1 Paige, 305; *Haye v. Bolles*, 33 How. Pr. 266; *Rinchey v. Stryker*, 28 N. Y. 45; *Frost v. Mott*, 34 Id. 253. *Thurber v. Blanch*, 50 N. Y. 80, does not hold otherwise, but does hold that the attachment to be effective must operate upon legal rights; the precise position of the plaintiff here.

The judgment should be reversed and a new trial granted, costs to abide event.

Judgment reversed.

c. Assignment of mortgage. Subrogation.

JOHNSON *v.* ZINK.

51 NEW YORK, 333. — 1873.

ACTION to restrain the prosecution by the defendant of an action upon a bond given by the plaintiff, which was secured by a mortgage on real estate, and for the subrogation of the plaintiff, or some person nominated by him, to the right of the defendant, on his being paid the amount due him.

LORT, Ch. C. — The conveyance by the mortgagor of the mortgaged premises, "subject to" the mortgage in question, to Comstock conveyed to him the equity of redemption only, and consequently the mortgage was to be discharged and satisfied out of those premises, before any right or interest therein was acquired by the grantee, and as between those parties it is clearly equitable that such discharge and satisfaction should be made out of the said premises, and that the obligor and mortgagor should not in exoneration thereof, personally be called upon to pay the same out of his individual property. The effect of the transaction was in equity to make the land the primary fund for the payment of the debt, and to place the plaintiff in the situation or relation of surety therefor only. This principle is clearly established. See *Jumel v. Jumel*,

7 Paige, 591-594; *Halsey v. Reed*, 9 Id. 446-453, etc.; *Marsh v. Pike*, 10 Id. 595; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Ferris v. Crawford*, 2 Denio, 595; *Stebbins v. Hall*, 29 Barb. 524, 529, 538.

This relation between the mortgagor and his grantee does not deprive the obligee from enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities. Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged premises for that purpose. This cannot prejudice the creditor, and it is clearly equitable as between the creditor and the owner of the land. He clearly has no right or color of right, justice or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the encumbrance, without any contribution, toward its discharge and satisfaction, from the land. This equitable principle is fully recognized in most of the cases above cited. Indeed, it is so consistent with right and justice as to require no authorities to sustain it.

Upon the application of it to this case, the plaintiff was entitled to protection and indemnity out of the mortgaged premises for what he was called upon to pay for the land, and it was reasonable and proper to have an assignment of the bond and mortgage made to an appointee of his nomination, for his benefit, so as to save any legal technical question that might arise out of the transfer of the security to the debtor and obligor himself, or as to its operation to satisfy the debt. Whether it was made to the plaintiff himself, or another person to hold for him, was wholly immaterial to the defendant.

The decision of the referee was, therefore, right on the merits, nor is there any ground for the reversal of the judgment on the admissibility of evidence. Assuming, as claimed by the appellant, that it was irrelevant and immaterial whether at the time of the execution of the deed from the plaintiff to Comstock there was an allowance made for the mortgage in question, the evidence could not prejudice the defendant. The presumption is, where premises are conveyed subject to a mortgage and the equity of redemption only is sold and conveyed, that the amount thereof is not paid to the vendor, but is deducted from the full value of the property.

There was some evidence given, against the exception of the defendant, of conversations with him, and on one occasion with his wife also, tending to show that he had actual knowledge and notice of the existence of the mortgage in question as a lien at the time of the purchase by his wife and the execution of the deed to her. The

objection made to its introduction also was that it was immaterial and irrelevant. In the view I have taken of the case, I think it may be so considered and was entirely harmless. The plaintiff was entitled to the relief given him, irrespective of such knowledge and notice; but I may add, that the defendant cannot complain of the equities resulting from the transaction in favor of the plaintiff, when he was fully advised of the facts on which they were based.

It is unnecessary to inquire whether any personal obligation was assumed by either Comstock or Mrs. Zink to pay off the mortgage. That question is immaterial to the issue involved in this case, and its examination would be entirely irrelevant.

It is proper to notice an objection raised by the appellant's counsel on the ground of the omission of Mrs. Zink as a party; and it is sufficient to say, in reference to it, that no such question was raised by demurrer or by the answer, nor, so far as appears by the case, on the trial. It is, therefore, unavailable on the present appeal.

It follows, from the views above expressed, that the judgment must be affirmed, with costs.

Judgment affirmed

MERRITT *v.* BARTHOLICK.

36 NEW YORK, 44. — 1867.

PARKER, J. — If the delivery of the mortgage, without the bond to Wentworth, as collateral security for the debt which such delivery was intended to secure, operated as a valid assignment of the mortgage to Wentworth, the judgment below is wrong and cannot be sustained. On the other hand, if it conveyed no interest in the mortgage to Wentworth, then the defendant, who claims his title through Wentworth's foreclosure of that mortgage, has no defense to the plaintiff's action to foreclose, and no interest in respect to it which, under the facts found by the referee, can avail him upon this appeal.

The single question for consideration then, is, did the delivery of the mortgage by Merritt, the mortgagee, to Wentworth, under the circumstances stated in the referee's report, operate to invest Wentworth with any interest in the mortgage?

The referee finds that, "On the 16th of July, 1853, or shortly thereafter, the bond and mortgage were assigned by the obligee and mortgagee therein named, to John Campbell, by assignment in writing, which was duly acknowledged and recorded on the 16th day of May, 1853. That prior to the assignment of said bond and mort-

gage to said Campbell, the mortgagee was indebted to Henry T. Wentworth in the sum of \$200, borrowed money; that Wentworth desired that said mortgage should be left with him as collateral security for said debt, and that the said Merritt delivered the said mortgage to said Wentworth, according to such request, and as collateral security for said debt of \$200; that the said mortgage was so delivered to the said Wentworth before the same was assigned to said Campbell, but that the bond accompanying the same was not delivered to the said Wentworth at the time, nor was anything said about the same, nor is there any evidence that the same was ever delivered to said Wentworth, nor was there any writing executed in reference to such transfer."

As a mortgage is but an incident to the debt which it is intended to secure (*Martin v. Nowlin*, 2 Burr. 969; *Green v. Hart*, 1 Johns. 580; *Jackson v. Blodget*, 5 Cow. 202; *Jackson v. Bronson*, 19 Johns. 325; *Wilson v. Trough*, 2 Cow. 231; *Cooper v. King*, 17 Abb. 342), the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions. See cases above cited; also, 4 Johns. 41; 5 Johns. Ch. 570; 9 Wend. 80.

Unless then, the bond was, in effect, assigned with the mortgage, Wentworth obtained no interest in the mortgage. Did the bond or the debt which it evidenced pass to Wentworth? In the first place, the transfer of the mortgage did not of itself operate to transfer the bond, for the legal maxim is the incident shall pass by the grant of the principal, but not the principal by the grant of the incident. So that unless we are authorized to say that such was the intent of the parties, we cannot hold that it did. This is a question of fact, which the counsel for the appellant argues in his points, but unless the referee has found it, as a fact, or found facts from which we are bound to infer its existence, it is a question not in the province of this court to determine. The act done by Merritt, the mortgagee, was the delivery of the mortgage to Wentworth, and the purpose of the delivery was to secure the payment of the debts of the mortgagee to Wentworth. Does it necessarily follow that the intention of the parties was to transfer the bond? The referee has not found either way upon this question of intent, and, therefore, unless the intent in question is to be inferred, as a matter of legal necessity from what he does find, it must now be held not to have existed.

If the transfer had been by a written assignment, describing the mortgage alone, and expressing the object to be to secure the debt

of the assignor to the assignee, nothing being said about the bond or the debt which it represents and delivery of the mortgage made, it would be impossible, I think, to hold that the intention was to assign the bond. There would be no opportunity for an implication to that effect. The circumstance that the assignment would be inoperative, unless the bond is held to pass, would not give the assignment that effect. The result of such holding would be to reverse the maxim, and make the principal follow the incident. To make the circumstance of its inefficacy a reason for giving it the effect desired, would, manifestly, uproot the maxim, and establish the contrary rule.

The fact that here the transfer was by manual delivery, merely, nothing being said as to the bond, or the indebtedness secured by it, does not afford any stronger evidence of intent to transfer the bond than the case supposed. There is no circumstance in the case not considered in the supposed case, and, as I think, nothing to compel the inference of intent to transfer the bond. I am unable to see, therefore, any escape from the conclusion that, upon this appeal, the judgment of the Supreme Court must be held correct, and affirmed.

ARNOLD *v.* GREEN.

116 NEW YORK, 566. — 1889.

ACTION to compel the specific performance of a contract to convey land. By the contract the land was to be conveyed "subject to all existing liens now on said property." There were two liens, at the time, in this order: (1) The Wadsworth mortgage, given by a prior owner, still unpaid when the action was begun. (2) A decree of the Surrogate's Court for the payment of the debts of Ashbel Arnold, a former owner of the land. Both of these liens were prior to defendant's right; an appeal from the decree was pending at the time of the trial herein. Plaintiffs are in possession of the land. Defendant, prior to the commencement of this action, paid off the Wadsworth mortgage, having first been refused an assignment of it. Defendant now asks that the Wadsworth mortgage be declared to be an equitable lien in his favor on the premises. The court below sustained his position.

VANN, J. — This appeal presents the single question whether, under all the circumstances of the case, the defendant should have been substituted in the place of Mr. Wadsworth as the owner of the mortgage in question. Did he by the fact of payment become the

equitable assignee of the security and entitled to enforce it for his own reimbursement and the protection of his interest in the land? Under some circumstances the payment of a mortgage does not satisfy it or destroy its lien because equity regards the person making the payment as the owner thereof for certain definite purposes and keeps it alive and preserves its lien for his benefit and security. According to the well-established principles upon which the doctrine of equitable assignment by subrogation rests, if the person paying stands in such a relation to the premises that his interest, whether legal or equitable, cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment. Sheldon on Subrogation, §§ 1, 3, 14, 16; 3 Pomeroy's Equity Jur. § 1211; Jones on Mortgages, § 874. The remedy of subrogation is no longer limited to sureties and *quasi* sureties, but includes so wide a range of subjects that it has been called the "mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." Harris on Subrogation, § 1; *Barnes v. Mott*, 64 N. Y. 397, 401; *Stevens v. Goodenough*, 26 Vt. 676; *Harusberger v. Yancey*, 33 Gratt. 527; *Smith v. Cosan*, 42 Conn. 244. While a mere volunteer, with no obligation to pay or interest to protect, is not entitled to its aid, it is frequently applied in favor of a vendee of encumbered real estate, who, although not personally liable, has paid the debt of another which is a charge upon the land, and which, if not paid, might cause him to lose his interest therein. Under such circumstances the debt, although paid and satisfied in form, is regarded in equity as neither paid nor satisfied in fact, but by operation of law the former holder ceases to be the creditor, while the person paying takes his place as owner of the debt and security unimpaired. Where, within the limitations suggested, benefit may result to the person paying without injury to the person who should pay, equity casts the burden upon the latter, who ought in fairness to bear it, provided it will not work injustice or disturb the rights of other creditors of a common debtor. *Id.*; *Johnson v. Zink*, 51 N. Y. 333; *Cole v. Malcolm*, 66 *Id.* 363; *Twombly v. Cassidy*, 82 *Id.* 155; *Gans v. Thieme*, 93 *Id.* 225, 232; *Averill v. Taylor*, 8 *Id.* 44, 51.

These principles, when applied to the facts of this case, sustain the judgment as modified by the General Term. The defendant was the purchaser of land subject to two incumbrances, the earlier of which was a mortgage for a large sum past due, and the other a decree in Surrogate's Court, the subject of which was still in litigation. He was the vendor of the same land, subject to the same incumbrances, but no part of the principal of the purchase-price had been paid, and interest thereon was past due and unpaid. The

land itself was the primary fund for the payment of said incumbrances, neither of which was the personal debt of the defendant, but either of which, if enforced, would require him to raise the money and pay it, or else lose his interest in the premises. He held the legal title to the land as security for the payment of the purchase-price, and as trustee for the plaintiffs, the equitable owners. It did not appear that the land was adequate security for the amount there was against it, including the demand of the defendant. It is clear, therefore, that he was not a mere volunteer or stranger, because he had an actual interest to protect against two prior liens, either of which might be enforced at any time, involving trouble, expense and the possible loss of his claim. The danger of interference may have been remote, but there was nothing to protect him against a change of mind on the part of the holder of the mortgage or on the part of the plaintiffs. Freedom from interference depended upon moral assurance, not upon legal right. How can he be called a stranger to a debt whose land is the primary fund for the payment of such debt? A stranger or volunteer, as those terms are used with reference to the subject of subrogation, is one who, in no event resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged with the payment thereof and cannot be sold therefor. A payment made by one who was liable to be compelled to make it, or lose his property, will not be regarded as made by a stranger. Where the person paying has an interest to protect he is not a stranger. Even if he holds the title to land merely as security, still he has an interest that is insecure, in a legal sense, as long as the prior lien is past due and held by another. Harris on Subrogation, §§ 795-798; Sheldon on Subrogation, §§ 245, 246; Jones on Mortgages, § 877.

It is insisted, however, that the payment made by the defendant was not a fair effort to protect his property, but that his method was underhanded and his object uncertain. This is doubtless true, and it gave the court jurisdiction to require the defendant to so handle his security as not to injure the plaintiffs, and to place them as nearly as possible in the same position as if he had not paid the mortgage. Owing to his misconduct he was properly compelled not only to defer the enforcement of his security until the plaintiffs had had a reasonable time to find another holder for the mortgage, but also to pay the entire costs of the litigation. The plaintiffs cannot, with propriety, complain of the decree as modified, because they lose nothing by it. They are substantially situated as they were before the payment was made. They should not, therefore, be permitted to take advantage of the defendant by insisting that an effect

be given to the payment which was not intended and which would be inequitable. They come into a court of equity seeking, among other things, relief from their own default in not paying the interest upon the law day. *Stevenson v. Maxwell*, 2 N. Y. 408. As they seek equity from the defendant, they must do equity toward him; and when they receive all that they contracted for, it would not be equitable for them to avoid paying for it as they agreed. Equity will not permit them to receive the equivalent of \$6,000 for nothing and at the same time to demand its aid for further relief against the person who parted with that sum for their benefit, even if his methods were indirect and his object questionable. On the other hand, it will give to each party his own; to the plaintiffs the land, and to the defendant the money and security, but, under the circumstances, will require him to so use the latter as not to take any advantage of his vendees.

If the plaintiffs had made a tender before the defendant made the payment, or if they could not have been placed in the same situation, substantially, that they were in before the payment was made, different questions would have arisen for consideration in relation to which we express no opinion.

We think that the judgment should be affirmed, but, under the circumstances, without costs.

d. Foreclosure.

(1.) STRICT FORECLOSURE.

ROSS *v.* BOARDMAN.

22 HUN (N. Y. SUPR. CT.), 527, — 1880.

DANIELS, J. — The mortgages were executed by the defendant and her husband, upon property owned by him, to secure, together, the sum of \$15,000. One was given on or about June 27, 1860, and the other on January 29, 1862. After they became due, the mortgagee and holder of both mortgages commenced an action for their foreclosure.

This action proceeded to judgment, under which a sale was made of the mortgaged property to a person named Powell. He continued to own the property from the time of this purchase in 1863 until 1869, when he conveyed it to the plaintiff in this action.

The defendant in this suit was not made a party to that action, and for that reason it has been brought to obtain a strict foreclosure of her interest. At the sale made under the judgment the property

brought the sum of \$17,775, which was more than was required to pay the amount due upon the two mortgages, together with the expenses of the proceedings. The effect of the omission to make the defendant a party to the first foreclosure suit, was to leave her contingent right of dower still a substantial incumbrance upon the property. It was a subsisting and valuable interest, which could only be discharged or extinguished by a release of it under the statute, or a proper judgment, and no such judgment could have been or was recovered in the foreclosure suit, as she was not made a party to it. The effect of the omission was to leave her interest in the property substantially the same as though no action had been prosecuted for the foreclosure of the mortgages. This was held to be the law applicable to such a state of facts in *Smith v. Gardner*, 42 Barb. 356; *Peabody v. Roberts*, 47 Id. 92; *Mills v. Van Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 53 Id. 298-303; where in general terms it was held, that a wife who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption of which her husband is seised, notwithstanding the mortgage, which right is not affected in equity unless she is made a party to the foreclosure. If omitted, she can at any time redeem, notwithstanding a decree and sale in the foreclosure suit. It is for the purpose of extinguishing this right of the defendant in the property that the present action, for a strict foreclosure of the mortgages in favor of the plaintiff, has been instituted, and the fact that a larger amount was realized upon the sale of the property than was necessary to pay what was then due upon the mortgages, will not prevent him from maintaining the action. For, by the terms of the statute declaring the effect of a foreclosure by action, the deed given upon the sale was attended with the effect of a conveyance executed by both the mortgagor and mortgagee of the property. 3 R. S. 5th ed. 273, § 88. The result of this provision was to render the deed, given to the purchaser at the sale, a conveyance of the interest of the husband in the property released from a third mortgage given by the same parties, and also to transfer so much of the two mortgages as remained unforeclosed by the judgment under which the sale was made, to the purchaser at that sale.

Substantially he acquired the title to the property, incumbered by this contingent dower interest, and an assignment of the mortgages so far as they remained unforeclosed, upon this outstanding interest. That such was the effect of the judgment and sale was substantially what was held in *Robinson v. Ryan*, 25 N. Y. 320. It is true, that was a foreclosure by advertisement; but, under the terms of the statute already referred to there seems to be no good reason on

which this case, in that respect, can be distinguished from that one. When the purchaser at the foreclosure sale afterwards conveyed the property to the plaintiff in this case, he by that conveyance transferred to him his title, together with this interest in the unextinguished mortgages, and for that reason he had such a title to the incumbrances as entitled him to maintain an action for their strict foreclosure, and he was not precluded from doing so, because the amount realized from the sale under the judgment exceeded that which was due upon the mortgages. For that amount was paid not only for the title itself, but in part also it formed a consideration for the transfer of these two mortgages so far as they had not been at that time foreclosed. Under such circumstances the settled rule seems to be that the purchaser, or his subsequent grantee, may maintain an action of this description, for the purpose of completing his title by securing a strict foreclosure of the incumbrances, or their redemption by the person whose interest still subsists in the property. *Benedict v. Gilman*, 4 Paige, 58. This subject was considered in *Bolles v. Duff*, 43 N. Y. 469, 474. In that case it was stated that strict foreclosures are now rarely pursued or allowed in this State, except in cases where a foreclosure has once been had and the premises sold, but some judgment-creditor, or persons similarly situated, not having been made a party, has a right to redeem. As to him a strict foreclosure is proper. The facts shown by the plaintiff upon the trial of this action brought it plainly within this principle, and for that reason the relief demanded by him should not have been denied, but judgment should have been directed to that extent in his favor, and the effect of that would have been that the defendant's interest in the property would be extinguished at the expiration of the time designated for the purpose of enabling her to redeem unless the amount required for the protection of her interest should be paid. What that amount might be, did not, and could not, appear in the case, for the reason that the purchaser at the foreclosure sale, and the plaintiff as his grantee, had been for years in the possession and enjoyment of the property and the receipt of its rents and profits. For those they were both legally and equitably liable to account, and the amount received from that source and applicable for that purpose, should be first deducted from the mortgage debts. The practice upon this subject was indicated in the case of *Benedict v. Gilman*, already cited, and the principles upon which the accounting should be had, were then substantially settled. The same subject was considered in the same manner in *Hubbell v. Moulson*, 53 N. Y. 225, 228, 229, and the reference ordered in this case appears to have been properly adapted to that end. The

defendant could redeem her interest by paying to the plaintiff whatever should prove to be the proportionate part of the mortgage debts which her interest ought to contribute, but the amount required for that purpose can in no way be ascertained, without such an accounting as was directed in this case. The judgment, so far as it provided for a hearing of that nature, was in conformity with these authorities, and it should for that reason be sustained. As judgment should not have been denied to the plaintiff, but a strict foreclosure in his favor should have been directed, he could not properly be charged with the costs of the action. Who may be entitled to costs in the case, whether the plaintiff, or the defendant, or neither, can only be equitably ascertained when the result of the accounting shall become known and final judgment be directed in the action. In this respect, therefore, the judgment should also be modified and costs should be reserved until the final determination of the action. With these two modifications the direction given in the case appears to have been proper. It has been claimed, on the part of the plaintiff, that proof of the third mortgage should have been received upon the trial, but that mortgage formed no part of the foreclosure proceedings in the first action, and certainly no interest in it was transferred to the purchaser under the judgment, or to the plaintiff in this case. It was extinguished as a lien on the property, because the holder was made a party to the first action, but as it formed no part of the title or interest which was sold, the plaintiff acquired no right to rely upon it as a basis of his right to relief in this case. So far as it may not have been fully paid, the holder of it may still be entitled to foreclose it against the defendant's contingent interest in this property. If its existence and the balance still remaining unpaid on it shall have any pertinency to the inquiry, or the investigation, required to be made by the referee, proof of these facts will undoubtedly be received; but the circumstance that they were rejected upon the trial, and the complaint was not allowed to be amended, so as to include a statement of them, can have nothing to do with the disposition which should be made of this case at the present time. The judgment should so far be modified, as to direct a strict foreclosure of the mortgages against the defendant, unless she shall redeem her contingent interest in the property, by paying the amount which may be found necessary for that purpose on the confirmation of the referee's report, and within such a period of time as may then be designated by the court; and so much of the judgment as provides for the recovery of costs against the plaintiff should be reversed, and as so modified the judgment already in the case should be affirmed.

(2.) FORECLOSURE BY ACTION,¹HOWELL *v.* LEAVITT.

95 NEW YORK, 617. — 1884.

[Reported herein at p. 1043.]

(3.) FORECLOSURE BY ADVERTISEMENT OR UNDER THE POWER OF SALE.²SHERMAN *v.* WILLETT.

42 NEW YORK, 146. — 1870.

[Reported herein at p. 209.]

IV. Title by devise.³JACKSON *EX DEM.* WELLS *v.* WELLS.

9 JOHNSON (N. Y.), 222. — 1812.

[Reported herein at p. 513.]⁴STALL *v.* WILBUR.

77 NEW YORK, 158. — 1879.

[Reported herein at p. 207.]

MAGOUN *v.* ILLINOIS TRUST AND SAVINGS BANK.

170 U. S. 283. — 1898.

MR. JUSTICE MCKENNA, after stating the case, delivered the opinion of the court. — Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and have been enacted in other States. They are not new in the laws of other countries. In *Tennessee v. Alston*, 94 Tenn. 674, 30 S. W. 750, Judge Wilkes gave a short history of them, as follows: "Such taxes were recognized by the Roman law. 1 Gibbon's

¹ For the New York statute see §§ 1626-1630, Code Civ. Pro. — ED.² For the New York statute see §§ 2387-2409, Code Civ. Pro. — ED.³ The law as to "succession to the estates of deceased persons" is the subject of a separate course; the law of "devise" and "descent" will not, therefore, be treated at length here. — ED.⁴ See also cases reported at pp. 53, 514 and 516, *supra*. — ED.

Decline and Fall of the Roman Empire, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell's History of Taxation in England, 148; Acts 20 Geo. III., c. 28, 45 Geo. III., c. 28, and 16 & 17 Vict., c. 51; *Green v. Croft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Mer. 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, Feb., 1893. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891 (chapter 25, now repealed by chapter 174, Acts 1893). They were adopted in North Carolina in 1846, but repealed in 1883; were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884." Other States have also enacted them — Minnesota, by constitutional provision.

The constitutionality of the taxes has been declared, and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S. 625, 628, 16 Sup. Ct. 1073; *Strode v. Com.*, 52 Pa. St. 181; *Eyre v. Jacob*, 14 Grat. 422; *Schoolfield v. Lynchburg*, 78 Va. 366; *Maryland v. Dalrymple*, 70 Md. 298, 17 Atl. 82; *Clapp v. Mason*, 94 U. S. 583; *In re Mariam's Estate*, 141 N. Y. 479, 36 N. E. 505; *Maine v. Hamlin*, 86 Me. 495, 30 Atl. 76; *Tennessee v. Alston*, 94 Tenn. 674, 30 S. W. 750; *In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181; Dos P. Colat. Inher. Tax Law, 20; *Minot v. Winthrop* 162 Mass. 113, 38 N. E. 512; *Gelssthorpe, v. Furnell* (Mont.) 51 Pac. 267. See also *Scholey v. Rew*, 23 Wall. 331.

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: (1) An inheritance tax is not one on property, but one on the succession; (2) the right to take property by devise or descent is the creature of the law, and not a natural right, — a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor, indeed, of the latter, for appellant conceded that testa-

mentary disposition and inheritance were subject to regulation. However, as pertinent to the subject, decisions of this court may be cited. In *United States v. Fox*, 94 U. S. 315-321, a law of the State of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The court said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or by any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivan*, 10 Wheat. 202.

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"Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII. there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English statute of wills became a part of the law of New York upon the adoption of her constitution in 1777, and, with some modifications in its language, remains so at this day. Every person must therefore, devise his lands in that State within the limitations of the statute, or he cannot devise them at all. His power is bounded by its conditions."

In *Mager v. Grima*, 8 How. 493, there was considered the validity of a law of Louisiana imposing a tax of 10 per cent. upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein. Mr. Chief Justice Taney considered the legal question of easy solution, and disposed of it summarily. He said: "This is a plain case, and when the facts are stated the questions of law may be easily disposed of in a few words." After stating the case briefly, he further said:

"Now; the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it think proper, direct that property so descending or bequeathed shall

belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take has been given to the alien, subject to a deduction of 10 per cent for the use of the State.

"In some of the States laws have been passed at different times imposing a tax similar to the one now in question upon its own citizens, as well as foreigners, and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption, and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

"We see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

In *United States v. Perkins*, 163 U. S. 625-631, 16 Sup. Ct. 1073, the inheritance tax law of the State of New York was involved. Mr. Justice Brown, speaking for this court, said:

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and the enjoyment of his own property, and the increase thereof during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. 'By the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com. 492.

"Prior to the statute of wills enacted in the reign of Henry VIII., the right to a testamentary disposition of the property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower, and to a share in the personal estate, is ordinarily secured to her by statute.

“By the Code of Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one-half the estate if the testator leave but one child, one-third if he leaves two children, and one-fourth if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy one-half of a testator's property must be distributed equally among all his children. The other half he may leave to his eldest son, or to whomsoever he pleases. Similar restrictions upon the power of a disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period recognized a natural right in children to inherit the property of the parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good.”

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CHAPTER III.

TITLE BY DESCENT.

OVERTURF *v.* DUGAN.

29 OHIO STATE, 230. — 1876.

[*Reported herein at p. 20.*]

MARCH *v.* BERRIER.

6 IREDELL'S EQUITY (N. C.), 524. — 1850.

[*Reported herein at p. 70.*]

SHERMAN *v.* WILLETT.

42 NEW YORK, 146. — 1870.

[*Reported herein at p. 209.*]

BATES *v.* SHRAEDER.

13 JOHNSON (N. Y.), 260. — 1816.

[*Reported herein at p. 460.*]¹

BATES *v.* BROWN.

5 WALLACE (U. S.), 710. — 1866.

EJECTMENT. — Wolcott devised his real estate to his wife Eleanor and his daughter Mary Ann, and their heirs and assigns forever. Mary Ann died intestate and without issue in 1832. In 1833 Eleanor conveyed the premises to David Hunter. In 1836 Eleanor remarried and plaintiff is the only issue of that marriage.

¹ For the New York Statute of Descents, see R. P. L., §§ 280-296. Titles by curtesy and dower consummate are analogous to titles by descent. — ED.

SWAYNE J. — Mary Ann Wolcott, from whom the plaintiff in error claims to have derived his title by inheritance, died nearly four years before his birth. During all the intervening time it is not denied that the title was vested in his mother and her grantee. Such was the effect of the statute. It is clear in its language, and there is no room for controversy upon the subject. Although born after the title became thus vested, he insists that upon his birth it became, to the extent of his claim, divested from the grantee and vested in him. His later birth and relationship to the propositus, he contends, is to be followed by the same results as if he had been living at the time of her death.

It is alleged that the rule of "shifting inheritances" in the English law of descent, is in force in Illinois, and must govern the decision of this case.

The operation of this rule is thus tersely illustrated in a note by Chitty, in his *Blackstone*: "As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. It seems to be determined that every one has a right to retain the rents and profits which accrued while he was thus legally possessed of the inheritance. *Hargrave's Co. Litt.* 11; *Goodtitle v. Newman*, 3 Wils. 526." 2 *Christ. Bl. Comm.* 208, note 9.

Such is undoubtedly the common law of England. *Watk. Des.* 169. It is said the Ordinance of 1787, which embraced the territory now constituting the State of Illinois, and the acts of the Legislature of that State of the 4th of February, 1819, and of the 3d of March, 1845, are to be considered in this connection.

The ordinance created a court which it declared "shall have common-law jurisdiction," and it guaranteed to the people of the territory "judicial proceedings according to the course of the common law." There is no allusion in it to the common law but these. The two acts of the Legislature contain substantially the same provisions. What is expressed in the second act, and not in the first, is clearly implied in the former. The latter declared that "the common law of England, so far as the same is applicable and of a general nature," . . . "shall be the rule of decision, and shall be considered as in full force until repealed by legislative authority." *Rev. St. Ill.* 1845, p. 337. Mary Ann Wolcott died, and the plaintiff in error was born before this act became a law, but it may be properly referred to as containing an exposition of the legislative intent in the prior act. Although the former act adopts "the

common law of England" in general terms, it was undoubtedly intended to produce that result only so far as that law was "applicable and of a general nature."

By the common law, actual seisin, or seisin in deed, is indispensable to the inheritable quality of estates. If the ancestor were not seised, however clear his right of property, the heir cannot inherit. According to the canons of descent, hereditaments descend lineally, but can never ascend. This rule is applied so rigidly that it is said "the estate shall rather escheat than violate the laws of gravitation."

The male issue is admitted before the female. When there are two or more males, the eldest only shall inherit, but females altogether.

Lineal descendants, *in infinitum*, represent their ancestors standing in the same place the ancestor would have stood, if living.

On failure of lineal descendants of the ancestor, the inheritance descends to his collateral relations — being of the blood of the first purchaser — subject to the three preceding rules.

The collateral heir of the intestate must be his collateral kinsman of the whole blood.

In collateral inheritances the male stock is preferred to the female. Kindred of the blood of the male ancestor, however remote, are admitted before those of the blood of the female, however near, unless where the lands have, in fact, descended from a female. Watk. Des. 95.

These principles sprang from the martial genius of the feudal system. When that system lost its vigor, and in effect passed away, they were sustained and cherished by the spirit which controlled the civil polity of the kingdom. The celebrated statute of 12 Car. II., c. 24, which Blackstone pronounces a greater acquisition to private property than Magna Charta, was followed by no change in the canons of descent. The dominant principles in the British constitution have always been monarchical and aristocratic. These canons tend to prevent the diffusion of landed property, and to promote its accumulation in the hands of the few. They thus conserve the splendor of the nobility and the influence of the leading families, and rank and wealth are the bulwarks of the throne. The monarch and the aristocracy give to each other reciprocal support. Power is ever eager to enlarge and perpetuate itself, and the privileged classes cling to these rules of descent with a tenacity characteristic of their importance — as means to the end they are intended to help to subserve.

Before the Revolution, some of the colonies had passed laws reg-

ulating the descent of real property upon principles essentially different from those of the common law. In most of them the common law subsisted until after the close of the Revolution, and the return of peace. It prevailed in Virginia until the act of her Legislature of 1785 took effect, and it was, perhaps, the law upon this subject in "the Northwestern Territory," at the time of its cession in 1784 by Virginia to the United States. With the close of the Revolution came a new state of things. There was no monarch, and no privileged class. The equality of the legal rights of every citizen was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has founded and shaped our institutions, State and National, and has impressed itself upon the entire jurisprudence of the country. One of its most striking manifestations is to be found in the legislation of the States upon the subject under consideration. Of the results an eminent writer thus speaks: "In the United States the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself." 4 Kent Comm. 412.

Another writer, no less eminent, upon this topic says: "In the law of descents there is an almost total change of the common law. It is radically new in each State, bearing no resemblance to the common law in most of the States, and having great and essential differences in all." Reeve, Des. 11.

So far as British law was taken as the basis of this legislation in the different States, it was the statutes of Charles II. and James II. respecting the distribution of personal property, and not the canons of descent of the common law. The two systems are radically different in their principles.

The Ordinance of 1787 contains a complete series of provisions upon the subject. They are the type and reflex of the action of many of the States at that time. The ordinance declared that the estates of persons dying intestate "shall descend to and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood."

We find here not a trace of the common law. These provisions

are diametrically opposed to all its leading maxims. We cannot infer from their silence that anything not expressed was intended to be adopted from that source by implication or construction. .

The statute governing the descent of real estate, already referred to, is also a complete code upon the subject of which it treats. It is to be presumed to cover every case for which the legislature deemed it proper to provide. If the same question had come before us under the ordinance, we should have said, with reference to the common law, conflict is abrogation and silence is exclusion. The spirit and aims of the two systems are wholly different. One seeks to promote accumulation — the other diffusion. One recognizes and cherishes the exclusive claim of the eldest son — the other the equal rights of all his brothers and sisters. The latter makes no distinction on account of age, sex, or half blood. We apply to the statute also the remark that silence is exclusion. It speaks in the present tense — of the state of things existing at the time of the death of the intestate, and not of any change or different state of things which might occur thereafter. If the Legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning.

One class of posthumous children are provided for. We see no reason to believe that another was intended to be included, especially when the principle involved is so important. The intention of the Legislature constitutes the law. That intention is manifested alike by what they have said and by what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the Legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it.

The principle contended for was applied in the case of *Dunn v. Evans*, 7 Ohio, 169. The case is briefly reported, and no arguments of counsel appear. It was also adopted in North Carolina, in *Cutlar v. Cutlar*, 2 Hawks, 324, and in *Caldwell v. Black*, 5 Ired. 463. No

recognition of it is to be found, it is believed, in any other American adjudication.

The subject was elaborately examined by the Supreme Court of Ohio, in *Drake v. Rogers*, 13 Ohio St. 21, and *Dunn v. Evans*, was overruled. It came before the Supreme Court of Indiana in *Cox v. Mathews*, 17 Ind. 367, and received there also a thorough examination. The result was the same as in the last case in Ohio. The doctrine was repudiated.

The court said: "Under the laws of this State it is contemplated that such change of title from one living person to another is to be made by deed duly executed, rather than by our statutes of descent. . . . The feudal policy of tying up estates in the hands of a landed aristocracy, which had much to do with the shifting of descents as recognized by the English canons of descent, is contrary to the spirit of our laws and the genius of our institutions. It has been the policy in this State, and in this country generally, not only to let estates descend to heirs equally, without reference to sex or primogeniture, but also to make titles secure and safe to those who may purchase from heirs upon whom the descent may be cast. Our laws have defined and determined who shall inherit estates upon the death of a person seised of lands. When those thus inheriting make conveyances, the purchasers have a right to rely upon the title thus acquired. If titles thus acquired could be defeated by the birth of nearer heirs, perhaps years afterwards, great injustice might, in many cases, be done, and utter confusion and uncertainty would prevail in reference to titles thus acquired. We are of opinion that the doctrine of shifting descents does not prevail under our laws, any more than the other English rule, that kinsmen of the whole blood only can inherit."

The rule is sanctioned by no American writer upon the law of descents. Judge Reeve, Reeve, Des., p. 74, Int., speaking of distributees, says: "I am of opinion that such posthumous children who were born at the time of the distribution were entitled, and none others,"

It is to be regretted that we have not the benefit of an adjudication by the Supreme Court of Illinois upon the subject.

Their interpretation — the statute being a local one — would of course be followed in this court. We have, however, no doubt of the soundness of the conclusion we have reached.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

JOHNSON *v.* HAINES' LESSEE.

4 DALLAS (PA.), 64. — 1799.

IN error from the Supreme Court.

The question arose upon the following facts, which, by agreement, were to be considered as if found by a special verdict.

"Ejectment for a house and lot in Germantown, of which Rebecca Vanaken died seised on the 13th of February, 1797, intestate, and leaving no father, mother, child, grandchild, brother, or sister, living.

"But the intestate had had brothers and sisters, who died under these circumstances:

"1st. Richard, who died without issue.

"2d. Catharine, who married Casper Wistar, and left issue, Richard, Margaret, Catharine, Rebecca, Sarah, and Casper; of this family Richard, Margaret and Rebecca are dead; but all of them leaving issue.

"3d. Anne, who married — Lukens, and left issue John, Mary, Daniel, Derrick and Rebecca; all of this family died in the life of the intestate, but all of them left issue.

"4th. John, who died in the lifetime of the intestate, but left issue Anthony (the plaintiff in error), John, Joseph, and Margaret, and Margaret also died in the intestate's lifetime, leaving issue.

"5th. Margaret, who intermarried with Reuben Haines, and left issue Casper (the lessor of the plaintiff below), Catharine, Josiah, and Reuben; Josiah is dead, leaving one son, who is now alive, and Reuben is dead without issue.

"It was agreed that Margaret, the daughter of Catharine, who was the sister of Rebecca, died in the lifetime of the intestate.

"And the questions submitted to the court are, whether the plaintiff in error is entitled to the whole of the premises? And, if he is not, how the premises are to be divided?"

M'KEAN, C. J.— The intestate died, leaving the children of several of her brothers and sisters, and a grandchild of one of her brothers; and it is now made a question, whether her real estate shall be divided among these surviving relations, or descend entirely to her heir-at-law? By the sixth section of the charter granted to William Penn, the laws of England "for regulating and governing of property, as well for the descent and enjoyment of land as for the enjoyment and succession of goods and chattles," were introduced and established in Pennsylvania, to continue till they were altered by the Legislature of the province. The common law being, therefore, the original guide, and the plaintiff in error being the heir at com-

mon law, his title must prevail, unless it shall appear, that an alteration in the rule has been made by some act of the General Assembly.

Now, when the intestate died, there was but one law in existence on the subject, the law of the 19th of April, 1794; and though the sixth section of that law provides for the case of a person dying intestate, leaving "neither widow nor lawful issue, but leaving a father, brothers, and sisters," it does not provide, nor does any other of the sections provide, for the case of a person dying intestate, without lawful issue, and leaving no father or mother, brothers or sisters. The descent of the real estate, in this specific case, was not, therefore, altered or regulated by any act of the General Assembly, when the estate was vested in the person entitled to take, at the death of the intestate.

It is probable, that if the case had been stated to the Legislature, they would have directed the same distribution in the year 1794, that they have since done by the act of the year 1797; and, it is urged, that as there is equal reason for making such a distribution, where no father survives, as where a father does survive, the intestate, the court ought, upon the obvious principle and policy of the law, to supply the deficiency. But, it must be remembered, that the system of distributing real estates in cases of intestacy, is an encroachment on the common law; and wherever such an encroachment takes away a right which would otherwise be vested in the heir-at-law, the operation of the statute should not be extended further, than it is carried by the very words of the Legislature.

We are upon the whole, unanimously, of opinion, that the judgment below should be reversed; and that judgment should be given for the plaintiff in error.

SEARS *v.* RUSSELL.

8 GRAY (MASS.), 86. — 1857.

BILL in equity by the infant children of Frederic R. and Mary Ann Sears, his deceased wife, against the trustees under the will of her father and the other heirs of said testator to establish their right to certain real and personal property of testator.

BIGELOW, J.— * * * We are thus brought to a consideration of the nature and quality of the estate which the plaintiffs will take under the conveyance to be made to them by the trustees. There would have been no room for doubt or question on this point, if the

will had contained no provision beyond the direction to the trustees to convey the estates to the testator's grandchildren, if living, or to their issue, or in default of such children or issue, to the heirs-at-law of the testator. The plaintiffs would then very clearly have been entitled to an estate in fee simple.

If the devise had been to the children of the daughter and their heirs forever, but, if they had died without issue, then to the heirs-at-law of the testator, it would have created an estate-tail by implication. The gift over would then have been on an indefinite failure of issue, and the law, implying an intent in the testator that the issue were to take the estate in succession, as children and heirs of the parent, would cut down the fee to an estate-tail. *Nightingale v. Burrell*, 15 Pick. 104; *Hall v. Priest*, 6 Gray, 18.

But no such implication can be raised under the provisions of this will. The gift over is not on an indefinite failure of issue to the daughter, but on such failure in the lifetime of the husband. The intent of the testator is expressly declared to be, not for the benefit of the issue of the children, but to exclude their father from inheriting the estate from them. Upon his death, their estates are to become absolute, and if they should die in his lifetime, leaving issue, the estate would descend to such issue in fee. The description of the contingency, therefore, upon which the gift over is to take effect, is such that it must be construed to be an executory devise. The gift to the children was of a fee; it cannot be cut down to an estate-tail by implication; there can be no remainder after the gift of a fee; it is the limitation of a fee on a contingency after a previous estate in fee, and must take effect, if at all, as an executory devise. The heirs-at-law of the testator, to whom the estates are devised upon the happening of the contingency, if they do not take by descent, must claim as executory devisees.

But it is urged, that the limitation being to the heirs-at-law of the testator, the estate must vest in them by descent, and that they cannot take as purchasers under the will. This argument is founded on the well settled rule of law, that a devise to an heir, of the same estate in nature and quality as that to which he would be entitled by descent, is void. In such cases, the heir takes by descent and not as purchaser. *Ellis v. Page*, 7 Cush. 161, and cases there cited. If this rule applies to the present case, then it would follow that the gift over to the heirs-at-law would fail as an executory devise, so that their title would not depend upon the principles of law by which estates of that nature are governed.

But it is entirely clear that this devise over to the heirs of the testator does not come within the recognized tests by which an heir

is held to be in by descent, and not by purchase. It is essential to a title by descent that the heir should take the same estate in quantity and quality, as if no will had been made and the estate had been left to descend to him; and this rule is not affected by carving out of the fee a prior particular or contingent estate, or subjecting it to an executory devise. All that is necessary to the operation of the rule is, that when the estate vests in the heirs, they should hold it by the same tenure and in like manner as if the devise had been omitted. If the nature or quality of the estate is changed when it comes to the heirs, or if they take it in different shares or proportions, the descent will be broken, and they must come in as purchasers under the will. *Ellis v. Page*, 7 Cush. 164; *Reading v. Royston*, 1 Salk. 242, 2 Ld. Raym. 829, and 1 Com. R. 123; 6 Cruise Dig. tit. 38 c. 8, §§ 9, 10.

Applying this rule to the present case, it is clear that the heirs-at-law of the testator must take as devisees, and not by descent. The limitation over to them is contingent until the prescribed event shall occur. The devise is to those who shall be his heirs when the contingency arises, and not to those who were his heirs at the time of his decease. They must take the estate under and by force of the will, in such proportions as it may vest in them when the event occurs, and not as heirs-at-law in the shares to which they would have been entitled if the devise over to them had been omitted. Such, we think, was clearly the intent of the testator. The rules of construction, that the word "heirs" in a will is usually construed to mean those who are such at the time of the testator's decease; and that estates created by devise are to be held to be vested rather than contingent; must give way to the controlling rule of interpretation that the intent of the testator is to govern, if it does not conflict with the rules of law. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 70, 80, 89; *Doe v. Frost*, 3 B. & Ald. 546; *Richardson v. Wheatland*, 7 Met. 169; *Olney v. Hull*, 21 Pick. 314. And if it be found to conflict, it does not change the rule of construction. The will must fail of effect so far as to violate the rules of law, not because the intent of the testator does not control its construction, but because the law will not permit his intent to be accomplished. *Brattle Square Church v. Grant*, 3 Gray, 158; *Hall v. Priest*, 6 Gray, 22, 23.

The intent of the testator, in making the limitation to his heirs-at-law in this clause of the will, is not left in any doubt. It is expressly declared, to be to prevent his son-in-law from inheriting any portion of the testator's estate, as heir to his children. The devise to the heirs was to take effect only upon one contingency. If the child survived the father, or died in his lifetime, leaving issue, the

heirs-at-law were to take nothing. The object of the testator was, not to benefit his heirs, but to break the legal course of descent in a certain contingency, so as to exclude his son-in-law from participating in his estate, beyond the specific sum bequeathed to him.

To carry out this intent, it is necessary to construe the limitation to heirs, as being to those who should hold that relation when the contemplated contingency should happen. If it should be held to mean a devise to the heirs of the testator at the time of his decease, this declared purpose would be defeated. The right or possibility of taking the estate in the prescribed contingency, would then have vested in part in the testator's daughter, at his decease, as one of his heirs; on her death, her share or proportion of this right or possibility would have descended to her children; and, in case of their death, without issue, in the lifetime of their father, it would go by descent to him — the very result which the testator sought most sedulously to prevent by this limitation to his heirs. It cannot be supposed that the testator intended to make a provision, the effect of which would be to admit his son-in-law to a share in that part of his estate, from which he expressly declared it to be his purpose to exclude him.

But this is not the whole extent to which this intent might be defeated, if the term "heirs-at-law" in this devise should be construed to be the heirs general of the testator at the time of his decease. It would then be a vested interest in them; if any of his children should die, leaving issue, this interest would descend to their children; in case of their death, it would go to their surviving parent, the son-in-law, or daughter-in-law, of the testator. To illustrate by an event which is understood to have already occurred: One of the testator's sons has deceased since the probate of the will, leaving an only daughter, who, as her father's representative, takes his right to this contingent interest, if it was vested at the time of the testator's death. If the daughter should die, this interest would go to her mother, a daughter-in-law of the testator; so that in the event of the death of the plaintiffs, or either of them, that daughter-in-law would take, as heir of her own daughter, a portion of the estates devised to these plaintiffs. The result of such an interpretation of this gift over to the heirs, would therefore be, in the supposed contingency, to give a portion of the testator's estate, not only to his son-in-law, the father of the plaintiffs, but also to a daughter-in-law, the wife of one of his sons, contrary to his distinctly declared intention; and the same result would follow in the like contingency in regard to the estates, devised in similar terms to the testator's other children.

This view of the intent of the testator in the gift over to his heirs-at-law, is greatly strengthened by the use of the same words with a similar meaning in a preceding part of the same clause in the will; by which he directs the trustees, in the event of the death of his daughter, without issue, to convey the estate, which had been held by them in trust for her use, to his heirs-at-law. Here he clearly intended that the conveyance should be made to those who should be his heirs, at the time the contingency should occur, and not to those who were his heirs at the time of his death. If the latter construction were adopted, it would follow that his daughter, being one of his heirs at his decease, had an equitable estate for life, and also a vested right to a conveyance in fee of the same estate, upon her own decease — an interpretation manifestly absurd; as it would present the anomaly of the creation of a trust estate for life for the separate use of the daughter, carefully guarded, so as to be beyond her own control and that of her husband, accompanied with a vested right to a conveyance of the whole estate in fee, subject to her absolute disposal. The language of the will and the intent of the testator are coincident. The trustees were to convey *in esse* when the contingency should arise. The conveyance was to be made to persons then answering the description of the testator's heirs-at-law, and not to those who were such at his decease, one of whom must necessarily have died before the contingency could arise. This interpretation of the term "heirs-at-law," as used by the testator in directing a conveyance by the trustees, is too clear to admit of doubt. It is reasonable to infer that the same words were used with like meaning in the very next clause of the will, in disposing of the same estates in the event of the occurrence of another contingency.

Without enlarging further upon this part of the case, the considerations already suggested render it certain that the intent of the testator was to devise the estates to those who should be his heirs-at-law, at the time the gift over should take effect. They cannot claim by descent, because the estate on the happening of the prescribed contingency would not vest in those who were the heirs of the testator at the time of his decease, and those who would be entitled could not take in the same proportions, as they would have done, if the devise over had been omitted. They must take, if at all, under the will as purchasers by force of the executory devise.

The only remaining question is, whether the intent of the testator can be carried out consistently with the rules of law; that is, whether the gift over as an executory devise will certainly take effect within the limits which are essential to its validity. The principles applicable to estates of this nature have been fully considered and

explained in a recent case. *Brattle Square Church v. Grant*, 3 Gray, 142. It was there held, that a limitation by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterwards, (adding, in case of gestation, about nine months,) is void for remoteness. In the present case, the limitation over was not to take effect until after the death of the testator's daughter, and after the death of her children, including those born after the death of the testator, or any of them. It was not a limitation upon a life in being, with twenty-one years superadded, but upon a life in being, and after its termination upon a life or lives not in being at the time of the testator's death, and which might continue for fifty years or more after the life of the first taker. Indeed the gift over could not take effect within the prescribed period as to the share of any child born after the testator's death, unless it died within twenty-one years after its mother. Standing by itself, therefore, as a devise to the mother, and, after her death, to her children, born or unborn at the testator's death, and, on their decease, to those who should be then the heirs of the testator, it was clearly too remote, because it was a limitation which possibly might not take effect until after the termination of a life in being at the testator's death, to wit, the life of the testator's daughter, and more than twenty-one years afterwards; that is, until the death of her after-born children, which might not occur within the allotted period.

But it may be suggested, that as the gift over was limited on the death of a child or children in the lifetime of the father, without issue, and as the father was living at the time of the testator's death, it is in fact a limitation on a life in being, and does not violate the rule of law. It is true that, as events have transpired since the death of the testator — to wit, by the death of his daughter, leaving a husband and children alive — the devise to the heirs would vest, if at all, before the expiration of the prescribed period. But the point of time at which the will is to be construed is at the testator's death. It is then that its language speaks. A devise must be then legal, or it must fail. It is not sufficient that on the happening of certain events the gift over may take effect, and, if originally limited to those events, would have been valid; but it must appear to be legal and valid in all the events which, at the time when the will takes effect, may by possibility occur. A limitation by way of executory devise to be valid must, *ex necessitate*, take effect within the prescribed period. If the event upon which the estate is limited, may, by possibility, not occur within that time, it is too remote. *Brattle Square Church v. Grant*, 3 Gray, 153, and cases there cited.

If, in the present case, the devise had been to the daughter for life, and on her death to her children in fee, but if the children or either of them should die without issue, in the lifetime of any husband of the daughter, living at the testator's death, then to the heirs of the testator, it would not have been liable to the objection of remoteness; because it would be limited over on an event which must occur within the allowed period, to wit, a life in being at the testator's death. But although, at the time of the death of the testator, his daughter had a husband living, his subsequent decease was neither impossible nor improbable. In the event of his death, she might have contracted a second marriage and had issue by a husband who was not born at the time of the death of the testator. Such an event was certainly improbable, but it was not impossible, and so the devise over might by possibility not have taken effect during a life in being at the testator's death, and more than twenty-one years thereafter. It was therefore void for remoteness.

Nor does it make any difference in the operation of the rule against perpetuities upon the devise in question, that the gift over might take effect, as being within the proper limits in relation to a portion of the estate devised, although void as to another portion, as being too remote. For instance: It might be contended that as to the portions of the estate which would go to the grandchildren of the testator, born during his life, or during the lifetime of his son-in-law living at his decease, the gift over was not open to objection on the ground of remoteness, although it might be as to the shares of other grandchildren, the issue of a second marriage of the daughter of the testator, and born after his death. But the difficulty is, that the shares of the grandchildren were contingent till the death of their mother. The trustees were to convey to the children then living. Those who had previously deceased took no vested interest until the event happened. The fee remained in the trustees, who were to convey it to those of her children who survived her. Under this devise, therefore, it was possible that the entire estate would go to children of the daughter, born after the testator's death, and by a husband not then living. Such might be the result, if the children of the first marriage should die before their mother; and in that event the whole estate would be limited over on a contingency too remote. As the validity of the gift over must be determined on the principle, that it cannot by possibility take effect beyond the period allowed by law, it follows that this devise must fail, because the limitation to the heirs is made to depend on an event which may not happen until after that period has expired. The possibility, however remote, that the limitation may not take effect within the

time fixed by the rule, is fatal to its validity. Lewis on Perp. 170; *Newman v. Newman*, 10 Sim. 51; *Dodd v. Wake*, 8 Sim. 615. See, also, *Challis v. Doe*, 18 Ad. & El. N. R. 231, 247.

The entire devise over to the heirs must, therefore, fail as being too remote; and as the rule applies to every executory limitation by will, whether of real or personal estate (Lewis on Perp. 169), the whole of the property comprehended in the gift to the heirs of the testator, must vest in the plaintiffs, free from the divesting limitation. The fee to be conveyed, and the personal property to be transferred, by the trustees to the plaintiffs, being subject to a gift over, which is void for remoteness, remain in them absolutely, unaffected by the limitation to the heirs of the testator. *Brattle Square Church v. Grant*, 3 Gray, 156.

We are inclined to the opinion that the gift over, being an executory devise, is void for another reason. By the will, the testator has given to his grandchildren the power to make a will, and dispose of the estates given over to his heirs, if they shall have arrived at the age of thirty years, at the time when they are to receive the property from the trustees; that is, on the death of their mother. One of the distinguishing features of an executory devise is its indestructibility by the first taker. Here is a power of disposition expressly given to the children, which is inconsistent with the gift to the heirs. See *Holmes v. Godson*, 35 Eng. Law & Eq. R. 591, and cases cited. But it is unnecessary to determine this point, and we forbear to express an opinion upon it.

Decree for the plaintiffs.

SUPPLEMENTARY CASES.

LILLIBRIDGE *v.* COAL CO.

107.¹

143 PENNSYLVANIA STATE, 293. — 1891.

PLAINTIFFS' predecessors in the ownership of certain land deeded to defendant company "all the merchantable coal underlying" a particular tract of forty-five acres of said land "together with the sole and exclusive right to mine or remove the same." Further facts and the nature of the action will appear below.

GREEN, J. — * * * It is not possible that there can be any question that this is an absolute grant in fee-simple of all the coal under the surface of the tract. But it is contended with great earnestness and ability by the learned counsel for the appellants, that nothing more than the coal passed to the defendant under the agreement, and as to the chamber or space left by the removal of the coal under the mining operations of the defendant, the plaintiffs were still owners, in fee, or reversioners, with a right which could not be invaded by the defendant, except for the purpose of removing the coal that underlaid the surface. This brings us to consider the precise character of the present proceeding, and the particular question that arises under it.

The proceeding is a bill in equity to restrain the defendant from removing coal belonging to them on another tract adjoining this tract on the north, by moving the same through a tunnel or way made by the defendant through one of the underlying veins of coal across the tract to the other land of the defendant, two hundred feet below the surface, of considerable breadth and twelve feet in height. It is alleged in the bill that this way was produced by the mining operations of the defendant in accordance with the contract, and that the defendant, having acquired the adjoining property after the agreement with the plaintiffs was made, have been and are taking out coal from the adjoining tract through and over this tunnel or way, and this is claimed to be an illegal use of the plaintiffs'

¹ Figures in full-face type refer to the page where the case should be added in the assignment of work.

property which they asked to have restrained. The argument is that it was not within the intention of the parties that such a right should be granted or exercised, and that whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations that it cannot be used without their permission.

There is nothing in the instrument or in the circumstances surrounding it, which can give any force to the argument from intention. We cannot know what was the intention of the parties except from the terms of their contract. The defendant demurred to the bill for want of equity. No testimony of any kind has been taken. The bill makes no averment of any intention of either of the parties, but simply sets out the contract and the acts of the defendant in executing its terms. Of course, there are no surrounding facts that we can consider. There are none in the bill except such as are subsequent to the contract, and these amount only to an allegation of the subsequently acquired interest of the defendant in the adjoining property, and the removal of the coal therefrom through the way made by the removal of the coal under the tract.

The proposition that the plaintiffs have a fee in the chamber or space left by the removal of the coal, antagonistic to the right of the defendant to use it, is a novel one. No authority is cited to support it, and it seems quite incongruous with the admitted ownership and estate of the defendant in the coal displaced. Under all the decisions, the coal in place was absolutely owned in fee-simple by the defendant. In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee-simple, and not own the space it occupied? Or, how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell v. Fulton*, how can the law regard the space which the substance occupies, as other than the substance itself? Of course, such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellants' argument. It could not be otherwise. Certainly, if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil

above. We said in *Caldwell v. Fulton*, "It is a common thing, in the mineral districts of Pennsylvania, for the surface to belong to one owner, and the coal which it covers to another. Both the surface and the coal are held by deeds, executed and delivered and recorded in the same manner; and there is no more reason for considering the coal an incorporeal hereditament, because it has not been opened, than there is for considering the soil such, because it has not been ploughed. Still less reason is there for calling it an incorporeal hereditament, if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal, instead of describing the coal without the customary circumlocution. In all these cases, where the right, rather than the thing, is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold. And where that is a coal bed, it is an abuse of language, and an unnecessary application of legal distinctions, to call it an incorporeal hereditament." [If, then, the coal in place is a pure corporeal hereditament, the title in fee-simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies, than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases.

By the necessity of the case the appellants argue that the defendant's right in the chamber or way is only an easement, and then cite authorities that an easement can only be exercised to the extent of the grant. But as we have already seen, this is in direct hostility to all the authorities on that subject. * * *

The right to use that space is exclusively in the defendant, and that use is not and cannot be questioned by the plaintiffs. It is not alleged that the defendant has failed to perform any duty imposed upon it by the contract. We are bound to assume, therefore, that all the coal which the defendant agreed to take out or pay for each year has been taken out or paid for. In no circumstances would the case be a proper one for an injunction. * * *

There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed-rock underneath the vein; on the contrary, it is alleged that the tunnel has been cut through the coal, by which we understand it is in the very body or substance of the coal which was bought by the defendant. It follows, hence, that the tunnel or way is exclusively within the defendant's own property, and is subject to such use as any owner

may desire of property belonging to himself. Upon the whole case, we think the disposition of it made by the learned court below was correct.

Judgment affirmed.

114. The Soil.

**THE LACUSTRINE FERTILIZER CO. *v.* THE LAKE GUANO
AND FERTILIZER CO.**

82 NEW YORK, 476. — 1880.

ABOUT 1853 the State dug a channel through lands of one Torrey. Marl taken from the ditch was deposited upon the banks. The banks so covered were then used by Torrey as a garden. In 1865 Torrey conveyed his farm to one Spaulding by a warranty deed, expressly excepting, however, the "beds or deposits of marl." It was stipulated that the marl might remain on the land for ten years and that Torrey might, "at any time within said ten years, remove a part or the whole of said marl." Spaulding gave Torrey a purchase-money mortgage. In 1866 Torrey executed to one Barnum a sealed instrument purporting to grant and convey said beds of marl to him and his heirs forever and containing a covenant of warranty. This deed was never recorded. Plaintiff claims the marl under this instrument through certain mesne conveyances. In 1869 Torrey, through foreclosure of the Spaulding mortgage, re-acquired title to the premises conveyed by him to Spaulding. Torrey died in 1870, and in 1874 his devisees conveyed the land to one Evans. Evans was a purchaser for value without notice of the deed to Barnum and he put his deed on record. Defendant claims under the Evans title. This action is brought to restrain defendant from removing or in any way interfering with this marl.

ANDREWS, J. — * * * When [the Spaulding] conveyance was made the marl was a part of Torrey's land. It was a part of the soil when excavated, and its character as land was not changed by reason of its displacement from the bed it originally occupied and its deposit on the other land of Torrey. It was not deposited with a view to removal. The value of the marl as a fertilizer was not known until about the time of Torrey's conveyance to Spaulding. It was not severed from the land, as timber trees cut by the owner, or as coal or minerals mined and deposited on the surface, with a view to a sale as chattels. By the deposit it became incorporated with and a part of the soil where it was deposited, and after as

before the deposit it was a part of Torrey's freehold. It does not appear that the State before cutting the channel had acquired title to the land through which it was made. But if that fact had been shown it would not, we think, have changed the conclusion that the marl, when deposited, became a part of the land on which it was placed. Soil removed from the land of one person and placed on the land of another by his consent, without any intention on the part of the former to reclaim it, or any agreement authorizing him to remove it, becomes a part of the land of the latter. In *Blewett v. Tregonning*, 3 Ad. & El. 554, the plaintiff sued the defendant in trespass for taking sand from his close. The defendant pleaded that the sand drifted onto the plaintiff's close from the sea-shore, and that, by custom, the defendant was entitled to the sand for manuring his own soil. The alleged custom was held to be void, and Patterson, J., said: "I am of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is a part of his close, and he has a right to it against all the world." It can, we think, make no difference whether, by avulsion or alluvion, or other action of the elements, the soil of one person is transferred to the land of another, or is placed there by the voluntary act of the former owner, with the consent of the other party, with the intention of leaving it there permanently. See, also, *Dearden v. Evans*, 5 M. & W. 11.

The marl being then a part of the realty at the time of the conveyance to Spaulding, the question arises as to the effect of the exception in Torrey's deed. The exception was of a part of the soil, viz.: the "beds of marl," with the right in the grantor to remove them within ten years from the date of the deed. The title to the land on which the marl was deposited was not excepted from the conveyance. It was like an exception by a grantor of the timber trees growing on the land granted, with the right of removal within a fixed period. The position and rights of Torrey under this deed were, we think, precisely similar to what they would have been if Spaulding had owned the land, and had granted to Torrey the beds of marl, with the same right of removal as is contained in Torrey's deed. The exception was of an interest in the land conveyed, but it was an interest terminable at the expiration of the ten years. It was in legal effect a reservation to Torrey of so much of the marl as he should remove from the premises within that time. If the right of removal was not exercised within the time limited, the right was gone, and Torrey's grantee would thereafter hold the land and the marl, relieved from the burden created by the exception. In *McIntyre v. Barnard*, 1 Sandf. Ch. 52, an instrument was executed

in 1836, by which M. granted, bargained and sold to C. and H. all the pine timber standing on certain land, habendum to them, their heirs, etc., together with the right of entering upon the land until January 1, 1841, to cut and remove the timber, and the Vice-Chancellor held that it was a grant of all the pine timber which should be removed from the land before the 1st of January, 1841, and that after that day the grantees had no interest or right in the timber then standing on the premises. The same rule was applied to a contract for the sale of timber trees in *Boisauvin v. Reed*, 2 Keyes, 323, and in *Kellam v. McKinstry*, 69 N. Y. 264, to a contract for the sale of bark to be taken from trees by the vendee. And long before these cases it was said in *Touchstone*: "If one grants lands in fee, excepting the trees or any other thing, to the grantee, without saying 'and to his heirs,' by this exception the thing excepted is severed only for the life of the grantee, and then it shall pass with the rest of the thing granted." Page 100. * * *

[Evans was chargeable with notice of the exception in the deed from Torrey to Spaulding, as that deed was on record at the time he took his conveyance. But the right reserved to Torrey thereby, except for the conveyance to Barnum, would have merged in the fee acquired by Torrey on the mortgage sale. The principle was adjudged in *Liford's Case*, 11 Rep. 50a: "If a man makes a feoffment in fee of a manor, excepting the trees, and afterwards the feoffee buys the trees, they are again made parcel of the inheritance although they were absolutely divided for a time." * * *

The question arises whether the instrument executed by Torrey to Barnum is a conveyance of real estate within the recording act? If it was, then not having been recorded it was, by the express terms of the statute, 1 R. S. 756, § 1, void as against Evans, a subsequent purchaser in good faith for a valuable consideration, and the Lake Guano & Shell Fertilizer Company, which has succeeded to his title, stand on the same right, and it is immaterial whether the company or any intermediate grantee from Evans did or did not have notice of the conveyance to Barnum when their rights accrued. A purchaser, from one who is protected by the recording acts against a prior unrecorded conveyance, is himself entitled to such protection, notwithstanding he purchased with notice. *Wood v. Chapin*, *supra*; *Griffith v. Griffith*, 9 Paige, 315. I think that the instrument executed by Torrey to Barnum was a conveyance within the recording act. By the 38th section, 1 R. S. 762, it is declared that the term "conveyance," as used in that act, "shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the

title to any real estate may be affected in law or equity; except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands." In *Green v. Armstrong*, 1 Den. 550, the doctrine was finally settled in this State that a contract for the sale of growing trees is a contract for the sale of an interest in land within the statute. Growing trees are not like growing crops, the product of annual labor and cultivation, which may be sold by parol and are regarded for most purposes as chattels. *Whipple v. Foot*, 2 Johns. 422; *Austin v. Sawyer*, 9 Cow. 40. The sale of a part of the soil is the sale of an interest in the land, and must, like the sale of trees, be in writing.

It is not material in determining the application of the recording act that in analogy to the sale of timber trees the marl, after the conveyance to Barnum, may have become, on the doctrine of constructive severance, personal property in the vendee which he might sell as such, and which on his death, without actual severance, would go to his executor. *Stukeley v. Butler*, Hob. 168. In the case of timber trees a sale is not equivalent to an actual severance as to all persons. It is said in *Liford's Case*: "If a tenant in tail sells the trees to another, now they are a chattel in the vendee and his executors shall have them, and in such case *fictione juris* they are severed from the land; but if tenant in tail dies before actual severance, they are part of the inheritance and shall go with it, and the vendee cannot take them, and yet, *quoad* the tenant in tail himself, they were severed for a time. So in the case at bar, *quoad* the lessee, *fictione juris*, they are divided for a time; but *quoad* the lessor, and all others, they remain parcel of the inheritance." It would be contrary to the policy of the recording act to construe the sale to Barnum as a sale of personal property on the theory of constructive severance. The statute was intended to protect *bona fide* purchasers for value against unrecorded conveyances of estates or interests in the land purchased. If the marl became personalty by force of the agreement between Torrey and Barnum, and for that reason is not to be regarded as a conveyance within the recording act, for the same reason the owner of land might convey, by an unrecorded deed, a sand bed or the coal or minerals thereon, and the conveyance would be good as against a subsequent purchaser for value of the fee without notice, although the rights created by the unrecorded instrument might greatly impair or even destroy the value of the fee and leave in the purchaser a mere naked title.

We think it must be a general rule that the owner of land cannot, by agreement between himself and another, make that which in its nature is land, personal property, as against a subsequent purchaser

for value, without notice, there having been no actual severance of the subject of the agreement when the subsequent grant was made, and we are also of the opinion that, in the case supposed, the doctrine of constructive severance cannot be applied to defeat the rights of subsequent purchasers under the recording act. The rule that things of a personal nature annexed to the freehold by a person other than the owner may, by agreement between him and the owner, retain their character as chattels and will not pass on a conveyance of the fee, is not applicable. The chattels in the cases to which the doctrine is applied were such originally and never became a part of the land. In *Vorebeck v. Roe*, 50 Barb. 302, it was held that a contract for the sale *in presenti* of standing timber was a conveyance within the recording act.

We are of the opinion that upon the case now presented the title to the marl is in the corporation defendant, but the Special Term dismissed the complaint on the ground that the title being disputed the plaintiffs should have brought a legal action to try the title before commencing an equitable action for an injunction. It appears that a suit in replevin was pending between the parties when this action was commenced involving the title to the marl. We do not understand that it is indispensably necessary, under our present blended system of procedure, that in case of a disputed title to land the title must be determined by a legal action before the court will interfere by injunction to restrain alleged trespasses by one of the parties. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *West Point Iron Co. v. Reymert*, 45 id. 703; *Broiestedt v. South Side R. R. Co.*, 55 id. 220. But we are of opinion that the Supreme Court in this case could in its discretion refuse to entertain the action until after the pending action was terminated and that on that ground alone the judgment below can be upheld.

We have examined the question of title, as counsel for both parties have desired it, and have reached the conclusion stated in the foregoing opinion. But to save the rights of plaintiff on the question of notice to Evans, of Barnum's deed, a question which may not have been fully litigated on this trial, we put the affirmance of the judgment on the ground that the court had the right, in its discretion, to deny equitable relief until the pending action had been determined.

Judgment affirmed.

116. Surface Waters.

BARKLEY v. WILCOX.

86 NEW YORK, 140. — 1881.

THIS action was brought to recover damages for injuries alleged to have been sustained by the obstruction of the natural flow of surface water from plaintiff's lot over and across that of defendant.

ANDREWS, J. — * * * This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course, because in times of drought the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water. Angell on Water-courses, § 4; *Luther v. The Winnisimmet Co.*, 9 Cush. 171.¹ [After pointing out that the doctrine of the common law as to the drainage of surface waters is in force in most of our states, the court proceeds as follows:] In some, the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of men has not created or increased the servitude. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat (Cush. ed.), 616; Code Napoleon, art. 640; Code Louisiana, art. 656. The courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*, id. 407; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 id. 158; *Ogburn v. Connor*, 46 Cal. 346; *Dela-houssaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an

¹ Such portions of the opinion as are omitted here will be found at pp. 837-840. *supra*. — ED.

incident of his estate, to have the surface water falling on his land, discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents, the surface water from passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 id. 106; *Bowlshy v. Speer*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 id. 656; *Swett v. Cutts*, 50 N. H. 439. It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State in respect to surface drainage. *Bents v. Armstrong*, 8 Watts & S. 40. And in *Livingston v. McDonald*, 21 Iowa, 160, the court, in an opinion by Dillon, J., after stating the civil-law doctrine, say that it may be doubted whether it will be adopted by the common-law courts of this country, so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states, that the prevailing doctrine seems to be that if for the purposes of improving and cultivating his land a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land and which formerly flowed on to the first mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. Wash. on Easements, 2d ed., 431. [After discussing certain reasons for the common law rule, the court concludes as follows:] It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course, in some cases the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will in the whole best subserve the public interests and is most reasonable in practice? For the reasons stated, we think the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots) are crossed by the depression. They must remain unimproved

if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

Judgment affirmed.¹

120. Prior appropriation of waters.

ATCHISON *v.* PETERSON.

20 WALLACE (U. S.), 507. — 1874.

THE first appropriator of certain waters for mining purposes (in Montana) asks an injunction against certain persons who, he claims, are invading his rights.

FIELDS, J. — By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metal is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of the water in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agri-

¹ As to rights of riparian owner to change mode of surface drainage into a stream, see *McCormick v. Horan*, 81 N. Y. 86, and *Noonan v. Albany*, 79 N. Y. 470.

cultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 379, "whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject and all the difficulty which arises consists in the application." 3 Kent's Commentaries, 439, side paging.

This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral

from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories. In *Irwin v. Phillips*, 5 Cal. 140, a case decided by the Supreme Court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the Federal government, and heartily encouraged by the expressed legislative policy of the State, the court said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers." * * *

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the

water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the Supreme Court of California in *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 143, where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause for complaint. In the subsequent case of *Ortman v. Dixon*, 13 Cal. 33; see also *Lobdell v. Simpson*, 2 Nev. 274, the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the use for which it is taken.

What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. This is substantially the rule laid down in *Hill v. Smith*, 27 Cal. 483; Yale on Mining Claims and Water Rights, 194. But whether upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. * * *

Decree affirmed.¹

¹ In several of the western states the rule as to prior appropriation is also applied to the irrigation of arid lands. *Drake v. Earhart*, 2 Idaho, 717. See also, *United States v. Rio Grande, etc., Co.*, 174 U. S. 690. — ED.

133. **Waters.****BLOODGOOD v. AYERS.**

108 NEW YORK, 400. — 1888.

THIS action was brought to restrain an alleged wrongful diversion of the waters of a spring on defendant's land from their natural channel.

FINCH, J. — * * * The General Term reversed the decision of the trial court mainly upon a single proposition which was founded upon undisputed evidence. A spring or at least a reservoir of water existed upon plaintiff's land, disclosing itself at the surface about twenty feet from the dividing line between the parties. The water from that reservoir followed depressions in the land across plaintiff's meadow to the road. It ran in no defined channel having natural banks, but flowed over the sod almost wholly without breaking it, following the lowest levels and sometimes spreading out over an acre or more. Its route could be traced by the deeper green of the grass which it watered, but it proved no obstruction when that came to be cut, for the evidence is that the plaintiff mowed across it habitually as if it were not there. He, himself, said in answer to the inquiry whether he could see the current, that in a wet time "you can see it a good ways," but in a dry time "you can see it maybe two rods, but anyone who did not know there was a spring there would not notice." When asked on cross-examination whether there were any banks to what he called the stream he could not say that there were; and at the inquiry if there was a channel was evidently puzzled; and saying there was no ditch cut, and then that he cut out a furrow answered the question four times repeated, by saying that he did not know how to answer it; and the inquiry being pressed once more, replied "of course there is a channel where the water flows." When asked the width of the channel he replied, "there are so many different channels I don't know how to get at it; the water covers a couple of acres of my meadow." The next witness for plaintiff had seen the water run across the meadow during a freshet, but could not say as to any other time; while a third witness pressed to describe an obvious channel said only "the course the water did take through you could see by the grass." The plaintiff's sons describe this flow somewhat stronger so far as the use of the words "bed" and "stream" were concerned, but without at all changing the facts. On the part of the defense it was shown that when water was visible on the meadow it was in times of freshet, when the water shed of twenty or thirty acres above

poured rain or melting snows down the depression described. Very probably some portion of the water crossing the meadow came by percolation through the earth from defendant's spring above, but, granting that, it seems to us difficult to say from the evidence that there was a water-course across the plaintiff's land within the definition of that term which we have heretofore adopted. *Barkley v. Wilcox*, 86 N. Y. 147.

But the General Term put their conclusion upon another ground growing out of some further facts. Upon defendant's premises, and something over a hundred feet from plaintiff's line, there was a living spring which came up out of the earth and was carried by a short leader to a trough which had long served as a watering place for the stock of defendant and previous owners. At that trough, or within a few feet of it, all the waste or surplus water sank into the ground and disappeared. What became of it was in no manner obvious to the senses until by digging and experiment a probability was established. About a hundred feet from the spring and within perhaps twenty feet of plaintiff's line water appeared upon the surface, sometimes seen to be in motion towards a sluice under the fence arranged for the passage of surface water mainly or in part at least. At that sluice the water except in times of freshet again disappeared, but came to the surface about twenty feet on plaintiff's side of the line, and at the point where his spring or reservoir was established. His experiments, which he details, make it strongly probable that by percolation or subterranean currents more or less of the water of defendant's spring reached the plaintiff's spring or reservoir, but the fact, if it be one, is established only as the result of inference or reasoning. In this state of affairs the defendant carried the waters of his spring to his house for domestic uses, and so, it is claimed, intercepted the supply of plaintiff's reservoir, and for that alleged wrong this action was brought.

The General Term held that it could not be maintained and we are of the same opinion. No stream or water-course ran from the spring. The source from which it came and the flow of its waste or surplus were alike under ground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to water-courses and their diversion apply. *Broadbent v. Ramsbotham*, 34 Eng. L. & E. 513; *Rawston v. Taylor*, 33 id. 435; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Goodale v. Tuttle*, 29 id. 466; *Ellis v. Duncan*, 21 Barb. 234; *Barkley v. Wilcox*, 86 N. Y. 147. The only exception established by the authorities is that of certain underground streams or rivers which are

known and notorious and flow in a natural channel between defined banks. A few such exceptions are admitted to exist and others may occur; but outside of these, sub-surface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water-courses, and they may be intercepted or diverted by the owner of the land for any purpose of his own. The case first above cited resembles the present one in the feature that the action was to prevent the interception and diversion of certain sources of supply reaching a water-course known as Longwood brook. One of these was a swamp or wet piece of ground, which the opinion describes as "merely like a spring, so to speak, fixed on the side of a hill;" and of the subterranean courses communicating with the swamp, which certainly existed, it was deemed a sufficient answer that they were "not traceable so as to show the water passing along them ever reaching Longwood brook." Another source of supply was described as a stream welling out of the ground at a depth of about two feet, which flowed into a receiving basin three feet square, used as a watering place. In those respects it resembled the spring in the present case, but unlike that the surplus and waste, instead of disappearing in the ground, followed ditches and depressions in the surface until it reached the brook. Both supply sources were intercepted and diverted and a right of action therefor denied — as to the first, on the ground that the subterranean currents were concealed and not traceable; and the second, upon the distinct proposition that the owner might intercept or stop them before they reached a natural water-course. In *Village of Delhi v. Youmans* (*supra*), it was said that the owner of land might lawfully intercept percolations or underground currents. The reasons and justification of the doctrine are well stated in *Acton v. Blundell*, 12 M. & W. 324. They are, that as the water does not flow openly in the sight of the owner of the soil under which it passes there is no ground for implying consent or agreement between the adjoining proprietors, which is one of the foundations on which the law of surface streams is built; that a different rule would enable a lower proprietor to prevent the upper owner from using the water in his own soil, and expose him to loss and danger in making improvements on his own land; and a further reason is found in the indefinite nature of the right claimed and the great extent of obligation which would be incurred.

The law in other States is in accordance with the views here expressed. *Haldeman v. Bruckhardt*, 45 Penn. 514; *Greenleaf v. Francis*, 18 Pick. 117; *Frazier v. Brown*, 12 Ohio, 294; *Chatfield v. Wilson*, 28 Vt. 49; *Roath v. Driscoll*, 20 Conn. 533; and the rule is

strongly stated in Angell on Water-Courses, chap. 4, § 114, as being that "the owner of land on which a spring issues from the earth has a perfect right to it against all the world except those through whose land it comes, and has a right to it even as against them until it comes in conflict with their enjoyment of their own property." The proposition while very broadly stated; and somewhat open to criticism, embodies the substance of the prevailing doctrine as to the right of the owner to intercept and divert underground currents and percolations for his own uses without responsibility to a lower proprietor.

The judgment of the General Term should be affirmed and judgment absolute rendered for the defendant with costs.

Order affirmed and judgment accordingly.

133. Percolating waters.

FORBELL *v.* CITY OF NEW YORK.

164 NEW YORK, 522. — 1900.

THE judgment below granted a perpetual injunction restricting the city from operating the "Spring Creek Pumping Station," and awarded the plaintiff past damages and costs.

LONDON, J. — The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or sub-surface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the sub-surface waters are unobservable from the surface, they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its

own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. City of Brooklyn*, 160 N. Y. 357, a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the sub-surface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law as expounded in many cases in this State, denies liability. *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 id. 520; *Village of Delhi v. Youmans*, 45 id. 362; *Phelps v. Nowlen*, 72 id. 40; *Bloodgood v. Ayers*, 108 id. 400; *Van Wycklen v. City of Brooklyn*, 118 id. 424.

The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees. & W. 324, and *Greenleaf v. Francis*, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil so long as it remains there is — unlike water flowing in a surface stream — a part of the soil itself. *Barkley v. Wilcox*, 86 N. Y. 140. That a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the sub-surface support or supply of sub-surface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were

ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the Appellate Division in *Smith v. City of Brooklyn*, 18 App. Div. 340. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive, before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain and thus provide its people with water without injustice to the plaintiff.

Judgment affirmed.¹

149. Ice.

VAN RENSSELAER v. MOULD.

48 HUN (N. Y.), 396 (399). — 1888.

INGALLS, J. — * * * It appears by the facts found by the referee, and the evidence is to the effect that, previous to the cutting and removal by the defendant, the ice remained precisely as it formed in the river. The plaintiff's testatrix had not even marked it for cutting or placed around it or upon it anything to indicate that she proposed to harvest the same. There was no severance by which the ice took the form of personal property or which indicated an intention on the part of Mrs. Van Rensselaer to make it such. If she had caused the ice to be cut into blocks it would have given it the appearance of personal property and amounted to a strong assertion that she regarded it as such in her possession. Considering the character of the stream, the situation of the ice before its removal by the defendant and the manner it had been treated by Mrs. Van Rensselaer, we conclude that if she possessed any property in the ice it could only be regarded as incident to the land to which it had become temporarily attached. Exactly what such interest was it is quite difficult, under the circumstances, to apprehend or define.² *Huntington v. Asher*, 96 N. Y. 604. * * *

¹ See "Percolating Waters: The Rule of Reasonable User," by E. W. Huffcut, 13 Yale Law Journal, 222. — Ed.

² The ice was taken from the Hudson below tide water but at a point where the plaintiff owned the bed of the stream. The action was for wrongful entry upon lands of testatrix and cutting and removing ice. It was held that in such form of action injury to the real estate is the question and the ice for the purpose of such an action must be viewed as an incident to the land and not as personal property. Compare *Am. Union Tel. Co. v. Middleton*, 80 N. Y. 408. — Ed.

174. Growing grass.

SMITH *v.* JENKS.

1 DENIO (N. Y.), 580. — 1845.

ARNOLD was a tenant of Hunt under an agreement by which the growing grass was to belong to the tenant. Arnold gave to Jenks a chattel mortgage on the grass before it was cut. Arnold cut the hay and thereafter it was levied upon and sold to Smith under an execution against Arnold. Jenks took possession of the hay and Smith sued him in trespass.

JEWETT, J. (for the court). — The grass of which the hay in question was made, when mortgaged, was growing on land occupied by Arnold, the mortgagor, as a tenant to one Hunt. Both parties claimed through him, thereby assuming that he, by some agreement, made between him and Hunt, had title to the property in it. This being so I am unable to see any legal objection to his capacity to sell or mortgage the grass at the time he executed the mortgage to the defendant so as to pass to the vendee or mortgagee his interest in it. It is true that growing grass, as a general principle, does not come within the description of goods and chattels, and cannot be seized as such under an execution against the owner of the land. It goes to the heir and not to the executor; and the rule is the same with respect to buildings and other fixtures, the property of the person seized of the land. But where the lands are owned by one person and the growing grass or buildings by another, neither the grass or buildings, on the death of the owner, would go to the heir; but would be assets in the hands of his executor. Such buildings are personal property.¹ *Smith v. Benson*, 1 Hill, 176.

187. 2., aa. Realty or Personalty?

BAGLEY *v.* COLUMBUS SOUTHERN RY. CO.

98 GEORGIA, 626. — 1896.

ACTION in Justice's Court to recover damages for the destruction by fire of plaintiff's fences, pasture and crop of unmaturing cotton. The Court holds that a justice of the peace has no jurisdiction of an action for damages to realty and that the pasture and fence are clearly realty. The following are some extracts from the long opinion by

¹ Affirmed on this point in *Jenks v. Smith*, 1 N. Y. 90. — ED.

SIMMONS, CH. J. — * * * Our main difficulty in disposing of the question of jurisdiction raised in this case has been to properly determine the legal character of the third item of damage claimed by the plaintiff, arising out of the destruction of unmatured cotton growing in his field. Many of the modern text-books, and numerous adjudicated cases, have been adverted to during the course of our investigation; but with a result tending rather to confusion than to practical aid, so far as concerns a correct determination of the question whether, at common law, growing crops were characterized as personal or as real property. [*After citing many texts and the case of Preston v. Ryan, 45 Mich. 174, and quoting from some of them, the Chief Justice proceeds as follows*]:

Any one wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing crops has become involved, may profitably direct his attention to the legion of cases cited by the various text-writers to whom we have above referred — the field thus open to him is promising even unto distraction. Such a rich mine of abstruse legal learning is doubtless of untold value. It has not, however, proved helpful in the decision of the present case, nor led us to an understanding of the general principle underlying the whole subject. Indeed, we are free to confess, about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each particular class of cases in which the question arises whether it is to be considered as personalty or as realty. Amid all this glare of legal light, we have not been so fortunate as to find any case — or class of cases — like the present, in which this creature of the law has thus arbitrarily volunteered to assume its distinguishing hue. Like a man with many aliases, it presents itself sometimes under one name — at other times under quite another; so that we may not know how, upon special occasions, to address it. Being thus thrown upon our own resources, we feel at liberty and shall endeavor to classify the plaintiff's unhappy crop of cotton agreeably to our own understanding of the legal status of growing crops at common law, and without regard to the conflicting views entertained by the several authors from whom we have above quoted.

We may in the outset remark that, in our opinion, growing crops, before actual severance from the soil, were consistently regarded at common law as realty. Whatever incongruities may have crept into the law upon the subject as now understood in many jurisdictions, we believe attributable alone to a misconception on the part of courts of the present day of the rules which govern this species of

property under the feudal system prevailing in England at an early period of its history. Especially would it seem that the principle which underlies the doctrine of emblements has been too often overlooked, disregarded, misunderstood or misconstrued. [*At the close of an elaborate argument to the effect that the doctrine of emblements has no bearing on the question as to the legal character of a standing crop, appear these paragraphs*]:

Nor is the fact that at common law the executor of a deceased tenant was entitled to claim emblements any test as to the legal character of such crops while yet standing in the field. Herein we disagree with the conclusions drawn by Mr. Freeman and other writers. Formerly, under the common-law rules of succession, the title to crops unsevered from the soil could not pass into the executor. Under the doctrine of emblements, however, he was given the right to enter upon the land, in the name of the deceased tenant, and convert the crops into personalty by gathering the same and carrying them away; whereby the rules of succession governing personalty were given opportunity to ultimately take effect upon this species of property.

Again, as has been seen, many text-writers call attention to the fact that, at common law, an execution could be levied on a growing crop — evidently, regarding this as persuasive authority for the statement that such crops were considered personalty. — * * * Crops raised by the tenant in fee, being profits arising from the estate of freehold to which he was solely entitled were, of course, no part of the inheritance. They were therefore held subject to his debts — not upon the idea that they were personalty rather than realty — but upon the theory that they were a species of property in which the debtor had an unqualified and exclusive ownership. We believe the doctrine that all the property of a debtor, of every kind and description, of which he is sole owner, should justly be held subject to the payment of his debts, obtains even in this degenerate day. In this regard we find no inconsistency in the common law as to its treatment of growing crops as realty. On the contrary, the distinction between this class of property and mere chattels belonging to the debtor seems to have been strictly observed. The writ of *fieri facias* was restricted in its operation to the seizure of the “goods and chattels” of the debtor. To reach the *profits* of his lands (which consisted chiefly of crops grown thereon or rents issuing therefrom), the writ of *levari facias* was requisite, which writ remained in use until the writ of *elegit* (established by statute), conferring greater rights upon creditors, naturally displaced it in

general practice. [*Here follows a discussion of 2 Bl. Com. 404, then this paragraph*]:

It will further be observed that Blackstone seems very studiously to avoid characterizing even "emblems" as personalty, but very happily, we think, remarks instead that they are "subject to many, though not all, the incidents attending personal chattels." And herein we believe he has struck the keynote explaining how, in later times, growing crops have come to be considered personalty, simply because, the law having placed upon them many incidents common alike to chattels, no reason ordinarily exists for observing their true status as realty; and therefore the distinction which really still survives between them and mere chattels has not been clearly and constantly kept in view. Under various rules of law, many "incidents" attend, and are alike common to, both real and personal property. For instance, a new and special tax upon the property might be laid upon both realty and personalty, irrespective of their inherent character, and yet this would really make them no closer kin than they were before. We have already seen that at common law, while estates of inheritance were not subject to be levied on under execution, growing crops were held liable for the claims of creditors, simply because the exclusive ownership of such crops was vested in the debtor, and the heir to the inheritance had no interest therein. As crops raised by the debtor were, perhaps, the only species of realty of which this was true, and as all chattels were held subject to execution, it is not strange that, in course of time, the impression should take root in the minds of those not familiar with or not recalling the history of this rule of law and the reasons upon which it was based, that no distinction existed between these two kinds of property, especially as in other respects no difference in the treatment of either was observed. * * *

We shall not, in the present case, undertake to enter upon any discussion of the effect of the statute of frauds upon private sales of growing crops made by the owner thereof, preferring to make no attempt to successfully cross this dangerous legal bridge until necessity brings us to it. As it would appear an unpromising and impracticable task to try to reconcile the many decisions, English and American, in which this question has been dealt with and discussed, we could hope to gain no fuller light as to how, in point of fact, growing crops were classified at common law. So we may dismiss the topic by merely remarking that if "for the purposes of such sales, emblems are suffered to be treated as personalty," the case with which we are now dealing does not fall within this excep-

tion to the general rule; nor, indeed, within any other of the "exceptions" referred to by text-writers, or of which we are aware.

We cannot refrain from remarking, in this connection, the embarrassment we have experienced arising out of the practice, which seems to have sprung up in some jurisdictions, of arbitrarily regarding growing crops as personalty for one purpose, and as realty for another. In the very nature of things this species of property, being tangible in form and possessing many marked inherent characteristics, is capable of being properly classified, and should be given a fixed legal status. Of course, where there is no imperative necessity for strictly observing and remarking the distinction existing between two entirely different species of property — as where rules of law operating alike upon either class are merely to be construed and enforced — no vicious consequence or positive harm immediately results from "treating" them as though they were identical in character, or even in inaccurately styling something "personalty" which should properly be referred to as "realty." But the importance of preserving, if possible, absolute consistency in the entire fabric of our law — thus rendering the same unequivocal, and therefore more readily and more clearly comprehended — should by no means be overlooked. The justice of this critical observation is evidenced by the utter confusion in which we find the law upon the subject with which we are now dealing to be involved.

That growing crops cannot properly be "treated" as personalty under the law as understood in this State, seems indisputable in view of the definition of realty contained in section 2218 of the code, which purports to be declaratory of the common law, and which reads as follows: "Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon." [*Here follows a discussion of the cases bearing on this statute. The Court then proceeds as follows*]:

In the foregoing discussion we have faithfully endeavored to dissipate the darkness which overhangs and envelops the subject at the present day, and to show that at common law no inconsistency in the treatment of growing crops as realty in fact existed, even though *emblems* were subjected to many of the *incidents* which attached to chattels. Whether or not this attempt has been successful, we leave to the reader to determine. That the proper result in this particular case has been reached, we are entirely convinced, and cannot regard as even debatable. The plaintiff was the owner, not only of the crop destroyed but also of the land upon which it was growing. His crop, therefore, cannot possibly fall within the term "emble-

ments," nor properly be considered as even constructively constituting a species of property distinct from the land upon which it was growing at the time it was destroyed by fire.

Our conclusion, therefore, is that the justice's court had no jurisdiction to entertain the plaintiff's action. * * *

Judgment affirmed.

283. Compensation for improvements.

THOMAS *v.* EVANS.

105 NEW YORK, 601. — 1887.

THE executors of Thomas Thomas assuming to act under a power of sale contained in his will, sold certain premises to one S. for at least their full value and S., some years later, after placing valuable improvements upon the property, conveyed the same to Evans. Evans also made valuable improvements upon the property claiming to be its absolute owner. One of the children and heirs-at-law of Thomas now seeks in equity to annul and set aside the transfers as not authorized and to procure a judgment that the property and all improvements thereon belong to such children.

RUGER, CH. J. — * * * A claim to recover back property which has been fairly sold and paid for at its full value, and the consideration of which has accrued to the benefit of the plaintiffs, without offering to render compensation to one who, honestly believing himself to be its lawful owner, expended large sums in its improvement, and which now constitutes its greatest value, seems to be unjust and inequitable.

We are of the opinion that the purchase-price originally paid for the land and the value of the improvements, to the extent that they have added to its permanent value, constitute an equitable claim, and that even if the plaintiffs should establish an equitable right to the property it would not entitle them to judgment therefor, except upon the condition of refunding to the defendant Evans the amount so expended. * * * Such are the rules applicable to those relations [life tenant and remaindermen] when they are open and acknowledged, and no special circumstances exist authorizing the application of principles of equity, to reimburse one who, in good faith, has increased the intrinsic value of the property, by expending his own means in making permanent erections and valuable additions thereto under the belief that he was its lawful owner. Such circum-

stances are held to exist when a trustee or mortgagee in possession supposing, in good faith, that he has acquired title in fee to the property, goes on and deals with it as his own, and makes improvements which are of permanent benefit to the property. *Putnam v. Ritchie*, 6 Paige, 390; *Mickles v. Dillaye*, 17 N. Y., 86. In the *Putnam Case*, the chancellor laid down the rule, as expressed in the head-note, that "when industrial accessions have been made to property, in good faith by a person who has the legal title to the property, so that the real owner is compelled to resort to a court of equity to assert his equitable title to such property, this court acts upon the civil law rule of natural equity and compels the complainant to compensate the adverse party for such industrial accessions or improvements, as a condition of granting the equitable relief asked for in the suit." * * *

In *Mickles v. Dillaye*, 17 N. Y. 80, 86, the rule was applied to a mortgagor who attempted to redeem from a mortgagee in possession under a voidable sale, and the rule adopted is expressed in the head-note of the case as follows: "When valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the owner, for several years before and after the improvements, to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements, although exceeding the rents and profits received." * * *

Pomeroy, in a note to section 1242 of his work on Equity Jurisprudence, states the rule as follows: "When a person in peaceable possession under claim of lawful title, but really under a defective title, has, in good faith, made permanent improvements, the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure." * * *

Previous to the year 1860 all of the remaindermen had arrived at years of maturity and were aware that the defendant Evans claimed to be the absolute owner of the property in question. For over twenty years they not only neglected to dispute such claim, but permitted the defendant to go on in apparent security as to his title, and make improvements upon the property and deal with it as his own. There seems to exist here the natural equity which entitles a party who has, in good faith, with his own means, improved the property of another, to reimbursement by the parties benefited thereby, and this equity is strengthened by the conduct of the owners who stood by and saw such party, without notice or objec-

tion, incur expense under the belief that he was improving his own property.

We are, therefore, of the opinion that the trial court should have imposed, as the condition of any relief to the plaintiffs, the reimbursement by them to Evans of the original price paid by Swackhamer for the lots, and also of such sums as were expended by Swackhamer and Evans in their improvements, so far as they have increased the value of the land, and in case Evans is charged with the rents received from the property since the death of the life tenant, he should be allowed interest on the amount payable to him.

The plaintiffs have sought their remedy in equity, and that course seems to have been requisite as the condition of a right to the relief demanded. The deed from the executors to Swackhamer apparently conferred the legal title under the power of sale contained in the will. The purchaser was under no responsibility for any misapplication by the executors of the consideration paid by him for the land, and was entitled to rely upon their apparent power to receive such consideration and to convey the land given to them by the will. 3 R. S. (7th ed.) 2183, § 66. We have altogether refrained from discussing the question as to whether the conveyance by the executors to Swackhamer was a valid execution of the power of sale.

There seems to be much reason for saying, under the peculiar condition of this property, its unproductive character and the want of means in which the testator left his family, the liability of the property to be sold for taxes and assessments for municipal purposes, that the real limitation intended to be put by the testator upon the power of sale was contained in the words that it should be sold when his executors "may deem best for those interested therein," and not in the language by which they were directed "to invest the proceeds in bonds and mortgages or other securities as they may believe best." Some diversity of opinion, however, exists among the members of the court upon this question, and we, therefore, refrain from determining it, believing that this point decided will substantially dispose of the case upon a retrial.

The judgments, both interlocutory and final, of the courts below should be reversed and a new trial ordered with costs to abide the event.

Judgment accordingly.

290. Fixtures.**McFADDEN v. ALLEN.**

134 NEW YORK, 489. — 1892.

FOLLETT, CH. J. — In determining as between mortgagor and mortgagee whether articles are or are not fixtures, the same rules prevail which are applicable to cases arising between grantors and grantees. *Snedecker v. Warring*, 12 N. Y. 170; *Gardner v. Finley*, 19 Barb. 317; *Laflin v. Griffiths*, 35 id. 58; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Main v. Schwarzwaelder*, 4 E. D. Smith, 273; 1 Dart V. and P (6th ed.) 607; 1 Jones Mort., § 428. And as between mortgagor and mortgagee the same rules are applicable to articles placed on the mortgaged premises by the mortgagor after the execution of the mortgage. *Gardner v. Finley*, 19 Barb. 317; *Rice v. Dewey*, 54 id. 455, 472; *Sullivan v. Toole*, 26 Hun, 203; *Walmsley v. Milne*, 7 C. B. (N. S.) 115, 135; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Ex parte Belcher*, 4 D. & C. 703; *Ex parte Reynal*, 2 M. D. & De Gex, 443; 1 Jones Mortg., § 436; 1 Sug. Vendors (7th Am. ed.) 37, note 1; *Phoenix Mills v. Miller*, 4 N. Y. S. R. 787. In the case last cited the rule was well stated, as follows: "A mortgagee of real property is entitled to have his lien respected as to all that was realty when he accepted the security; also as to all accession to the realty, save, perhaps, when the accession is made under an agreement with the party that its purchase price or expense shall be secured and is secured by a lien thereon."

The same rules apply to articles annexed to the premises by a subsequent grantee or vendee in possession under an executory contract to purchase. *Eastman v. Foster*, 8 Met. 19; *Lynde v. Rowe*, 12 Allen, 100; *Glidden v. Bennett*, 43 N. H. 306; *Cooper v. Adams*, 6 Cush. 87; *Ogden v. Stock*, 34 Ill. 522; *Poor v. Oakman*, 104 Mass. 309, 318; 1 Wash. R. P., page 2, par. 4.

Bearing these general rules in mind, it remains to apply them to the particular facts involved in the case at bar, which briefly are as follows: Jeremiah McFadden was the owner in fee of eighteen acres of land, upon which was a mill-pond, saw-mill, dwelling and barn. December 11, 1878, he mortgaged the property to Orson Wallace to secure the payment of \$400 five years thereafter, with semi-annual interest, which mortgage was duly recorded September 2, 1879. The plaintiff, a son of Jeremiah McFadden, occupied the premises from December, 1879, until May 21, 1887, when he was ejected by a writ of assistance issued in and in pursuance of a sale made by virtue of a judgment foreclosing said mortgage.

The plaintiff testified that it was orally agreed between himself and his father that the former should take possession of the property, have the use of it, and when he had paid the mortgage he was to have a deed. The son was to make such improvements as he chose, with the right of removing them if he failed to pay the mortgage and acquire the property. Under this contract the son occupied the property for nearly eight years, and added to it some new buildings and machinery. Under this contract the plaintiff became the equitable owner of eighteen acres, and on paying the mortgage could have compelled a conveyance of the legal title by his father. *Freeman v. Freeman*, 43 N. Y. 34. The plaintiff could have devised the land, and, had he died intestate, his interest held under this oral contract would have descended to his heirs subject to the dower right of his widow. *Cogswell v. Cogswell*, 2 Edw. Ch. 231, 239; *Griffith v. Beecher*, 10 Barb. 432; *Warren v. Fenn*, 28 id. 333; *Dayton's Surrogate* (3d ed.) 630. While in possession of the eighteen acres under this arrangement with the father, the plaintiff and his father, with their wives, executed a mortgage on the eighteen acres and another parcel of thirty-seven acres June 16, 1885, to secure \$634.26 to Frances L. and Anna M. Harrison, who were made defendants in the action to foreclose the first mortgage, and they became the purchasers at the sale and afterward conveyed to the defendant. It is not asserted that Wallace, the first mortgagee, or the Misses Harrison had notice actual or constructive, of the alleged contract between the father and the son. The son, by the execution of the mortgage, treated the eighteen acres as his own, and the buildings and the machinery as a part of it, and he cannot now be permitted to assert as against the Misses Harrison or the defendant, their grantee, that the buildings and machinery were not fixtures.

The plaintiff, his wife, Jeremiah McFadden, his wife, Frances L. Harrison and Anna M. Harrison were defendants in the action brought by Orson Wallace to foreclose his mortgage, and were personally served with the summons and complaint in that action. The complaint contained this allegation: "The plaintiff further shows, upon information and belief, that Alexander McFadden, Lunetta McFadden, Frances L. Harrison, Anna M. Harrison and Truman Jones have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgagee."

None of said defendants appeared in the action and a judgment of foreclosure was recovered by default, pursuant to which the sale before mentioned was made, and the writ of assistance was issued. The plaintiff's rights in the eighteen acres were subsequent in time

to the mortgage given to and foreclosed by Wallace, which was alleged to be a lien on the property, prior in law and equity to the rights of the plaintiff in this, and the defendant in the foreclosure action. If the plaintiff intended to assert title to the fixtures he was bound to do it in that action and he could not lie by until a judgment had been entered declaring his rights inferior to the mortgage, and then assert as against the purchaser under the judgment or his grantee that his claim to the buildings and machinery was prior to the lien of the mortgage. On the trial of this action the plaintiff testified that July 7, 1886, he "stated in writing to the Ames Engine Manufacturing Co., for the purpose of obtaining credit, that he owned in fee the fifty-five acres of land covered by said two mortgages," and that March 3, 1887, he wrote to the agents of the Misses Harrison (the second mortgagees) that he had paid his father for the eighteen acres and held a deed thereof subject to the mortgage.

This statement was made for the purpose of obtaining a further loan from them. This evidence is entirely inconsistent with the plaintiff's present claim that he was merely the occupant of the premises, with the right to remove betterments, instead of the equitable owner with the right to have the legal title upon the payment of the Wallace mortgage; the plaintiff testified that he was not a tenant of his father and paid no rent. His position was that of a beneficial owner, subject to the mortgage, and all improvements which he made upon the property were subject to the rules of law applicable to mortgagors and mortgagees.

As an authority for the position that the agreement between the father and son impressed the character of chattels upon the buildings and machinery, we are referred to the case of *Tyson v. Post*, 108 N. Y. 217; an examination of the record in that case shows that the owner of the premises conveyed them for \$70,000, of which \$10,000 was paid down and \$60,000 was secured to be paid by the grantee to the grantors by two mortgages on the premises. Post paid to the grantors \$6,200 of the \$10,000, and then took a deed of the premises from the first grantee, it being orally agreed between him, the mortgagees and Post that he might remove the railway and machinery whenever he chose. This was held sufficient as between the mortgagees and Post to change the railway and machinery which were immovables or fixtures, into moveables or personal chattels, and relieve them from the lien of the mortgages.

In the case at bar, if the mortgagees and the owners of the fee had agreed with the plaintiff upon a sufficient consideration that he might remove the buildings and machinery, then they, as between

the parties to the agreement, would have ceased to be fixtures, would have become movables and relieved from the lien of the mortgage. But the mortgagees in the case before us were not parties to the alleged agreement between the father and son who could not by an agreement between themselves affect the lien of the mortgages or the rights of the holder of them.)

The judgment should be affirmed with costs.

BRADLEY, J. — The mortgage, through the foreclosure of which the defendants derived their title, was prior to the agreement between the mortgagor and the plaintiff. The title taken by the foreclosure vested by relation as of the time mortgage was made. *Rector, etc., v. Mack*, 93 N. Y. 488; *Batterman v. Albright*, 122 id. 484. It does not appear that the mortgagee in any manner assented to such agreement.

In *Sheldon v. Edwards*, 35 N. Y. 279, the arrangement that the property there in question should be treated as personal was made between the mortgagor and mortgagee.

In *Tift v. Horton*, 55 N. Y. 377, there was a stipulation of the mortgagee made before the sale that the legal rights of the plaintiff should not be changed by the foreclosure sale.

In *Globe M. M. Co. v. Quinn*, 76 N. Y. 23, the plaintiff was assignee of a lease of the premises made prior to the mortgage, and in *Tyson v. Post*, 108 N. Y. 217, the mortgagee was a party to the agreement that the property in controversy there should remain personal.¹

I concur in affirmance.

Judgment affirmed.

344. Manure.

CARROLL v. NEWTON.

17 HOWARD'S PRACTICE (N. Y.), 189 — 1858.

SARATOGA COUNTY COURT. One Daniel Hartnett rented of the defendant a house, barn, grocery and garden, at the yearly rent of \$100. At the time of renting Hartnett told the defendant that he might have the manure to be made at the barn, if he would furnish the straw to be used there. The defendant replied that he could not furnish the straw as he had no more than he wanted himself. The plaintiff afterwards agreed with Hartnett to furnish, and did

¹ Followed in *Chandler v. Hamell*, 57 App. Div. (N. Y.) 305. — Ed.

furnish the straw, with the understanding that the manure should be his. Hartnett for some time kept from eighteen to twenty horses at the barn. The defendant drew the manure away, claiming it as his own, "on the ground that it was not movable." The plaintiff brought this action therefor and recovered a judgment for sixteen dollars damages and five dollars costs.

MCKEAN, COUNTY JUDGE. — Where land is rented for agricultural purposes and manure is made upon it in the ordinary course of farming, such manure belongs to the landlord. *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142. "But this rule does not apply to manure made in a livery stable or in any manner not connected with agriculture or in the course of husbandry." *Daniels v. Pond*, 21 Pick. 367. In *Lassel v. Reed*, 6 Me. 222, some of the cattle kept on the farm belonged to the lessor and were leased with the premises; others belonged to the tenant. Some of the hay also was purchased by the tenant, and the residue was cut on the farm. It was held that the manure belonged to the lessor, but the court said: "We do not mean to be understood, by this opinion, as extending the principles, on which it is founded, to the case of tenants of livery stables in towns, and perhaps some other estates, having no connection with the pursuits of agriculture; other principles may be applicable in such circumstances."

In *Lewis v. Jones*, decided by the Supreme Court of Pennsylvania in January, 1852, the defendant who was a tenant of agricultural lands, claimed part of the manure, on the ground that he had bought and used on the place some hay and other provender. But the manure thus made was commingled with that made from the produce of the place.

In delivering the opinion of the court, Lewis, Justice, said: "The doctrine, that the manure goes with the land, is of course confined to farms which are let for agricultural purposes." He said also, "the tenant, by his own act, has rendered it impossible to ascertain the extent of his right. The doctrine of confusion of goods properly applies to his claim." This ruling clearly implies that, if there had been no commingling of the manure, the tenant could have held that made from provender bought by him, although he occupied agricultural lands.

When a landlord is allowed to hold manure, the reason for the rule would seem to be the fact that the manure is made from the produce of the farm, and, to allow the tenant to remove it, would tend to impoverish the farm. But where the manure is made from produce obtained elsewhere, or where the lands are not agricultural lands, no such reason, and, therefore, no such rule exists.

The manure in question belonged to Hartnett, or rather to the plaintiff, by virtue of his contract with Hartnett. What the defendant supposed to be the law of the case may not be important; but, that he understood the tenant as having a right to hold or dispose of the manure, may be inferred from the conversation at the time of renting the premises.

Judgment affirmed.

629. Seisin for curtesy.

CARR v. ANDERSON.

6 APP. DIV. (N. Y.) 6.¹ — 1896.

JOHN ANDERSON devised all his real estate to John Charles Anderson, one of his children. Decedent left five heirs-at-law, one of whom was the wife of Walter S. Carr. Mrs. Carr survived her father less than two months. She left no will. Her husband and one daughter, Mary Maud Watson, survived her. Later Mrs. Watson brought an ejectment action against the grantees of John Charles to recover a part of the lands of which her grandfather, John Anderson, had died seized, claiming that his will was invalid and that she, as one of *his* heirs-at-law, was entitled to an undivided one-fifth of his land. She succeeded and an appeal was taken by John Charles, who at the same time commenced an action to establish the will as a will of real estate. Mrs. Watson defended this action, but finally, having been paid a considerable sum, she withdrew her objection and Carr, on her request, having executed a consent, a decree was entered establishing the will. Carr now brings this action to have the decree set aside that he may come in and defend. He failed below and now appeals.

BROWN, P. J. — * * * It appears from the findings of the trial court that since such settlement was made, various parcels of land in the city of New York, of which John Anderson died seized, have been sold by the respondent to *bona fide* purchasers for large sums of money, and that upon said lots have been erected large and costly buildings, and that said purchasers took title thereto with knowledge of and in reliance upon the probate of said John Anderson's will and the judgment which the appellant seeks in this action to have set aside. At the foundation of the claim which the appel-

¹This case was taken to the Court of Appeals. In October, 1899, it was advanced on the calendar of that court (160 N. Y. 671), but no further record of it appears in the reports. — ED.

lant now makes lies the assertion that, by reason of the invalidity of John Anderson's will, he became possessed upon the death of his wife of an estate by the curtesy in an undivided one-fifth of the land of which John Anderson died seized. The learned counsel for the appellant does not appear to contend for the absolute truth of this proposition, nor am I able to find in the record that he requested the court at the trial to rule upon it. The findings of the trial court, which were made upon the appellant's request, were that his claim to curtesy was one of substantial value, and that the value of an estate for his life in real estate was about fifty per cent of the fee value thereof. But these facts the appellant knew before he executed the consent to the entry of the judgment against him, and he was advised by able counsel, who undoubtedly believed that his opinion, that the appellant possessed no estate by the curtesy in any part or share of John Anderson's real estate, was a correct statement of the law. This advice the appellant acted upon, and if he had not acted upon it, his daughter, whose interests he appears to have sought to protect and maintain, could not have successfully prosecuted her suit in ejectment or have brought about the settlement made with the respondent.

It is quite apparent, therefore, we think, that the appellant's application to set aside the judgment to which, under the circumstances he gave his consent, should receive very little consideration, unless the court is satisfied that the advice given him and upon which he acted was erroneous, and that upon the assumption of the invalidity of John Anderson's will he did possess an estate by the curtesy in one-fifth of the land of which said Anderson died seized. To set aside the judgment and permit the appellant to bring actions against the present owners of the land in question and therein seek to establish his rights and estate, would impose an unjust expense upon innocent parties and cast an unwarranted cloud upon their titles.

The proper place to settle the plaintiff's rights is in an action against the present defendant. We have no difficulty in reaching the conclusion that the appellant had no estate in the land in question. Tenancy by the curtesy was a common-law estate, and it has been adopted in this State without modification. Our Statute of Descent provides that the estate of a husband by the curtesy shall not be affected by any of the provisions of that chapter. 1 R. S. 754, § 20.

The appellant's claim must, therefore, be tried by the common-law rule applicable to such an estate. All the elements of such an

estate exist in the appellant, except seisin of his wife during coverture.

In order to entitle a husband to curtesy the wife must have had actual seisin of the lands during coverture. Constructive possession of the wife or a bare right to possess will not support the estate. 1 Washb. on Real Prop., 5th ed., 180, ¶¶ 24, 25; 4 Kent's Comm. 29, 30; 2 Black. Comm. 127; Willard on Real Est., 2d ed., 58; Hilliard on Real Prop. 111.

Actual seisin or actual possession, as distinguished from constructive possession or possession in law, has been defined to be one based upon an actual entry on the land and one which requires or gives an occupation as a demonstrative thing. *Churchill v. Onderdonk*, 59 N. Y. 134; *Boylston v. Wheeler*, 61 id. 521.

Washburn states the general rule to be that, if the estate be such that there may be an entry made upon it, there must be such an entry during coverture in order to give the husband curtesy. Vol. 1, § 25.

To the same effect see Coke upon Littleton, 29 (a) *558; Bacon's Abridgment, Title Curtesy C. 2; 4 Comyn's Digest, Title Estates D. 2.

In this State it was said by Judge Bronson in *Adair v. Lott*, 3 Hill, 182, that this doctrine did not apply where a wife took by deed, but did apply where she took as heir or devisee. See also *Pond v. Bergh*, 10 Paige, 140; *Ferguson v. Tweedy*, 43 N. Y. 543.

The common-law rule was well-settled that an heir's title to the real estate of his ancestors was not complete until entry. If the heir died before entry his title was defeated and the inheritance went to the heirs of the person last seized. If a wife claimed land by devise or descent and died before entry, the husband did not have his curtesy. 4 Kent's Comm. 30; *Jackson v. Johnson*, 5 Cow. 74.

This rule has been modified in other jurisdictions by statute, but in this State is still in force.

There are exceptions to the rule which requires an entry on land to complete an heir's title, as in the case of wild and unoccupied lands, but there is no similarity between such lands and the land involved in this action. Actual entry was always necessary to complete an heir's title to land so situated that an entry could be made upon it, and this rule is particularly applicable to city property. The argument, therefore, that the lands in suit are to be likened to wild lands cannot be sustained. The complaint alleges, and the court found as a fact, that Mrs. Carr never made an entry upon the lands, and this fact is conclusive upon the appellant's

right to curtesy. The learned counsel for the appellant does not question, of course, the general rule which I have referred to. He meets it by reference to the Statute of Descent under which he asserts that real estate passes at once and absolutely to the heir. In a strictly legal sense this statement is accurate. Applied to a case of intestacy and where the intestate's land was not held adversely, it is undoubtedly true.

And upon the judicial determination of the invalidity of a devise the heir may be correctly said to have had title from the date of the death of his ancestor. But under our statute every estate in land which is descendible may be devised, and it is only where land has not been devised that it descends to the heir. A devise of land establishes a title in the same manner as a deed, and a will of real estate is sometimes spoken of as a statutory conveyance. It may be introduced in evidence as proof of title either to recover or defend the possession of property. *Norris v. Norris*, 32 Hun, 176.

For this purpose it is not necessary that the will be admitted to probate, but a surrogate's decree admitting it to probate is *prima facie* evidence of its validity. Code Civ. Proc., § 2627; *Corley v. McElmeel*, 149 N. Y. 228.

A person in possession of land devised to him is in the same position as a grantee in possession under a deed, and presumptively he has the title. But the appellant's claim does not depend upon these considerations. The estate he claims depends upon the technical rule of the common law. The fact that Mrs. Carr never was actually and in fact in possession of any share in the lands devised to the respondent is fatal to the appellant's case.

Judgment affirmed.

648. Dower.

ELMENDORF v. LOCKWOOD.

57 NEW YORK, 322. — 1874.

ELMENDORF owned certain land subject to purchase-money mortgages. Elmendorf conveyed said land by warranty deed to one Van Vechten, Mrs. Elmendorf joining in the conveyance. The mortgages were afterwards foreclosed and surplus moneys arising from such foreclosure are in the hands of one of the defendants. Elmendorf died just after the foreclosure. Mrs. Elmendorf sues to get her dower in the surplus moneys. Van Vechten is not a party to the suit, but the defendant insists that the money all belongs to Van Vechten and that he must pay it to him.

EARL, C. — * * * During coverture, the wife's inchoate right of dower is incapable of being transferred or released, except to one who has already had, or by the same instrument acquires, an independent interest in the estate. Hence, when the deed of the husband is for any reason void, or is set aside or superseded, so as to become inoperative, the wife's dower, although she joined in the conveyance, is not barred. *Malloney v. Horan*, 49 N. Y. 111. But in all cases, when the wife unites with her husband in a conveyance, properly executed by her, which is effectual and operative against her husband, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished, for all purposes and as to all persons; and to the contrary of this proposition our attention has been called to no authority in this State. It is claimed, however, on the part of the plaintiff, that inasmuch as the wife has no estate in the land, nothing but a contingent interest, her deed cannot operate as a conveyance, but simply by way of estoppel; and hence, that it is binding upon her only in favor of the grantee and those who hold under him as privies in blood, law or estate, in whose favor only the estoppel runs. I deny that her deed can operate only by way of estoppel. Under the law as it has always been understood and administered in this State, her dower is released and extinguished, and the whole estate released therefrom is vested in the grantee. But if we admit that the deed can only operate against the wife by way of estoppel, during the lifetime of the husband, we reach the same result. Whenever a conveyance of a contingent interest operates only by way of estoppel, as soon as the contingency has happened and the estate becomes certain and vested, it feeds the estoppel, and what was before an estate by estoppel only, becomes an estate in interest, and of the same effect as if the contingency had happened before the conveyance was made. *Rawlin's Case*, 4 Coke, 52; *Weale v. Lower*, Pollexf. 54; *Trevivan v. Lawrence*, 6 Md. 258; *Vick v. Edwards*, 3 P. Wms. 372; *Doe v. Oliver*, 10 Barn. & Cress. 181. After the death of the husband, the widow's right to dower is no longer contingent; she then has a certain interest in the land which she can release to the owner of the fee by any conveyance properly executed to pass such an interest. If she has, before the death of her husband, united with him in a conveyance — conceding that such a conveyance, at the time of its execution, operated as against her only by way of estoppel — at his death, the contingency having ceased, and her interest having become certain, the estoppel is fed, and her interest is released as effectually as if she had been a widow when her deed was executed. In this case, therefore, upon the death of

her husband, the plaintiff had a certain interest in the surplus moneys which she could assign or release, and which could have been reached by her creditors in equity. *Tompkins v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb. 438; *Moak v. Coats*, 33 id. 498. And this interest became vested in Van Vechten as effectually as if she had assigned or released it to him after she became a widow. She, therefore, had no cause of action against the defendants. * * *

The judgment must, therefore, be affirmed with costs.

DWIGHT, C. — The action in this case is brought to recover surplus moneys remaining after the foreclosure in the hands of mortgagees. It is admitted that the plaintiff, by joining with her husband, had released her right of dower to one Van Vechten, and that as between her and Van Vechten, the estate was wholly in him. It is, however, claimed that this fact cannot be set up as between the plaintiff and the mortgagees, who do not claim under Van Vechten's title. When the release was made the plaintiff's right of dower was inchoate. When the action was commenced her husband was dead and she had a vested right to dower assignable in equity.

This case raises a question as to the true effect of the union of the wife with the husband in a release of dower. Some light may be shed upon it by considering the nature of a fine in the English law, for which the present system of private acknowledgments is a substitute, and from which it was borrowed. *Morris v. Sargent*, 18 Iowa, 99; 3 Washburn on Real Property, 281. Mr. Preston says: "Strangers to the fine, that is, persons not parties to it, may avail themselves of the fine, to preclude the title of the cognizor in the fine, and a party will not be allowed, in opposition to his own fine, to assert a title to the land." Vol. 1, on Conveyancing, 209. He adds: "The consequence is the fine inures to the benefit of the persons, etc., to whom the right might have been released, exactly the same as if the fine had been a release. Hence, the resolution in *Buckler's Case*, 2 Coke, 55a, that if a disseizee levy a fine to a stranger, the disseizor shall hold the land forever, for the disseizee, against his own fine, cannot claim the land . . . and by the fine the right is extinct, whereof the disseizor shall take advantage." *Moore's Case*, 2 Rolle, 312. The fine operates as an extinguishment of the disseizor's right. *Edwards v. Rogers*, Sir W. Jones, 456; 1 Preston on Conveyances, 301-306.

It is sometimes said that an acknowledgment barring a right of dower only operates by way of estoppel, and that as estoppels are reciprocal, a stranger cannot take advantage of it. But the fine,

for which the acknowledgment is a substitute, operated only by way of estoppel, and yet, as has been shown, it extinguished the right. There is, thus, a well-settled distinction between a simple release and an estoppel by way of fine. A fine levied by a person who has no title, but who afterward becomes heir, will be an estoppel to his claim as heir, and yet, a release by deed would not have barred his title. The principle seems to be that the fine accompanies the estate and becomes a muniment of title, and may be resorted to by any one who happens to be in possession of the estate. These views would prevail in the case of dower while it is still inchoate. The argument would be yet stronger after the husband's death. The estoppel would then work a transfer of the estate to the vendee under the husband's conveyance. *Lampt's Case*, 10 Coke, 46b; *Helps v. Hereford*, 2 B. & A. 242. In the case last cited there was a conveyance by an heir apparent, under a fine, which was held to work a title when the estate accrued to him. Under this principle the right of dower would be released to the owner of the fee. *Elwood v. Klock*, 13 Barb. 50.

On this ground, it is clear that a claimant of the land can avail himself of the release, though not claiming under the same title. *McKee v. Brown*, 43 Ill. 130. In that case a husband and wife had made a conveyance to one Rayburn, and the title, through intermediate transfers, commencing with that of Rayburn, had vested in a city. County authorities claimed the same land, under a title derived through a forfeiture of the husband's interest, and conveyed such estate as they had to one McKee, who was put in possession. It was held that until the conveyance to Rayburn was set aside for fraud McKee could set up the outstanding title in him (Rayburn) as a bar to the widow's claim, and that she was estopped by her release, though McKee did not claim under Rayburn's title. In other words, so long as the conveyance to Rayburn stood unimpeached, the widow could make no claim for dower against a mere stranger in possession. This case decides that a release accompanying the husband's conveyance absolutely extinguishes dower, so long as that conveyance remains in force, as, for example, is not canceled or set aside. Put the case in this form: Suppose that a husband makes a conveyance with intent to defraud his creditors, and his wife unites with him, and that the creditors take no proceedings to set the conveyance aside. A stranger in possession can, under these circumstances, make a successful defence against the widow's claim for dower.

The real point in all such cases as *Malloney v. Horan*, 49 N. Y. 111; *Robinson v. Bates*, 3 Metc. 40; *Woodworth v. Paige*, 5 Ohio St. 70, is this: The husband and wife having united in a conveyance

which is fraudulent as to creditors, and that conveyance *having been set aside* as to the husband, the conveyance as to the wife's right of dower became a release to a stranger to the title; in other words, the releasee had no interest except that which he derived from the wife. The act of setting the husband's conveyance aside on the ground of fraud, made that void from the beginning, so that the wife's release could not be affirmed to be made to a person having an estate in the land. The decisions just referred to all rest upon *Pixley v. Bennett*, 11 Mass. 298, where the sole point was that a wife could not release her dower to a stranger to the title. There is no case opposed to *McKee v. Brown* (*supra*), where the title still continues in the grantee undisturbed.

The plaintiff's counsel rested on *Blain v. Harrison*, 11 Ill. 384, and *Summers v. Babb*, 13 id. 483, as holding that the release of dower must, to be valid, be made to the owner of the fee. From this proposition he argued that, as the mortgage had been foreclosed, and the fee sold under the paramount title, the release of dower did not take effect, as these circumstances occurred before the husband's death. The cases on which he based this doctrine have been disavowed by the court which rendered them. *Chicago Dock Co. v. Kinzie*, 49 Ill. 289, 294. It is held in that case that the release may be made to a tenant for life, remainderman, reversioner or equitable owner, and that it is not indispensable that the releasee should have the legal fee. This is deemed to be a sound rule. In this case at bar Van Vechten must be deemed to be the equitable owner, as the surplus moneys, as between him and the plaintiff, belong to him, and under the doctrine of equitable conversion must be regarded as land. Accordingly, the estoppel, if not equivalent to a release during the husband's life, on his death, extinguished the dower in favor of the equitable owner, and the rule in McKee v. Brown, applies. The mischief of any other rule is apparent. If the widow is allowed to recover this money, she is under an immediate duty to pay it over to Van Vechten as his trustee. The litigation is thus made fruitless and unmeaning, while there is danger that the rights of Van Vechten may be impaired by the insecurity of the fund and its exposure to loss.

Judgment affirmed.

724. Duration of term.

BUCHANAN v. WHITMAN.

151 NEW YORK, 253. — 1896.

BARTLETT, J. — The plaintiff instituted summary proceedings to recover possession of premises leased by him to defendant, on the ground that the tenant was holding over after the expiration of his term. The defendant answering the petition, denied that the term of his tenancy had expired, and averred that under the provisions of the lease he had the privilege of renewal for another year, of which he had availed himself.

The first important question presented is whether the term of the tenancy had expired when these proceedings were begun. The lease, bearing date the 8th day of April, 1892, contained this provision: "This lease is to extend for the term of one year from the date hereof." On the 8th of April, 1893, the plaintiff began these proceedings, and the question is presented whether he acted prematurely in so doing. It is the contention of the counsel for the defendant that the term of the lease continued during the entire day of April 8, 1893; while the plaintiff's counsel insists that the lease expired at midnight, April 7, 1893.

This is a subject upon which a great diversity of opinion has prevailed in the courts of England and this country. Lord Mansfield, in *Pugh v. Duke of Leeds*, Cowp. 714, laid down the rule that "from the day" may either include or exclude that day, according to the context and subject-matter. It has been held in many cases that the court will so construe a lease as to carry out the intention of the parties if possible.

Mr. Parsons, in his work on Contracts, says: "The computation shall always conform to the intention of the parties so far as that can be ascertained from the contract aided by all admissible evidence." 2 Pars. on Con. 175. This rule is recognized in a late English work. *Foa on Landlord and Tenant* (2d. edition, 1895), p. 85. There are also text books in this country which announce the same doctrine. 4 Kent's Com. 95, note b; McAdam on Landlord and Tenant, p. 187.

In *Deyo v. Bleakley*, 24 Barb. 9, the General Term of the Supreme Court held that where the period for which the lease was granted, was from the first day of April, 1853, for a term of five years, that the day of the date of the lease was included in computing the term.

The learned court was led to this conclusion by the fact that the rent was made payable on the first day of April, July, October and January in each year, thus disclosing the clear intention of the parties that the term of the lease should begin on the 1st day of April, 1853.

In the case at bar we find that the parties have given a practical construction to the lease under consideration. The plaintiff, testifying in his own behalf, stated, among other things, that the lessees took possession of the premises April 8, 1892. It would be difficult in the face of this uncontradicted fact to hold that the lease did not commence on that day. It is, therefore, unnecessary to decide the question argued by the appellant as to the effect of the language already quoted from the lease standing alone and unexplained by the acts and intentions of the parties.

This leads to the conclusion that the tenancy terminated at midnight on the 7th of April, 1893, and that these proceedings were not prematurely instituted.

Judgment affirmed.

733. d. Eviction.

EDGERTON v. PAGE.

20 NEW YORK, 281. — 1859.

GROVER, J. — The demurrer presents two questions: First, whether the facts alleged in the answer constitute a defence; second, whether they constitute a counterclaim, available to the defendant by way of recoupment or otherwise in this action. The rule has long been settled, that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. *Christopher v. Austin*, 1 Kern. 217. Whether this eviction must be actual by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof, was not settled in this State until the case of *Dyett v. Pendleton*, 8 Cow. 728. In that case, the principle was established by the Court for the Correction of Errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered

as a settled rule of law binding upon all the courts of the State. Such act of the lessor, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed. In case of eviction, from a portion of the premises, the law will not apportion the rent in favor of the wrongdoer.

In this case, the answer shows that the defendant continued to occupy the premises for the whole time for which the rent demanded accrued. In this, the case differs from *Dyett v. Pendleton*, *supra*. I cannot see upon what principle the landlord should be absolutely barred from a recovery of rent, when his wrongful acts stop short of depriving the tenant of the possession of any portion of the premises. The injury inflicted may be to an amount much larger than the whole rent, or it may be of a trifling character. In all the cases where it has been held that the rent was extinguished or suspended, the tenant has been deprived, in whole or in part, of the possession by the wrongful act of the landlord, either actually or constructively. There is no authority extending the rule beyond this class of cases. It would be grossly unjust to permit a tenant to continue in the possession of the premises, and shield himself from the payment of rent by reason of the wrongful acts of the landlord impairing the value of the use of the premises to a much smaller amount than the rent. This must be the result of the rule claimed by the defendant. The moment it is conceded that the injury must be equal to the amount of the rent, the rule is destroyed. It would then only be a recoupment to the extent of the injury. In *Ogilvie v. Hull*, 5 Hill, 52, Nelson, Ch. J., in giving the opinion of the court, says: That no general principle is better settled, or more uniformly adhered to, than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent. The rule contended for by the defendant is a very different one, suspending or extinguishing the rent whenever the enjoyment, in consequence of the tortious acts of the lessor, becomes less beneficial than it otherwise would have been. The true rule, from all the authorities is, that while the tenant remains in possession of the entire premises demised, his obligation to pay rent continues. * * *

Judgment affirmed.

735. Holding over term.**HERTER v. MULLEN.**

159 NEW YORK, 28. — 1899.

MARTIN, J. — This action was to recover seven months' rent of a dwelling-house situated upon Madison avenue in the city of New York. There was a lease between the parties by which the defendants rented the premises from May 1, 1894, for a period of one year, the rent payable in monthly installments in advance. The rent for that term has been paid. By this action the plaintiff seeks to recover rent for a portion of the succeeding year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time.

The facts are undisputed. The defendants alleged as a defense to the action the making of the contract or lease with the plaintiff; that in the month of February, 1895, before the expiration of their term, they notified the plaintiff that they would not retain the premises for another year, and that after such notice the plaintiff and his agents were permitted to show the premises and to place the usual notice "To Let" upon them, which remained during the balance of the term. The defendants then specially alleged that on May 1, 1895, the defendants were prevented from yielding up the possession of the premises by the act of God in afflicting their mother, who was a member of their family, with a disease which, at that time, previously, and subsequently including May fifteenth, confined her to her bed so that it would have endangered her life to take her from the house; that for that reason and for no other, of which the plaintiff had full knowledge and notice, the defendants were obliged to and did occupy a small portion of the premises until May fifteenth; that all their property, furniture and belongings and their family were removed from the premises, and every part thereof on May 1, 1895, except from the sick room in which their mother was confined, and that they were forbidden by the physician in charge to remove her until May fifteenth, when she was at once removed.

Upon the trial it was admitted that upon the 1st of February, 1895, the defendants notified the plaintiff that on the 1st of May they would give up and surrender the possession of the premises. That they were occupied under the lease was admitted, also the rate of rent, and the fact that the defendants from necessity held over after the expiration of the lease some fifteen days. The plain-

tiff then admitted the facts set up in the answer as to the impossibility of the defendants' surrendering possession at the expiration of the year, so that the question presented is whether, notwithstanding the facts alleged in the answer, the plaintiff was entitled as a matter of law to recover rent for the succeeding year, upon the ground that the defendants held over after the expiration of their term. The admission of the plaintiff amounts to a concession that by reason of the sickness of the defendants' mother it was impossible for them to surrender up the possession of the premises to the plaintiff; that so far as it was possible they did so; and, hence, that their retention was wholly involuntary. If there was any doubt as to the question of impossibility, it should have been submitted to the jury, and the defendants' exception to the direction of a verdict was well taken. Thus, in a word, the question is whether that impossibility justified the defendants' action, or whether, although it was impossible to surrender the entire premises, the holding of a small part for a few days imposed upon them a liability for rent for the succeeding year.

It is well settled that where a tenant voluntarily holds over after the expiration of his term, he may be held as upon an agreement to hold for a year upon the terms of the prior lease. *Conway v. Starkweather*, 1 Denio, 114; *Commissioners of Pilots v. Clark*, 33 N. Y. 251; *Haynes v. Aldrich*, 133 id. 287, 289.

The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

It is also well settled that where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused, but where a person absolutely and by express contract binds himself to do a particular thing which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God. *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 id. 272; *Dexter v. Norton*, 47 id. 62.

Thus, the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease,

is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of his duty and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law and not by an express or absolute agreement, it falls within the first part of the foregoing rule, and hence, it is obvious that if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law.

The reason for the distinction between the effect of impossibility of performance, occasioned by inevitable accident or the act of God, upon an obligation created by express contract, and upon an obligation which the law implies, has been held to rest "upon the unwillingness of the law to at once create, impose and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence." *School District v. Dauchy*, 25 Conn. 530. Under the principle of the authorities relating to this subject, I think that it is clear that, as the obligation sought to be enforced was one created by law and not by the agreement of the parties, impossibility of performance was a valid excuse and the defendants cannot be held for the rent for the subsequent year.

Moreover, the same result may be reached upon another ground. There are many cases where the courts have implied a condition in a contract to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible. The principle upon which those cases are based is that when the contract was made the parties contemplated that the condition which consequently existed might arise and render performance impossible, and that the implied condition is to be construed as a part of the existing contract, and thus relieves the party from liability in case that condition arises. *Dexter v. Norton*, 47 N. Y. 62; *Lorillard v. Clyde*, 142 id. 456, 462; *Stewart v. Stone*, 127 id. 507; *Spalding v. Rosa*, 71 id. 40, 44; *Taylor v. Caldwell*, 3 Best & S. 826; *Robinson v. Davison*, L. R. 6 Ex. 269; *Kein v. Tupper*, 52 N. Y. 550, 555; *Dolan v. Rodgers*, 149 id. 489, 492.

To hold in this case that this agreement was made upon an implied condition that the defendants should not be required to vacate the premises at the expiration of their term in the event that it was rendered impossible by inevitable accident or the act of God is quite within the principle of the authorities cited. But, be this as it may, it is manifest that the charge of liability which the plaintiff seeks to enforce was created by law and not by agreement, and that

as its performance was prevented without the defendants' fault, they were excused from the onerous liability which the plaintiff now seeks to enforce.

It may well be, and doubtless is, true that the plaintiff may recover for the time the premises were occupied by the defendants, or if by reason of their failure to surrender up the premises additional damages follow, that they may be recovered in a proper action so that all damages caused by the defendants' misfortune would be borne by them, but that he cannot recover the rent for the subsequent year upon the implied contract or duty imposed by law, seems to me clear.

These considerations lead me to the conclusion that the judgment in this action should be reversed and a new trial ordered with costs to abide the event.¹

810. Easements in gross.

METCALF *v.* CRYSTAL BROOK PARK ASSOCIATION.

63 APP. DIV. (N. Y.) 445. — 1901.

SEWELL, J. — The appellant is the owner of an island in Mount Sinai harbor, known as Tooker's Island. The respondent is the owner of the mainland near said island, known as Crystal Brook neck or Tooker's neck. Nathaniel Tooker, the common source of title, died in 1799, leaving a will, the material portions of which read as follows, viz.:

"*Item.* I give and bequeath to my oldest daughter, Huldah Tooker, all my neck of land that I now live on call (*sic*) Christle crook neck together with all the salt meadow adjoining said neck. . . .

"*Item.* I give and bequeath to my daughter, Nancy Tooker, all the remainder of my lands and meadows wherever they may be found, either on deed or record, to her and her heirs forever, . . . also, it is my will that Nancy should have the privilege always of spreading hay that she may cut in the harbor on the neck which I have given to Ahuldah, and of carting it through said neck in a reasonable manner."

The plaintiff derived title to the island through mesne conveyances from Nancy Tooker, to whom the island passed under her father's will. The title to Crystal Brook neck came by successive

¹ See *Sullivan v. Ringler & Co.*, 59 App. Div. (N. Y.) 184, affirmed without opinion in 171 N. Y. 693. — ED.

conveyances to the defendant. This action was brought by the plaintiff to recover damages for being prevented from spreading on the neck of land in question the hay cut on the island. The vital point in the plaintiff's case is involved in the construction and meaning which should be given to the clause of the will granting this privilege to Nancy, since he cannot succeed in this action unless the privilege granted was of such a character as to be in the nature of an easement which attached and passed as an appurtenance to the land devised to her. It is quite obvious from reading the will that no such easement was granted. The principal requisite of an easement is that it be imposed upon corporeal real property for the benefit of corporeal real property, and that there be two distinct estates, the dominant and the servient. Bouv. Inst. 1602; *Nellis v. Munson*, 108 N. Y. 453.

The will did not provide in terms or by implication that Nancy shall have the privilege of spreading or carting the hay cut on the island or from any other land devised to her. No distinct dominant estate is described or mentioned in the will to which the privilege could attach or be appurtenant. The contention that the clause should be read as if the testator had written: "It is my will that Nancy should have the privilege always of spreading hay that she may cut on the island," is subject to the objection that such a construction requires something to be inserted that her testator never assented to. He used no words which necessarily connected the privilege granted with the occupation or enjoyment of any land owned or devised by him. There is nothing in the will to indicate that the testator intended to connect the privilege granted with another tenement. The words, "hay that she may cut in the harbor," in their immediate connection, are only descriptive of the hay that she may spread, and have no reference to any distinct piece or parcel of land to be benefited by the grant or privilege. They only serve to identify and define the privilege granted, which is general, in that it is not limited to the island or to the land owned by the testator. Only by the use of plain and direct language of a grantor, should it be held that he created a right in the nature of an easement, and attached it to one parcel as the dominant estate and made the other servient thereto for all time to come. *Clark v. Devoe*, 124 N. Y. 120.

It is clear from the provisions of this clause standing alone that the privilege impressed upon the land was intended as a mere personal privilege or right in gross in favor of the plaintiff's grantor which terminated with her death. The intention of the testator to create an easement, right or privilege personal to plaintiff's grantor

also appears from the fact that the grant is without words of inheritance or perpetuity, which was then necessary to convey anything more than a life estate. Prior to the adoption of the Revised Statutes, 1 R. S. 748, § 1, in 1830, the term "heirs" or other words of inheritance were required to create or convey an estate in fee.

It is a familiar proposition that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense. *Harvey v. Olmstead*, 1 N. Y. 489.

It is evident that the testator knew that words of inheritance were necessary, from the use of them in the clauses of the will devising the real estate, and the omission of them in granting the privilege must be construed as evidence of his intention to limit the grant to the lifetime of Nancy. The whole instrument shows an unmistakable intention that the privilege should not be permanent or apply to any one but the grantee named. That was the established construction of a devise containing no words of limitation at the time of the making of the will. It is the literal and hence natural interpretation of the language used, and as the parties stand in the place of their common grantor each is held to a strict construction of the words of the grant.

We have, therefore, come to the conclusion that the grantees of Nancy Tooker did not become entitled to spread their hay upon the land devised to Ahuldah, and that the acts of the plaintiff in spreading his hay upon the defendant's lands were unlawful; that the defendant did not interfere with any rights of the plaintiff in removing the hay, and that judgment should be affirmed with costs.

Judgment affirmed with costs.

812. Restrictive covenants.

TRUSTEES OF COLUMBIA COLLEGE *v.* LYNCH.

70 NEW YORK, 440. — 1877.

ONE Beers owned the westerly portion of a certain city block and the Trustees of Columbia College owned the rest of the block. In 1859 they entered into reciprocal covenants not to carry on any kind of business or build certain classes of structures on any part of said block. The covenants were declared to be intended to be binding on all persons who might in any way succeed to the interests

of either of the parties in any part of said premises. The agreement was duly recorded and the defendant Lynch bought her lot of Beers expressly subject to the conditions and limitations therein contained. Mrs. Lynch put up a dwelling-house on said premises and later rented portions of it to Yates and to Blaisdell, the former of whom is now carrying on a real estate business on the premises and the latter has an office (with a business sign) for the receipt of orders for painting. It appears that the opposite side of the street (premises not covered by the covenants) is occupied by a livery stable and that there are other business establishments in the near neighborhood.

This action was brought to restrain the defendants Lynch, Yates and Blaisdell from carrying on business in the Lynch house. The complaint was dismissed by the trial court with the following findings of law:

" 1. That there was no privity of estate between the plaintiff and Beers.

" 2. That the covenant sought to be enforced in this action does not run with the land.

" 3. That the defendant's land is not bound by the covenant sought to be enforced in this action.

" 4. That the restrictions imposed by the agreement between the plaintiffs and Beers did not mutually and reciprocally bind the plaintiffs and their assigns and Beers and his assigns.

" 5. That the covenant against carrying on any business is one liable to conflict with the public welfare, and retards the advancement of the community."

ALLEN, J. — It was competent for the plaintiffs and Mr. Beers, from the latter of whom the defendant derived title, while they were the owners of adjoining tracts or parcels of land in the city of New York, by mutual covenants to regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and the advancement in value of each. The mutual and reciprocal covenants of the contracting parties constituted a good consideration for the covenants and agreements of both. All that is required when the undertaking of one of two contracting parties gives the consideration for the undertaking of the other, is that there should be mutuality; covenants or undertakings by each, that each should come under some obligation, or release some right to the other; but a perfect reciprocity in the undertakings, or equality in the obligations assumed or rights released, is not involved in or essential to the sufficiency of the considerations. Equality is not of the essence of mutuality. It suffices that some promise or covenant

has been made, or some right given up; and the adequacy of the same, as a consideration to support the undertaking of the other party, in the absence of fraud, is for the parties to determine. A covenant is well supported in law and in equity by any consideration, however slight. In this case it is not material to inquire whether the covenant of the plaintiffs is, as viewed from our standpoint, the perfect equivalent of that of Mr. Beers. It was accepted by the latter as a sufficient consideration for the covenant made by him, and there is no evidence before us to impeach the agreement as one not fairly and honestly made.

The agreement itself is not void, as in restraint of trade or as imposing undue restrictions upon the use of property. Covenants, conditions and reservations, imposing like restrictions upon urban property, for the benefit of adjacent lands, having respect to light, air, ornamentation, or the exclusion of occupations which would render the entire property unsuitable for the purposes to which it could be most advantageously devoted, have been sustained, and have never been regarded as impolitic. They have been enforced at law and in equity without question. The restrictions are deemed wise by the owners, who alone are interested, and they rest upon and withdraw from general and unrestricted use but a small portion of territory within the corporate limits of any city or municipality, and neither public or private interest can suffer. It is not alleged in the answer, nor was it proved upon the hearing, that there has been any change in the character of the locality, the surroundings of the premises, or the occupation of contiguous property, or the business of the vicinage, which has rendered it inexpedient to observe the covenant, or made a disregard of it indispensable to the practical and profitable use and occupation of the premises, so that it might be inequitable to compel a specific performance of the agreement. If such a defense could avail, it has not been interposed, so that the facts found by the learned trial judge, in respect of the character of the buildings, and the business carried on at this time in the Sixth avenue, are immaterial and cannot affect the result.

The purpose and intent of the parties to the agreement is apparent from its terms preceded by the recital. The agreement recites the ownership by the respective parties of adjacent premises particularly described, and these constitute the subject-matter of the mutual covenants. There was no privity of estate, or community of interest between the parties, but each could, by grant, create an easement in his own lands for the benefit of the lands owned by the other, and the purpose of the agreement was to create mutual easements, negative in their character, for the benefit of the lands of each. It was

the design to impose mutual and corresponding restrictions upon the premises belonging to each, and thus to secure a uniformity in the structure and position of buildings upon the entire premises, and to reserve the lots for and confine their use to first-class dwellings to the exclusion of trades and all business, and all structures which would derogate from their value for private residences. The purpose clearly disclosed was, by the restrictions mutually imposed by the owners respectively upon the use of their several properties, to make the lots more available and desirable as sites for residences, and the agreement professes to and does in terms impose, for the common benefit, the restrictions in perpetuity, and to bind the heirs and assigns of the respective covenantors. This should be construed as a grant by each to the other in fee of a negative easement in the lands owned by the covenantors. An easement in favor of, and for the benefit of lands owned by third persons, can be created by a grant, and a covenant by the owner, upon a good consideration, to use, or to refrain from using his premises in a particular manner, for the benefit of premises owned by the covenantor, is, in effect, the grant of an easement and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a covenant, and even a parol agreement of the grantees. *Curtiss v. Ayrault*, 47 N. Y. 73; *Tallmadge v. East River Bank*, 26 id. 105; *Gibert v. Peteler*, 38 Barb. 488, affirmed 38 N. Y. 165. The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with and upon his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another. Wash. on Easements, 5. Easements of all kinds may be created and exist in favor of any third person, irrespective of any privity of estate or community of interest between the parties; and, in this respect, there is no distinction between negative easements and those rights that are more generally known as easements, as a way, etc.

A covenant by the owner with A. B., his heirs and assigns, that it should be lawful for them at all times afterwards to have and to use a way by and through a close, etc., was held to be an actual grant of a way and not a covenant only for the enjoyment of such right.

Holms v. Seller, 3 Lev. 305; *Gibert v. Peteler*, *supra*; Wash. on Easements, 22, 28, and cases cited in note 1. * * *

It is strenuously urged, in behalf of the defendants and respondents, that there was no privity of estate between the mutual covenants and covenantees, in respect of the premises owned by them respectively, and which were the subjects of the covenants and agreements, and that the covenants did not therefore run with the lands, binding the grantees and subjecting them to a personal liability thereon. This may be conceded for all the purposes of this action. It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements.

The covenantor, Beers, bound himself, and in equity charged the premises with the observance of the covenant, and thus impressed this easement upon the lands then owned by him in favor of the lands then and now owned by the plaintiffs. A right, in respect of the defendants' lands, and affecting the use in behalf of the plaintiffs and their lands, existed, which, while Beers continued the owner, equity would have enforced, and this right was a right in perpetuity, going with and attaching to, the lands in the hands of all subsequent grantees taking title, with notice of its existence. An owner may subject his lands to any servitude and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities and such right or claim, and stands, in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do. Lord Cottenham uses this language: "If an equity is attached to property by the owner, no one purchasing, with notice of that equity, can stand in a different situation from the party from whom he purchased." *Tulk v. Moxhay*, 2 Phil. 774. In the case cited, a covenant between grantor and grantee, in respect to the use of the granted premises, was enforced against subsequent grantees thereof, with notice. The rule is of universal application, as stated by Lord Cottenham. *Tallmadge v. E. R. Bank*, *supra*; Story's Eq. Jur., §§ 395, 397. Here each successive grantee, from Beers the covenantor, down to and including the defendant Lynch, the present owner, not only

had notice of the covenant, and all equities growing out of the same, but took their title in terms subject to it and impliedly agreeing to observe it. It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned, that it did not run with the land, so as to give an action at law. A distinguished judge answered a like objection in a similar case by saying, in substance, that if an action at law could not be maintained, that was an additional reason for entertaining jurisdiction in equity and preventing injustice. The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, an exception to the general rule which charges lands in the hands of a purchaser with notice with all existing equities, easements and servitudes. The rule and its application does not depend upon the character or classification of the equities claimed, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges, however created, of which he has notice. *Parker v. Nightingale*, 6 Allen, 341; *Catt v. Tourle*, L. R. 4 Ch. App. 654; *Carter v. Williams*, 18 W. R. 593, before V. C. James; *Wolfe v. Frost*, 4 Sandf. Chy. R. 72; *Tulk v. Moxhay*, *supra*; *Whiting v. Union R. Co.*, 11 Gray, 359; *Gibert v. Peteler*, *supra*; *Barrow v. Richard*, *supra*; *Greene v. Creighton*, 7 R. I. 1; *Bronner v. Jones*, 23 Barb. 153. The grantees from Beers became entitled to the benefits of the corresponding covenants on the part of the plaintiffs, and of the easement in their lands, and in the purchase had recompense for any diminution in the value of their own lands by reason of the restrictions upon their use. * * *

The cases in which it has been held that an action at law will not lie, upon a covenant restricting the use of the lands against the grantees of the covenantor, when there was no privity of estate between the covenantor and covenantee, do not aid us in determining whether there may not be relief in equity for a violation of the equitable right resting upon and growing out of the covenant treated as, in substance, a grant and the consideration upon which it was made.

The author of the American note to *Spencer's Case*, 1 Smith's Leading Cases, 6th Am. Ed., 167, recognizes the distinction between the binding obligation at law of covenants not running with the lands and the equitable rights recognized and enforced in equity in such cases. He says, speaking of such a covenant: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement creates."

In *Hills v. Miller*, 3 Paige, 254, and *Trustees of Watertown v. Cowen*, 4 Ib. 510, and *Barrow v. Richard*, 8 Ib. 351, there could have been no recovery at law, or actions on the covenants; but upon the deeds and instruments, in writing, under seal, it was held that easements had been granted out of the property sought to be charged, which had come by assignment to the hands of the defendants, which were intended by the parties to be appurtenant to lands owned by the plaintiffs; and the observance of the easements was enforced.

Barrow v. Richard, although differing in circumstances from the present case, was decided upon the ground that is controlling here, that the parties intended to create mutual easements for the benefit of the owners of the whole tract, and that the want of a remedy at law would sustain, rather than defeat, the jurisdiction of equity, and that the covenant should consequently be enforced by injunction against those who held the land to which it related. The lands of the defendants are equitably chargeable with the easement created by Beers, and the objection that the easement is not obligatory upon the defendants as a contract, cannot avail as a defense to a suit in equity to restrain the defendants by injunction from its violation and a destruction of the easement. * * * There is nothing in the record from which we can determine, that if permitted, such businesses will not defeat the object and purpose of the agreement of the parties and deprive the plaintiffs of the substantial benefit of the covenant. If the occupation and use of the premises by the defendants in the manner reported by the judge is in contravention of the spirit, as well as the letter of the covenant, the question of damages is wholly immaterial. Upon that question men might differ, and it might be thought that the damages, if any, were so trifling as to be inappreciable, but the parties had the right to

determine for themselves in what way and for what purposes their lands should be occupied irrespective of pecuniary gain or loss, or the effect on the market value of the lots.

Judgment reversed.

812. Restrictive covenants.

TRUSTEES OF COLUMBIA COLLEGE *v.* THACHER.

87 NEW YORK, 311. — 1882.

THIS case upon a former appeal is reported in 70 N. Y. 440, and *supra*, at p. 1193. During the pendency of the action, defendant Thacher purchased the premises with notice of the action and of the restrictive covenant. He has sublet to new business concerns as well as to those to whom objection was made before. He has been duly brought in as a defendant.

DANFORTH, J. — The validity and binding obligation of the covenant cannot be questioned by the defendant Thacher. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440. Moreover it appears that he bought with notice, not only of the agreement, but of this action. He, therefore, could not take the property without performing the obligation attached to it, and must be deemed to have taken it at his own peril, to the extent of such judgment as might be rendered in the action. * * *

In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled. The general current of business affairs has reached and covered the entire premises fronting on Sixth avenue, both above and below the lot in question. If this was all, however, the plaintiffs would be justified in their claim, for it is apparent from the agreement that such encroachment was anticipated, and that the parties to it intended to secure the property in question from the disturbance which business would necessarily produce. But the trial court has

found that since the action was begun, an elevated railway has been built in the Sixth avenue. It runs past the premises, and a station has been established in front of them, at the intersection of Fiftieth street. He finds that "the railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation." The evidence sustains the finding. The premises may still be used for dwellings, but the occupants are not likely to be those whose convenience and wishes were to be promoted by the covenant, persons of less pecuniary ability, and willing to sacrifice some degree of comfort for economy, transient tenants of still another class, whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood. Not only large depreciation in rents when occupied, but also frequent vacancies have followed the construction of the road. Its trains, propelled by steam, run at intervals of a few minutes, until midnight. The station covers from fifteen to twenty feet of the street opposite the defendant's premises. Half the width of the sidewalk is occupied by its elevated platform. From it, persons waiting for the trains, or there for other purposes, can look directly into the windows. Noise from its trains can be heard from one avenue to the other.

It is obvious, without further detail, that the construction of this road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, and all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. Nor are the causes of this depreciation transient. The platform of the railroad station, which renders inspection of the interior of the house easy to all observers; the stairs, which render the road accessible, must remain so long as the road is operated; and the noise and smoke are now, at least, an apparent necessity consequent upon its operation. It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature and, by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property values. It

has made the defendant's property unsuitable for the use to which, by the covenant of his grantor, it was appropriated, and if, in the face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity. The land in question furnishes an ill seat for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose. And although the land has not itself been taken as in *Baily v. De Crespigny*, L. R. 4 Q. B. 180, for actual occupation by the railroad, the railroad has encumbered the walks and streets about it, and taken away those advantages of situation which induced its owners to dedicate it to dwellings instead of stores, and to retirement rather than to the bustle of business. Submission to this is necessary, because it is authorized by the legislature, and so the defendant is made incapable of carrying out, if he should desire it, the wishes of those by whose agreement he would otherwise be bound.

There is, I think, no merit in the respondent's suggestion that the change in the character of the neighborhood is insufficient so long as it does not extend to all the property affected by the agreement. If this assumption is well founded — if the influence of the road is felt only by the portion of land owned by the defendant, it is still apparent that the original design of the parties has been broken up by acts for which neither the defendant nor his grantors are responsible, that the object of the covenant has been, so far as the defendant is concerned, defeated, and that to enforce it would work oppression and not equity.

To avoid this result the judgment appealed from should be reversed and the complaint dismissed, but as this result is made necessary by reason of events occurring since the commencement of the action it should be without costs.

Judgment reversed and complaint dismissed.

812. Restrictive covenants.

LEWIS v. GOLLNER.

129 NEW YORK, 227. — 1891.

ONE Gollner, a builder of tenement houses and flats, having entered into a contract for the purchase of a valuable lot in a fine residence neighborhood and paid five hundred dollars upon said contract, announced his intention of erecting on said premises a

seven-story flat. Lewis and other neighbors bought Gollner out, paying him about six thousand dollars more than the market value of the lot. It was part of the parol agreement under which the purchase was made that Gollner would not erect any flats in Lewis' immediate neighborhood or trouble him any more. Gollner at once contracted for another lot near by and commenced the erection of a seven-story flat. A suit having been threatened he transferred his interest to his wife for a valuable consideration, and then as her agent and architect went on with the work. Mrs. Gollner knew all the facts as to the parol agreement.

FINCH, J. — * * * This state of facts had its natural effect upon the courts below, and the General Term, after their recital, added that if there was any authority, directly or indirectly, in plaintiff's favor they would, without hesitation, grant him relief; but saying that, felt also bound to say that equity stood helpless before this cool and deliberate wrong. The inquiry which faces us is, therefore, whether in truth equity is thus helpless to enforce such a clear and admitted right.

I think we should first examine the situation, as between plaintiff and Gollner upon the supposition that the latter has remained owner of the land and was himself engaged in violating his contract, and ask of ourselves the question whether in such event it would have been possible for equity to interfere, or whether the objections and difficulties suggested by the respondents would have proved insuperable.

Two of those objections we may dismiss quite briefly. The agreement was not in the least indefinite or uncertain, as it respects the matter in controversy. The phrase "immediate neighborhood," taken in connection with the subject-matter of the contract, is not so indefinite as to be incapable of just and natural boundaries, but in any event, covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness. Nor is there any foundation for saying that, in its restrictive character, the agreement is against public policy. We have too lately discussed that subject to make a recurrence to it necessary. We have perhaps widened and extended the area within which restraints of trade and business may lawfully operate, and certainly should not narrow them till they are less than one neighborhood in a single city.

Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in

which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries, have been enforced by injunction, and it certainly does not lessen the duty or imperil the right that the contract proved or established is by parol. In one possible view of this case we are, in fact, dealing with just such a contract. The occupation of the defendant Gollner was that of a builder of flats and tenement houses. He so describes himself and gives that as his specific business and occupation. He sought to carry it on in plaintiff's neighborhood, and was paid six thousand dollars not to carry it on in that locality, and because his doing so would in fact cause injury to the persons who paid him the money. Of course, there is a difference between the present case and those in which the contract purpose is to prevent competition; a difference which respects the nature and character of the injury resulting from a breach; but that difference does not disturb the doctrine common to both, that in a proper case, equity will specifically enforce by affirmative decree or restraining injunction a definite and fully-established and a valid contract, although a personal one, and irrespective of the fact that it happened to be by parol. The jurisdiction attaches upon the ground that an action at law for damages will not do complete justice, or accomplish the purpose contemplated by the contract. Even though the agreement itself fixes a penalty for its breach, it will not follow that equitable relief must be denied, for, if the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely damages for the breach, the equitable relief will be awarded. *Diamond Match Co. v. Roeber*, 106 N. Y. 474. When that relief is by injunction to restrain the commission of an injurious act, the complaint of the plaintiff is somewhat in the nature of a bill *quia timet*, in which equity acts to prevent a mischief rather than to redress it. There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate and not redress the injury. It would be a continuing one whose full and actual effects could scarcely be foreseen, and which the plaintiff could only escape by breaking up his home and retreating to some possible locality in which tenements were not and their builders did not afflict.

But Gollner did not remain the owner of his new purchase and that brings us to the difficulty which the courts below deemed insurmountable and which needs to be thoughtfully considered.

They reasoned that the new vendee could not be affected, except through or by the purchase of the land, and so, only when the land carried with it as an inseparable attachment the burden of the contract; that when the contract was made, there was no land to which it did or could attach; and the agreement remained wholly personal to Gollner and did not affect or bind his wife. I do not see the contract in that way. Gollner might have fulfilled it by omitting to buy or lease any land within the prescribed limits, but his agreement left him at liberty to do so or not as he pleased, and yet required that if he did so purchase or lease, he should not erect upon the land so owned or possessed, the prohibited structures. The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor, who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought, if it came, as it did, within the scope of the contract. Why should it affect the result that the obligation and the land ownership were not simultaneous, or that the latter came from a vendor who did not restrict when the contractor could and did? In the case of a mortgage the lien may attach to and bind after-acquired property, or cover future and later advances, as between the parties themselves, and that is permitted because they have so agreed and their contract contemplates that precise result. In like manner I think the agreement under discussion was in substance and effect, that whatever land the defendant Gollner might thereafter possess in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects and was intended to affect the use and occupation of Gollner's after-acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is that the contract equity is so attached to the use of the land which is the subject-matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the existing equity, and more especially when he buys for the express purpose of defeating and evading that equity. It has been held that the equity resulting from a valid agreement, although the latter was not a covenant running

with the land, or a legal exception or reservation out of it, but stood solely upon the ground of a personal contract dictating the mode of user, would, nevertheless, go with the land into the hands of a purchaser, with notice, and who did not buy innocently or in good faith. *Whitney v. Union Railway Co.*, 11 Gray, 363.

In *Hodge v. Sloan*, 107 N. Y. 250, we substantially affirmed that doctrine, holding that a purchaser without restriction in his deed, but from one who was restricted by a personal covenant, not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a court of equity. Judge Danforth described the character of the agreement thus: "It is restrictive, not collateral to the land, but relates to its use."

It is true and should be noted that in these cases the restrictions followed the line of title and were imposed by the original owners and vendors of the land, while here they were not so imposed, but came from one never an owner of the land, but deriving his right from a contract with one who did become such owner. But why should that difference change the result? The original owner's right rests upon one consideration, and that of the stranger to the title upon another, but each are equally good and worthy of equitable regard. In *Parker v. Nightingale*, 6 Allen, 344, it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory and to warrant equitable relief in case of their infraction. I think that doctrine is sound and just. The source of the restriction would seem to be immaterial if itself binding and founded upon sufficient consideration; and a breach is no greater wrong to a privy in estate than to a stranger validly contracting about its use. Nor can the vendee in bad faith stand upon such a difference. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated. If these views are correct it will follow that plaintiff should have been awarded the relief which he sought.

Judgment reversed.

812 Restrictive covenants.**EQUITABLE LIFE INSURANCE SOC. v. BRENNAN.**

148 NEW YORK, 661. — 1896.

ONE Page owned the easterly half of a certain city block free from any restrictive covenants, and also a portion of the westerly half which was heavily burdened with such agreements. Further facts appear in the opinion.

BARTLETT, J. — * * * On the 10th of January, 1882, Page conveyed to Robert and Ogden Goelet the two westerly lots of the easterly half of the block lying on Fifty-first street. This deed contained the following covenant:

"The said parties of the second part, for themselves, their heirs, executors and administrators and assigns, do hereby covenant, promise and agree to and with the said parties of the first part, their heirs and assigns, that neither they nor any of their heirs or assigns, shall, at any future time or times, erect or build, or permit or cause to be erected or built, any stable, machine shop, brewery, distillery, slaughter-house or smith's shop upon said premises, it being understood and agreed that the foregoing covenants on the part of the parties of the second part shall run with the land and bind all successive owners thereof, and their heirs and assigns." * * *

On January 10, 1883, Page conveyed to Rosanna Spaulding the two westerly lots on the east half of the block lying on Fiftieth street, being premises immediately in the rear of the Goelet lots. This deed contained the same covenant as that inserted in the conveyance to the Goelets.

On March 1, 1883, Page conveyed to one Abraham Benson the remaining lots in the easterly half of the block, which included those now owned by the defendant. This deed contained the same covenants as the deeds to the Goelets and Mrs. Spaulding. Benson paid no cash for the property conveyed to him, but executed mortgages for the full amount of the purchase money, and also agreed to execute further mortgages to secure advances which were to be made to him by Page to enable him to erect buildings upon the property.

On the 20th of September, 1883, Page died, and by his will he devised and bequeathed all his property, real and personal, to his wife, Mary E. Page.

On the 21st of February, 1884, Benson conveyed to Robert C.

Hine all of the property deeded to him by Page, including the buildings in process of erection, subject to mortgages made to Page. On the 10th of March, 1884, Mary E. Page executed to Hine a release of the covenant against nuisances contained in Page's deed to Benson.

The defendant thereafter became the owner of that portion of the east half of the block lying on Park avenue and running westerly 100 feet on each street. There were nine mesne conveyances before the title vested in defendant, and in none of them was there a reference to any restrictive covenant. The plaintiff is now the owner of the lots conveyed to Mrs. Spaulding, on which stands an apartment house.

The main question presented by this appeal is whether the defendant rests under the restrictions contained in the deed from Page to Benson. The learned referee, in the 12th finding of fact, states: "Said Page adopted and acted upon a uniform plan of restriction in making conveyances of said easterly half of said block, but this finding is not based upon any oral statements alleged to have been made by Mr. Page to Mr. John Lindley."

The complaint alleged an agreement between Mrs. Spaulding and Page, whereby the latter covenanted to restrict the eastern portion of the block in the same manner as by the covenant in her deed. The plaintiff attempted to prove this agreement by Mr. Lindley, the attorney for Mrs. Spaulding, but evidently failed to do so.

The General Term state that the 12th finding of fact was the only one challenged by the appellant, and they were of opinion that it was sustained by the weight of documentary evidence and by the testimony descriptive of the uses of the adjacent property at the time the deeds containing the restrictive clauses were executed. We are unable to agree with this conclusion, and are of opinion that the 12th finding of fact is wholly unsupported by evidence.

It is urged on the part of the defendant that the Goelet and Spaulding deeds are no part of his claim of title, that he had no notice of the same, and that there was nothing in the conveyances disclosed by any legitimate search he was required to make, that would put him on inquiry as to the restrictions imposed upon adjacent property.

It is also insisted that the only covenant brought to defendant's notice was that contained in the deed from Page to Benson, which had been released as disclosed by the record.

We do not deem it necessary to decide this point or to rest our decision upon this narrow ground.

Assuming that the Goelet-Spaulding-Benson deeds are a part of

defendant's chain of title, we hold that neither the documentary evidence, nor the testimony relating to the uses of the adjacent property, establishes a uniform plan of restriction as found by the court below. It will be observed that the covenant contained in the three deeds in question and relied upon as the documentary evidence to establish this uniform plan of restriction, is wholly silent as to any such plan and is for the benefit of the grantor only. In neither of the deeds is there a mutual covenant binding the grantor. * * *

Another important fact should be recalled in this connection, to wit; at the time Page conveyed to the Goelts he was still the owner of lots in the western half of the block, resting under the severe restrictions to which we have referred, and it is quite reasonable that he should require his grantees to enter into the modified covenant that was inserted in their deed, for the reason that the lots conveyed to them were the westerly ones of the eastern half of the block, and lying adjacent to the property resting under the more stringent covenant against nuisances. The covenant in the Spaulding deed was reasonable, the lots being also adjacent to the restricted property. That Page should have inserted the same modified covenant in his deed to Benson was quite natural, in view of the circumstances under which that conveyance was made. Benson had paid no portion of the purchase money in cash, and Page evidently deemed it wise to retain some control of the property. In this connection it may be well to call attention to the testimony of John Lindley, who was sworn as a witness for the plaintiff. He, as the attorney for Mrs. Spaulding, attempted to explain why he had not inserted in the deed from Page to Mrs. Spaulding the covenant requiring Page to restrict the balance of the property in the block. The reason he gave was that it might interfere if they bought the balance of the block, as he did not wish to be embarrassed by restrictions. He further stated that they were under negotiations with Page to buy to Fourth avenue, and would have done so in all human probability had they been able to negotiate a loan on the rest of the block. It further appeared that this negotiation for a loan was with the plaintiff company, and that the representative of the latter reported against making it because of the "noise of the engines."

We have here not only very good reason given why there were no mutual covenants of restriction in the Spaulding deed, but a practical illustration of the effect of the railroads on the Park avenue side of this block.

We think enough has been stated in regard to the manner in

which this block has been conveyed and restricted from time to time to show that no uniform plan of restriction was established by the transactions in relation to the eastern half of the block.

This brings us again to the documentary evidence, and we have already pointed out that upon the face of the three deeds relied upon there is nothing disclosed except a covenant binding the grantee, his heirs and assigns, for the benefit of the grantor.

While it may not be possible to harmonize all the authorities in this country and England on the subject of equitable negative easements, yet a few general rules may be regarded as settled by the cases. It is not necessary in order to sustain the action that there should be privity either of estate or of contract; nor is it essential that an action at law should be maintainable on the covenant; but there must be found somewhere the clear intent to establish the restriction for the benefit of the party suing or his grantor, of which right the defendant must have either actual or constructive notice.

If the covenant is silent; if there is no mutual agreement or understanding between the various owners creating an easement; if there is nothing in the surrounding circumstances from which mutual rights can be fairly inferred, then no action can be maintained. There is a class of cases where the covenant, by fair interpretation of its language, is not exclusively for the benefit of the grantor, but of other property owners in the immediate vicinity. *Barrow v. Richard*, 8 Paige, 351; *Brouwer v. Jones*, 23 Barb. 153; *Seymour v. McDonald*, 4 Sandf. Ch. 502; *Lattimer v. Livermore*, 72 N. Y. 174.

There is still another line of cases where the covenant was for the benefit of specific owners of lots and reciprocal covenants were entered into. *Trustees v. Lynch*, 70 N. Y. 440. There are many cases in this country and England which uphold the doctrine laid down in *Tallmadge v. The East River Bank*, 26 N. Y. 105, to the effect that although the legal title be absolute and unrestricted, yet the owner may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan which is binding upon a subsequent purchaser with notice.

In the case at bar the covenant running to the grantor only does not, standing by itself, tend in any way to prove the plaintiff's case, while the surrounding circumstances fail to establish any uniform plan of restriction on the eastern half of the block.

Judgment reversed.

812. Covenant for positive act.**GOULD v. PARTRIDGE.**

52 APP. DIV. (N. Y.) 40. — 1900.

ADAMS, P. J. — Upon the foregoing facts the counsel for the defendant contends that the provision of the Phoenix Mills deed for furnishing power to Howe, its grantee, should be treated simply as a personal contract or covenant to sell power from an appliance then upon the premises; that while possibly it might be regarded as in the nature of an easement to take from the wheel in the Stone Mills force or energy to the extent of certain specified horse power, it was in no sense a grant of realty or of any interest therein. In short, that the provision, by whatever name it may be called, does not amount to a covenant which runs with the land, and that, consequently, the defendant, while she may be enjoined from interfering with the plaintiff's enjoyment of such privileges as it was designed to confer, cannot be compelled to perform any affirmative act for their maintenance.

This contention was supported by an exceptionally forceful argument, in the course of which it was asserted that inasmuch as no privity of estate existed between the covenantor and covenantee, and none was created at the time the covenant was made, the case falls directly within the principle of *Cole v. Hughes*, 54 N. Y. 444, and *Scott v. McMillan*, 76 id. 141.

Upon the other hand, however, it was quite as earnestly contended that all the elements which are essential to the creation of a running covenant, including a privity of estate, were present at the time the agreement in question was entered into, and that, consequently, the burden of liability arising therefrom is not confined to the original covenantor, but passes to subsequent grantees as an incident to the land conveyed.

The controversy thus formulated presents a most interesting question, in the discussion of which counsel have certainly displayed a vast amount of labor and research, and did we suppose that a determination of the issues presented upon this appeal would impose upon us the necessity of defining the term "privity of estate," as that term is here used, we should shrink from a task which would bring to our judgment "a judicial quarrel almost as venerable as the common law itself and open yet to vigorous dispute." Finch, J., in *Mygatt v. Coe*, 142 N. Y. 78, 82; Rawle Cov., 5th ed., § 203, n. 2. But haply, in the view which we are inclined to take of the

case, a discussion along the lines pursued by counsel becomes a work of supererogation.

The purpose and intent of the parties to the original agreement are, we think, perfectly obvious. The Phoenix Mills was the owner of a valuable water privilege as well as of the means and appliances for utilizing the same. It was also the owner of a tract of land for which it had no particular use. To meet this condition of affairs it subdivided its surplus land into parcels and then sold the same to various parties. In order, however, to enhance the value of the land thus placed upon the market and induce purchasers to buy, the company agreed to furnish a certain amount of power with each parcel sold. As a consequence the land, with this incident attached to it, found ready sale, and the purchasers thereof immediately set about to erect buildings for manufacturing purposes upon their respective parcels, in reliance, doubtless, upon the right to the water power which their several grants secured to them. In these circumstances, if, as claimed by the plaintiff, there was a community of interest or a privity of estate between the original grantor and grantees, the covenant made by the former would unquestionably be one which would run with the land and one for the breach of which an action at law could be maintained by the covenantee or his grantees.

But even in the absence of any community of interest or privity of estate, it has been held that the owners of land may, by agreement, create mutual easements for the benefit of each other's land which will be enforced in equity; that an easement of this character can be created by grant, and that the right to its enjoyment will in like manner pass as appurtenant to the premises in respect of which it was created. In discussing a similar proposition in the American note to *Spencer's Case*, 1 Smith L. C., 6th Am. ed., 167, it was said: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement involves."

The principle thus enunciated has, we believe, been recognized and enforced by the courts with great uniformity from an early day down to the present time; and when it is applied to the facts of this case, it seems to dispose of the defendant's contention, regardless of her major proposition, as to which we express no opinion. Nor-

man v. Wells, 17 Wend. 136; *Parker v. Nightingale*, 6 Allen (Mass.) 341; *Morse v. Aldrich*, 19 Pick. 449; *Trustees v. Lynch*, 70 N. Y. 440; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 id. 400; *Hart v. Lyon*, 90 id. 663; *Nye v. Hoyle*, 120 id. 195.

In this connection it is proper to suggest that in the case last cited it was said that the views there expressed do not conflict with *Cole v. Hughes* and *Scott v. McMillan*, *supra*. A distinction is, however, sought to be drawn between the cases above referred to and the one under review, because, as it is asserted, in the former the covenants were in terms between the parties and their respective heirs and assigns, and they were connected with the subject of the grant and entered into the value thereof, while in the latter all these elements are absent. It is true that the covenant in the deed to Howe does not in express terms bind the grantor, its "heirs and assigns," but the defendant took possession of the premises burdened with the covenant, and she thereby became subject, as grantee or assignee, to its terms and conditions, although not bound by express words. *Denman v. Prince*, 40 Barb. 213; *Mygatt v. Coe*, *supra*.

As regards the other distinguishing features which are said to exist it is necessary only to advert to the fact, which we think sufficiently appears, that the covenant in question was connected with and without doubt entered into the consideration of the grant from the Phoenix Mills to Howe.

The defendant took her title to the premises owned by her with actual and full notice of the covenant in the Howe deed and of all the equities arising therefrom. Moreover, she and her predecessors in title gave practical construction to the language and obligations of that covenant by sustaining the burden which it imposed for a long term of years, and, in view of these circumstances, it would, as was said by Allen, J., in *Trustees v. Lynch*, *supra*, "be unreasonable and unconscientious to hold (her) absolved from the covenant in equity for the technical reason assigned, that it did not run with the land so as to give an action at law."

Judgment affirmed.

812. Covenant for positive act.**MIDDLEFIELD v. CHURCH MILLS KNITTING CO.**

160 MASSACHUSETTS, 267. — 1894.

HOLMES, J. — This is an action to recover the amount of damages which the plaintiff has been compelled to pay in consequence of a breach of a duty alleged to rest primarily on the defendant. The declaration is not in covenant, to speak in terms of the old forms of action, but in assumpsit, on the principle of *Lowell v. Spaulding*, 4 Cush. 277; *Woburn v. Henshaw*, 101 Mass. 193, and other cases of that class. The mode in which the defendant's duty originated, whether by prescription, *Regina v. Bucknall* 2 Ld. Raym. 804; Bac. Abr. Highways (E); Angell & D. Highways, § 255, or by grant or covenant having the effect of a grant, *Bronson v. Coffin*, 108 Mass. 175; *Norcross v. James*, 140 id. 188, 190; *Ladd v. Boston*, 151 id. 585, 588, or otherwise, *Perley v. Chandler*, 6 id. 18, is one step more remote than when the declaration is on the covenant directly. However it might be in the latter case, we are of opinion that the duty is sufficiently alleged for the purposes of the case at bar. See *Bernard v. Cafferty*, 11 Gray, 10, 11; form of declaration for obstructing way, Pub. Sts., c. 167, § 94.

It is true that, in order to overrule the demurrer, we have to assume the possibility that the defendant might be bound as assign and tenant of a *quasi*-servient estate to perform an active duty created by its predecessor in title; but in view of the foregoing and other decisions we are not prepared to deny that it might be bound in law or in equity so far as to make it liable to indemnify the plaintiff to the extent of simple damages. It is true that, in general, active duties cannot be attached to land, and that affirmative covenants only bind the covenantor, his heirs, executors and administrators. But there are some exceptions, and most conspicuous among them is the obligation to repair fences and highways. We do not deem it advisable to discuss the law in detail until the facts shall appear more exactly than they do at present. If such a duty can be attached to land, then, although ordinarily the corresponding right could not exist in gross, yet in the case of a way which a town is bound to keep in repair for the benefit of the public, the town is the natural and convenient protector of the obligation, and, being immortal and locally fixed, may enforce a covenant originally made to it without being shown to be strictly the owner of the highway as a *quasi*-

dominant estate, just as, conversely, a local corporation was bound to the terre-tenant to perform active services in *Pakenham's Case*, Y. B. 42 Ed. III. 3, pl. 14.

Demurrer overruled.

812. Easement implied from quasi-easement followed by a grant.

PAINE *v.* CHANDLER.

134 NEW YORK, 385. — 1892.

BROWN, J. — The judgment in this action rests upon the rule of *Lampman v. Milks*, 21 N. Y. 505, that when the owner of land sells a part thereof he impliedly grants to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The learned counsel for the appellant does not attack the principle, but his contention is that the easement involved in this controversy is of the class known as discontinuous, and such an easement passes by implication only when absolutely necessary to the enjoyment of the property conveyed. To use his own language, "the rule contended for has been confined to cases where the easement claimed was something without the use of which the premises would be practically worthless." The rule is not confined in its application to continuous easements, but applies to those artificial arrangements which openly exist and effect materially the value of the respective parts of the estate at the time of the sale. *Lampman v. Milks*, *supra*; *Curtiss v. Ayrault*, 47 N. Y. 73-79.

To support his argument upon the claim of absolute necessity the appellant in part relies upon Massachusetts cases. It was said in the opinion in *Buss v. Dyer*, 125 Mass. 287, that if an easement existed by implication it was because it was absolutely necessary to the enjoyment of the estate.

But that remark was not necessary to the decision, as the verdict of the jury was in the defendant's favor under a charge that there was no easement unless there was a reasonable necessity therefor. The learned judge who delivered the opinion in that case conceded that his statement of the rule was in conflict with the decision of the courts of England and of this State. In this State the rule of strict necessity is applied to implied reservations, but not to implied grants. In the recent case of *Wells v. Garbutt*, 132 N. Y. 430, it

was said: "As a grantor cannot derogate from his own grant while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor."

This distinction between implied reservation and implied grants there pointed out is well founded in the law, although in some of the reported cases it has apparently been overlooked. In *Johnson v. Jordan*, 43 Mass. 234, Chief Justice Shaw, after stating the rules applicable to the construction of a grant, said, "if a man owning two tenements has built a house on one and annexed thereto a drain through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance and pass with it, because such a construction would be most beneficial to the grantee, whereas if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance." See also *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31, 49; Washburn on Easements, 4th ed., pp. 105-106; *Burr v. Mills*, 21 Wend. 290.

In *Johnson v. Jordan* (*supra*), to which appellant refers, the conveyances of the dominant and servient tenements were simultaneous and the right to the easement was denied upon a construction given to the deeds and the circumstance attending their delivery.

In *Buss v. Dyer*, 125 Mass. 287, the chimney in which an easement was claimed had worn out and had been taken down, and the jury found as a fact that the plaintiff at a reasonable cost could have built one on his own property, and the facts of the case amply justify the decision without reference to the rule of strict necessity.

Undoubtedly an easement to pass by implication must be necessary to the enjoyment of the estate granted, but the necessity required is a reasonable not an absolute one. Mere convenience would not be sufficient to create or convey the right.

The privilege or right implied must be of value to the estate granted which the grantee has estimated as an advantage to the estate and paid for in his purchase.

In *Curtiss v. Ayrault*, 47 N. Y. 73, the essential question of fact there involved was stated to be whether the grantor of the plaintiff in arriving at the price he would pay considered and had a right to consider, as an element of value of the land he was buying, the ditch across the tract giving the supply of water through it. See

also *Simmons v. Cloonan*, 81 N. Y. 557-566; *O'Rourke v. Smith*, 11 R. I. 259; Washburn on Easements, 4th ed., pp. 110-111.

Root v. Wadhams, 107 N. Y. 384, cited by the appellant, was distinguished by the court in its facts from *Lampman v. Milks* and kindred cases, and nothing need be added to what was there said on this subject.

The trial court in this case found as a fact that the uninterrupted flow and use of the water through the pipes from the spring on the Grimes farm was essential to the enjoyment of the estate conveyed to the plaintiff, and this finding has ample support in the evidence. After the water was cut off plaintiff dug a well upon his premises and failed to procure sufficient water for his stock and he was under the necessity of driving them considerable distances down a hill to a stream in order to water them. The court further found that the loss of the flow of water in the barnyard impaired the rental value of the farm fifty dollars a year and depreciated the fee value six dollars per acre, and it is apparent, therefore, that the use of the water was a substantial and valuable right and not a mere convenience.

The facts, therefore, justified the court in holding that the plaintiff took under his deed by implication a right to the use of the waters of the spring.

It appeared that the diversion complained of was not caused by any direct interference with the waters in the spring, but that the defendant upon his own land and upon ground higher than the spring, and a few feet therefrom, dug a well, and from it a ditch extending north about twelve rods, parallel with the pipes leading to the Paine farm and about ten feet therefrom.

That, as a result of this act, the body of the water in the spring was diminished and fell below the mouth of the pipe leading to the Paine farm, and the court found that this was done maliciously and with the purpose of depriving the plaintiff of the use of the water.

The fact that the defendant's act was with malice towards plaintiff is of no importance in determining its legal character. Unless it interfered with a legal right of the plaintiff, it was not actionable because done maliciously. A person may do what he pleases upon his own land, and so long as he violates no legal duty that he owes to his neighbor, he is not liable, although he may perform the act for the sole purpose of injuring his neighbor. The question presented, therefore, is, was the act of intercepting the flow of water to the spring an interference with the rights of the plaintiff acquired under his deed?

The appellant contends it was not and cites us to *Bliss v. Greeley*,

45 N. Y. 671. In that case the plaintiff had acquired by deed the right to use a spring of water upon defendant's property and to carry the same through a pipe to his house on adjoining land. The defendant, by excavation on his farm a short distance from the spring, intercepted the flow of water thereto and plaintiff's right was destroyed. The court held that the plaintiff's rights were no greater than if he had owned the fee of the land in which was the spring, and, upon principle of law applicable to adjoining lands when neither one has any easement or right in the land of the other, held that the plaintiff could not recover.

In *Johnstown Cheese Manufacturing Co. v. Veghte*, 69 N. Y. 16, *Bliss v. Greeley* was distinguished from the case then before the court, and because in the latter case there was a grant of the use of the water which at the time of the grant was being conducted to the spring, and the intent of the parties was to secure a continuance of that supply as a thing necessary to the operation of the cheese factory, the defendant was restrained from digging on his land and intercepting the flow of water to the spring from which plaintiff's supply was drawn.

In this case the rights of the parties under the implied grant of the use of the water, are to be determined by a consideration of the circumstances surrounding it, the situation of the respective farms with reference to it, with a view to ascertain the true intent of the parties.

The general rule is that a man, who owns land subject to an easement, has a right to use his land in any way not inconsistent with the easement, and the extent of the easement is to be determined by a true construction of the grant creating it, aided by such circumstances surrounding the estate and parties as have a legitimate tendency to show the intention of the parties. *Onthank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194.

Under this rule the rights of the owner of the easement are paramount to the extent of his grant. There is no joint use of land contemplated in the sense that the rights of the grantee of the easement must, under certain circumstances, give way to those of the grantor.

The intent of the parties, under the implied grant to the plaintiff, was that plaintiff should have the use of the water in his farmyard as a thing not only beneficial to the estate purchased by him, but necessary to the full enjoyment thereof. If deprived of that use, he loses that which was an open and visible appurtenance to his property, and which represented a part of the consideration for which he paid the purchase price to the defendant. By the acts of

the former owner, the defendant's land became servient to the plaintiff's to such extent as was apparent at the time of the conveyance to the plaintiff. And plaintiff's legal right was that the water should continue to flow to his barnyard as it flowed when he acquired his title.

Any act of defendant's which impaired that right was actionable. Defendant could not lawfully by direct means lower the water in the spring below the pipe leading to plaintiff's property, nor could he lawfully divert the water from the spring and thus deprive plaintiff of its use. Such acts would be in violation of his implied contract and actionable. Substantially this same question was raised in *Curtiss v. Ayrault*, p. 81, and *Simmons v. Cloonan*, p. 566, *supra*.

In the first case, in discussing the point that defendant's acts, being upon his own lands, were not in violation of plaintiff's rights, it was said: "It matters not how the diversion is effected, whether by digging a new ditch or deepening an old one, the reciprocal rights of the parties are to have the status of the tract maintained as it was when Newbold sold."

The full enjoyment of the property purchased by the plaintiff was the thing contemplated by the parties. This could not be had if the flow of water was stopped. That the defendant could do this without incurring any liability would be destructive of the contract implied in his deed, and reduce the grant to a mere license revocable at his will.

We are of the opinion that the defendant's acts were clearly an interference with the legal rights of the plaintiff and were actionable.

Judgment affirmed.

812. Implied easement.

WELLS v. GARBUTT.

132 NEW YORK, 430. — 1892.

VANN, J. — Both parties unite in the position that the plaintiff acquired through the sale in foreclosure the entire estate of both mortgagor and mortgagee, as of the date of the mortgage. *Rector, etc., v Mack*, 93 N. Y. 488; *Pardee v. Steward*, 37 Hun, 259, 262; 2 R. S. 192, § 153; Code Civ. Pro., § 1632. The question presented for decision, therefore, is whether a riparian owner, who has imposed a burden on one part of his land for the benefit of another part, upon conveying the former without express reservation, should be

held under the circumstances of this case, to have impliedly reserved the right to continue the burden. As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned judges, in considering what may be termed an implied grant, as distinguished from an implied reservation, without, however, mentioning the distinction, have used language apparently applicable to all easements existing by implication, when in fact intended to be limited to those existing in favor of a grantee. Others in deciding that an easement was impliedly created by a grant and conveyed to the grantee, have gone farther in their discussions than the point involved required and have broadly declared the rule to be reciprocal and applicable alike to benefits conferred and burdens imposed, provided the marks of either were open and visible. Such was the case of *Lampman v. Milks*, 21 N. Y. 506, where the discussion outran the decision, for, while it was decided that, on the facts then appearing, an easement should be implied in favor of the grantee, against the grantor and his remaining lands, it was asserted that under like circumstances an easement would be implied in favor of the grantor, against the grantee and his lands. The latter proposition was involved neither in the case decided, nor in any of those relied upon to support it, except such as have since been overruled, either expressly or impliedly. So much has been written upon the general subject of implied reservation that a review of the authorities is no longer practicable in an opinion of reasonable length and we shall content ourselves by announcing the rule applicable to the facts of this case and citing a few out of the many authorities upon which it is based.

Where the owner of two parcels of land conveys one by an absolute and unqualified deed, we think that an easement will be implied in favor of the land retained by the grantor and against the land conveyed to his grantee, only in case the burden is apparent, continuous and strictly necessary for the enjoyment of the former. *Outerbridge v. Phelps*, 13 Abb. (N. C.) 117; *Shoemaker v. Shoemaker*, 11 id. 80; *Scrymser v. Phelps*, 33 Hun, 474; *Dales v. Ceas*, 5 W. Dig. 400; *Burr v. Mills*, 21 Wend. 290, 292; *Sloat v. McDougall*, 30 N. Y. S. R. 912; *Butterworth v. Crawford*, 46 N. Y. 349; *Longendyke v. Anderson*, 101 id. 625, 630; *Buss v. Dyer*, 125 Mass. 287; *Mitchell v. Seipel*, 53 Md. 251; *Burns v. Gallagher*, 62 id. 462; *Brown v. Burkenmeyer*, 9 Dana, 159; S. C., 33 Am. Dec. 541; *M'Donald v. Lindall*,

3 Rawle, 492; *Dillman v. Hoffman*, 38 Wis. 575; *O'Rorke v. Smith*, 11 R. I. 264; *Cooper v. Maupin*, 35 Am. Dec. 464, note; *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Wheddon v. Burrows*, L. R. 12 Ch. Div. 31; *Crassley v. Lightowler*, L. R. 2 Ch. App. 478; *Suffield v. Brown*, 4 DeGex, J. & O. 185; *Russell v. Watts*, L. R. 25 Ch. Div. 572; *Brown v. Alabaster*, 37 id. 504; Washburn on Easements, 104, 4th ed.; Gould on Waters, §§ 357, 362; 6 Am. & Eng. Encyc. 143; 4 R. S., 8th ed., p. 2491, § 1.

The trial court found "that at the time of the making and execution of the said mortgage said mills were in operation and there had been maintained a dam across said creek through said lot 43, which set the water back up the creek to lot 37." It was not expressly found, however, that there was any apparent overflow at the time when the mortgage, or the deed was given, or that the mortgagee or the grantee had any notice of the facts when either instrument was accepted. While the dam was high enough to overflow the forty-one acres when the pond was full, it does not appear, unless by implication, that any standing water was visible at the date of the mortgage, or that there was then any visible sign indicating "to a person reasonably familiar with the subject, upon an inspection of the premises," that water had stood there in the past. *Butterworth v. Crawford*, 46 N. Y. 349. At the date of the deed the dam was not in use, as it had been partly swept away by a freshet. Both the mortgage and the deed were given at a season of the year when the water of streams in this State is ordinarily low. Thus it is by no means clear, from the facts as found, that at the date of either instrument upon which the plaintiff's title is founded, there was any visible overflow, or apparent sign of previous overflow. As regularity is presumed, the one who claims that an error was committed, must cause it to clearly appear, or effect will be given to the presumption by affirming the judgment appealed from. *Tracey v. Altmyer*, 46 N. Y. 598; *Appleby v. Erie Co. Sav. Bank*, 62 id. 12, 18.

But even if the findings, when liberally construed, show that the alleged easement was apparent and continuous, they utterly fail to bring it within the rule of strict necessity. It does not appear that the water-power of defendant would be materially diminished if he were not permitted to overflow the lands in question. The maximum overflow affects but little more than two acres of plaintiff's land, which, if the dam should be restored, would be rendered "wet and spongy" and unfit "for agricultural purposes." The defendant claims that the capacity of his mill, when the pond is full, is about fifty barrels of flour each day, and that the fall at the bulkhead is eleven feet, but it does not appear what the capacity or

fall would be with the overflow restricted to the lands which he has the undisputed right to overflow. We are not informed as to the fall of the stream as it flows through the land affected, the grade of the banks, the depth of the water when the overflow is greatest, or the quantity of water that was accumulated or stored on the two acres by the old dam. For aught that appears the advantage of flowing such a small quantity of land was so trifling as to raise the presumption that the mortgagor willingly abandoned it when he omitted to mention or reserve it from the operation of the mortgage. The doctrine of implied reservation rests upon the presumed intention of the parties as it is gathered from the conveyance, interpreted in the light of the circumstances surrounding them when it was executed and with reference to which, as existing facts, they are supposed to have contracted. If it appeared that the mill could not be operated without overflowing the plaintiff's land, it would be cogent if not conclusive proof of that strict necessity, which does not create the easement, but is simply evidence as to the intention of the parties. If, on the other hand, it appeared that owing to the slight declivity the accumulation of water was insignificant and that the mill property was worth substantially as much without the right in controversy as with it, there would be no proof of "necessity" and nothing upon which an implication in favor of the mortgagor or grantor could rest. Even the dimensions of the pond are not furnished us, and we cannot compare its extent with and without the two acres, although it appears to extend partly across one lot and entirely across another before it reaches the lands of the plaintiff. When it is claimed that an easement exists by necessity, evidence of the necessity must be given. *Stuyvesant v. Woodruff*, 47 Am. Dec. 156; *Gayetty v. Bethune*, 14 Mass. 49, 55; *Elton v. Pitman*, 98 id. 50.

While absolute physical necessity need not be shown, as in the case of land-locked premises, or the support of a wall, there must be a reasonable necessity, as distinguished from mere convenience. *Root v. Wadhams*, 107 N. Y. 384; *Hollenbeck v. McDonald*, 112 Mass. 250; *Berry v. Brown*, 6 Cald. 98; *Cooper v. Maupin*, 35 Am. Dec. 464, note.

But in the case before us, where certainty is required, all is conjecture. There is neither finding nor evidence that, in order to run the mill with substantially undiminished efficiency, it is necessary to maintain the dam at such a height as would cause the water to flow over the plaintiff's land.

Upon the facts as found we think it would be unreasonable to hold that the mortgagor intended to reserve any right in the nature

of an easement over the mortgaged premises, or that the mortgagee understood when he accepted the security that it was cut down in extent and reduced in value by the fiction of an implied reservation.
Judgment affirmed.

834. Party walls.

KING v. WIGHT.

155 MASSACHUSETTS, 444. — 1892.

MORTON, J. — We can have no doubt that Mrs. Burt and Mrs. Pease intended by their agreement to bind and benefit their respective estates, into whosoever hands they might come, and did not intend a merely personal contract between themselves. The structure to be built was to be permanent, and was designed to serve as a partition wall between two adjoining blocks, and was to stand one-half on the land of each owner, and was to have flues where one party or the other, as the case might be, should direct. There was nothing which limited the building of the wall to the parties to the agreement, or during their ownership of their respective premises. On the contrary, it is expressly provided that the agreement shall be binding on them and their heirs and assigns forever, meaning clearly that the heirs and assigns of each shall succeed with the estate to the same rights and liabilities under the agreement which their predecessor in title had or might have. If, for instance, neither Mrs. Burt nor Mrs. Pease built the wall, then the heirs or assigns of either might build it as provided in the agreement, and with the same rights on the part of the adjoining landowners to use it, and upon using it the same liability to pay for one-half of its cost, as would have arisen if it had been built by Mrs. Burt and used by Mrs. Pease, or *vice versa*. Such being the purpose of it, the next question is whether the agreement, as thus construed, can be carried into effect. We think it can be, and that it creates mutual covenants running with each lot. The form of the instrument is plainly sufficient. It is under seal, binds the heirs and assigns of the respective parties, and is duly acknowledged and recorded. The fact that it does not purport in terms to create covenants running with the land is not of much moment. The effect of the instrument is to be gathered from it as a whole. Where one party covenants with another in respect of land, and at the same time with and as a part of making the covenant neither parts with or receives any title or interest in the land, nor creates an easement

or a right in the nature of an easement for the benefit of the land, such a covenant is at best but a mere personal contract. *Morse v. Aldrich*, 19 Pick. 449; *Savage v. Mason*, 3 Cush. 500; *Bronson v. Coffin*, 108 Mass. 175, and 118 id. 156; *Norcross v. James*, 140 id. 188, 190.

In the present case the agreement created an easement of use and support in favor of each lot-owner, and her successors in title, in the half of the wall which stood on the other lot, and in the land under the same. Each lot of land became entitled, therefore, to the benefits and subject to the burdens arising from the covenants contained in the agreement, and relating to the erection and maintenance of the wall. They inhered in and belonged to it. The burdens and the benefits were inseparably connected, and the defendant could no more avoid paying to the successors in title of Mrs. Burt for one-half of the wall when he sought to use it, than he could prevent the wall from standing when it had been built, assuming that it was built one-half on each lot. In this view of the case it is not necessary to consider whether the defendant would be liable, as upon an undertaking to pay the cost of one-half of the wall to whomsoever should be the owner of the adjoining lot when he should desire to use the half of the wall on his side. See *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 id. 111; *Richardson v. Tobey*, 121 id. 457; *Martin v. Drinan*, 128 id. 515.

We understand the defendant practically to concede that, if we should be of opinion that the agreement creates covenants running with the land, then the plaintiffs are entitled to recover. At any rate he contends that the plaintiffs cannot recover unless the covenants contained in the agreement do run with the land. For the reasons given above we think they do; and the entry must be, therefore,

Exceptions overruled.

834. Party walls.

CONDUITT *v.* ROSS.

102 INDIANA, 166. — 1885.

MITCHELL, J. — On the 26th day of April, 1875, Julia A. Ross and John Hauck were the owners of adjoining lots in the city of Indianapolis. Pursuant to a written agreement entered into by Mrs. Ross and her husband on the one part and Mr. Hauck on the other, she placed one-half the width of the south wall of a four-story brick

and stone building which she erected on her lot, on the north margin of the Hauck lot. After erecting the building she conveyed the lot, with the improvements thereon, to George P. Bissell, reserving, by a stipulation contained in her deed, the right to receive compensation from adjoining property owners for the building, or use of existing party walls. Subsequently the appellant became the owner of the Hauck lot, and in 1882 commenced the erection of a building thereon, and attached the same to and used the wall erected by Mrs. Ross. Refusing to make payment, this suit was commenced to recover one-half the original cost of the wall. Upon the issues made a trial was had, which resulted in a finding and judgment for the plaintiff.

Counsel for appellant rest their argument for a reversal of this judgment mainly upon the proposition that the agreement between Hauck and Mrs. Ross was purely personal to them, and that Conduitt, by using the wall erected in pursuance thereof, came under no obligation whatever in consequence of such use. They insist further, that if liable at all, the extent of his liability was the actual value of the wall when used, and not its original cost. * * *

The liability of the appellant depends upon whether the contract set out constituted a continuing covenant, which became annexed to and ran with the Hauck lot. If it did, he is liable according to its terms; if it did not, he is liable in this form of action for nothing.

In considering whether a covenant is one which does, or does not, run with the land, there is always embraced the following inquiries: 1. Is the covenant one which, under any circumstances, may run with land? 2. Was it the intention of the parties, as expressed in the agreement, that it should so run?

Doubtless, a covenant which from its character might run with the land, may be so restricted in terms as to make it purely personal, and available to the parties to it, and no other. So, too, a covenant may contain apt words to make it a continuing covenant; yet if its nature or the subject-matter of it is such that it does not concern some interest or estate in land, either existing or created by it, it cannot run with land.

When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate, or interest granted, which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as

to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.

In *Bally v. Wells*, 3 Wils. 25, it was said: "When the thing to be done, or omitted to be done, concerns the lands or estate, *that* is the *medium* which creates the privity between the plaintiff and defendant."

By the contract under consideration, Mrs. Ross acquired the right to enter upon the Hauck lot and erect and permanently maintain thereon a party wall. This was a grant to her of an interest in land, and was of such a character that a perpetual covenant might be annexed to it. *Snowden v. Wilas*, 19 Ind. 10; *Hazlett v. Sinclair*, 76 id. 488, 40 Am. R. 254; 1 Smith Leading Cases, 8th ed., 161, 162.

In consideration of this grant to her she covenanted to do an act beneficial to the remaining interest of Hauck; that act was the erection of a wall so situated as that one-half of it should rest on the margin of his lot and the other half on hers, thus devoting each estate to the mutual support of the party wall. She at the same time covenanted that when she should be reimbursed one-half of the cost of the wall, he, or his grantees, should acquire a reciprocal interest in her lot, and in legal effect become owner of one-half the party wall.

This agreement created what has been aptly termed mutual or cross-easements in favor of each in the lot of the other, and was an arrangement mutually beneficial to both properties. *Fitch v. Johnson*, 104 Ill. 111; *Roche v. Ullman*, 104 id. 11; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. R. 335; *Thompson v. Curtis*, 28 Iowa, 229.

It contained, therefore, all the elements necessary to a covenant capable of running with the land. *Hazlett v. Sinclair*, *supra*; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. R. 283; *Standish v. Lawrence*, 111 Mass. 111; *Maine v. Cumston*, 98 id. 317; *Savage v. Mason*, 3 Cush. 500; *Brown v. McKee*, 57 N. Y. 684; *Keteltas v. Penford*, 4 E. D. Smith, 122; *Platt v. Eggleston*, 20 Ohio St. 414; *Masury v. Southworth*, 9 Ohio St. 340; *Bertram v. Curtis*, 31 Iowa, 46; *Norfleet v. Cromwell*, 70 N. C. 634, 641, 16 Am. R. 787.

It is apparent, too, that it was the intention of the parties that the covenant to pay should run with the land. The words used in that connection are those usually and aptly employed for the purpose: "John Hauck hereby binds himself, his heirs, executors, administrators and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs.

executors, administrators or assigns, shall, in any building he or they may erect," etc., they will pay, etc. A continuing covenant may exist without the word "assigns," or "grantees," but when these or equivalent words are used they become persuasive of the intent of the parties. *Van Rensselaer v. Hays*, 19 N. Y. 68. It was the manifest purpose of the parties that the right to receive payment for the wall should be personal to Mrs. Ross. It was stipulated that payment should be made to Julia A. Ross.

It results that the complaint was sufficient and that the second paragraph of answer, in which it was alleged that the wall, by reason of injuries sustained from fire, was worth much less than the original cost, was insufficient, and the respective rulings of the court were not erroneous.

The covenant being one which ran with the land, when the appellant availed himself of its benefits he became related to it as the original covenantor, and it became the measure of his obligation. We think it is fairly deducible from the complaint that the appellant derived his title through Hauck.

Judgment affirmed.

847. Highways. c. Encroachments.

DRIGGS *v.* PHILLIPS.

103 NEW YORK, 77. — 1886.

DANFORTH, J. — The action was brought to recover damages for an alleged trespass by the defendants upon land of which the plaintiffs claimed possession and ownership. At the trial it appeared that the premises were part of a large tract of land, which, in 1827, was granted by the State to Burrows, Williams and others who, in 1828, made a partition of the same, and described the various parcels as bounded in part by certain streets and highways, and among others "by the highway formed by the continuation of the military road," referring also to a map of the village of Tonawanda, made by Colton Fletcher in 1825; and one of the covenants into which the parties to the partition entered was that all the streets named in the deed as bounding any part of the premises "shall be continued as public streets according to the plan of them in the before-mentioned map." The plaintiff and one Mansfield bought of Williams a portion of this land, and in 1829 or 1830 took from him a contract, which was not produced, but the plaintiff testified that

Mansfield subsequently quit-claimed to him the same premises, and his deed shows a grant "of lots 1 and 6 in block 4 of the village of Tonawanda, as described in a map made by Colton Fletcher and filed in Erie county." He also testified that "the building, for tearing down which the action was brought, stood on the corner of Main and North Canal streets in the central part of the village of Tonawanda," that the lot he claimed was "lot 1," and that Main street was formerly known as the military road. One of the defendants was the supervisor of the town of Tonawanda; the others were its highway commissioners. At the time of the alleged trespass they were lawfully engaged in constructing a bridge over the creek at the point where Main street intersected it. Upon that street its approaches were to be constructed. In carrying out a necessary retaining wall they came to an old foundation wall. It was in no way occupied and, so far as appeared, no person was in possession. They deemed it within the lines of the street and made it fit for their purpose by coping stones which brought it to the surface of the ground. The plan required an iron railing. Its completion was delayed a few days and in the meantime, without the defendants' knowledge, the plaintiff proceeded to erect a small frame building, placing one corner of its frame upon the coping. Before the house was finished the defendants returned to put on the railing and, to do so, necessarily pushed away the the plaintiff's structure. This was the trespass complained of, and the main question litigated was whether the building was within the lines of lot 1, or whether it projected into the street upon which it was conceded that lot abutted. * * *

The court reviewing the whole evidence, charged the jury that if the plaintiff, in the erection of his building, kept within the lines of his lot he was entitled to recover, otherwise not. This was the simple and real issue in the case; it was fully tried, and fairly submitted to the jury in a manner, and in various forms so satisfactory that no exception was taken. * * *

The issue was not between individuals nor in relation to private property. It concerned the public and their rights in the highway. The defendants, at the time in question, were town officers, engaged in the performance of official duty, and if the acts complained of were performed upon premises which at any time, no matter how long before, had been set apart as a highway, and by dedication had become such, the plaintiff could not recover, although he had occupied a particular portion of it from time to time, or even for a continuous period of time extending to twenty years. *Mills v. Hall*, 9 Wend. 315; *Kellogg v. Thompson*, 66 N. Y. 88. There was no non-

user of the highway and his occupation was a mere obstruction and nuisance for which no lapse of time would enable him to prescribe. Once established a highway does not cease to be such until it has been discontinued by the proper authorities. Of that in question it was conceded no record could be found, but the claim rested upon the dedication by the owner of the land and acceptance by the public through user. Upon this point the learned trial court after calling attention to the facts and circumstances relating to it, said, "for the purpose of maintaining a highway of this description it is not necessary that the ground should be constantly or continually used, but that it should be used for the general purposes and convenience of the public as a portion of a public thoroughfare or highway," and the verdict of the jury under other instructions, to which I before adverted, shows that this was done over that portion of the land now claimed by the plaintiff and which contained the *locus in quo*. No exception was taken to this proposition and it must be considered settled that the line of the highway included the wall in dispute. The jurisdiction of the defendants in the performance of their duty extended over the whole width of the highway, as established, and each part of it. The plaintiff took his title subject to the easement, and no act of obstruction on his part could deprive them of their jurisdiction. *Bridges v. Wykoff*, 67 N. Y. 130. No acquiescence on their part in any act of the plaintiff could deprive the public of the right to use the whole highway, or in any degree lessen the duty of the defendants to remove obstructions, when that removal was necessary. *Cook v. Harris*, 61 N. Y. 448. In any view of the case the plaintiff had upon the trial every opportunity which the law affords to assert his title, and we think no error was committed by the learned trial judge to his prejudice.

Judgment affirmed.

847. Highways. d. Additional burdens.

PALMER v. LARCHMONT ELECTRIC CO.

158 NEW YORK, 231. — 1899.

HAIGHT, J. — This is an action in ejectment to compel the defendant to remove its poles and wires from Palmer avenue in front of the plaintiff's premises. The plaintiff is the owner of lands at the corner of Palmer and Rushmore avenues in the town of Mamaroneck, Westchester county, and his fee extends to the center

of the highways, subject to the easements of the public therein. The defendant is an electric corporation organized under the Transportation Corporations Law of this State, L. 1890, ch. 566, having for its objects the manufacture and use of electricity, for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this State. On the 14th day of March, 1894, it obtained a grant from the town board of the town of Mamaroneck, giving it the right to construct and maintain suitable lines of wire for the purpose of conducting electricity to such points within the corporate limits of the town as may seem fit to the company, subject, however, to certain rules and restrictions specifically mentioned, among which were the requirements that the wires should be insulated, conducted upon poles of a specified size and uniformity, made straight and attractive in appearance, on which wires should be strung not less than eighteen feet from the ground. The grant contained the further condition that the company shall furnish to the town \$100 worth of light free of charge each and every year, and for every \$1,000 worth of light bought by the town from the company an additional \$100 worth of free light shall be furnished, the light to be placed in such locations as shall be designated by the town board. Pursuant to this grant the town contracted for certain lights at the rate of \$22.50 per light per year, and thereupon, pursuant to the grant and contract, the defendant constructed its line of wire through Rushmore and Palmer avenues, locating a light on the corner of those avenues in front of plaintiff's premises, and erected on Palmer avenue, in front of his premises, two poles on which the wires were strung, and which the evidence shows were necessary to enable the company to perform its contract with the town.

• This action was prosecuted to recover the possession of the lands occupied by these poles and for damages.

The care, management and control of the public ways devolved upon the local municipal government in which they are located, and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience as well as the safety of the traveling public. It is not only one of the uses to which the public ways may be devoted, but in the case of crowded thoroughfares a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right

of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway. } *Johnson v. Thomson-Houston El. Co.*, 54 Hun, 469; *Consumers' Gas and El. L. Co. v. Congress Spring Co.*, 61 id. 133; *Witcher v. Holland Water Works Co.*, 66 id. 619; s. c. affirmed, 142 N. Y. 626; *Hequembourg v. City of Dunkirk*, 49 Hun, 550; *Sun Pub. Assn. v. Mayor, etc.*, 152 N. Y. 257, 265; *Van Brunt v. Town of Flatbush*, 128 id. 50, 56.

As we understand the opinion of the learned court below, its views are in accord with our own, as applied to public highways in cities and incorporated villages, but it reached the conclusion that the rule was different with reference to country highways, and that the density of population ought not to be made the test in determining the line in respect to easements which separate the urban from the rural districts. 6 App. Div. 12. That court was also of the opinion that this case was controlled by the case of *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133.

Our views are somewhat different. We think the *Eels* case is clearly distinguishable from that under consideration. In that case ejectment was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. It is urged that the wires might be used for the purpose of notifying the fire department of a municipality of the breaking out of a fire. Undoubtedly, and so far as they are used for that purpose, it clearly would be for a municipal purpose, but there is a broad distinction between a municipal purpose and a street purpose. [The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads.] Sewers drain the surface water from the highways and thus relieve them from impairment and destruction. [In this respect sewers are for a street purpose.] In addition they may drain also the abutting property and houses and thus tend to promote the public health. In this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it is for a municipal purpose. Light is, as we have seen, an aid to the public in the night-time in traveling upon the highway. It is, therefore, used for a street purpose. All of the street purposes which we have referred to are clearly incident to the highway and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires.

They in no way preserve or improve the streets or aid the public in traveling over them.

We are thus brought to a consideration of the difference between urban and rural streets. That there is a distinction between such streets has long been recognized by the authorities, but a careful examination of the cases discloses the fact that the distinction arises out of the necessary requirements of the public in the use made of them.

Dillon, in his work upon Municipal Corporations, vol. 2, § 688, says: "In the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to these all the public requires is the easement of passage and its incidents, . . . but, with respect to streets in populous places, the public convenience requires more than a mere road to pass over and upon them. They may need to be graded and be brought to a level, and, therefore, the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make culverts, drains and sewers upon or under the surface." This same distinction was made in *Matter of the Petition of the Bloomfield and Rochester Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, in which it was held that a gas-light company could not lay its pipes in a country highway without compensation to the owner of the abutting land, where its pipes were not used for the lighting of the highway through which the company sought to lay its pipes. But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the *Eels* case, and it is, therefore, apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require. Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the night-time. The inhabitants of our large cities are in a measure supplied with food and other necessities of life from the surrounding country. Scarcely a city can be named in which there will not be found one or more great public highways leading into the country, which, day and night, are thronged with teams transporting the produce of the farm to the markets of the city. Towns, in some instances, have recognized the public necessity and have caused

some of these throughfares to be lighted. In many of our towns there are villages of considerable size, remaining unincorporated, in which lights in the street would be of great convenience and materially add to the safety of the public. May not towns properly supply these streets and thronged highways with light? If they may, they may properly contract with others to supply the light. * * *

The plaintiff is not complaining of the contract or of the supplying of his premises with light. He is seeking compensation for the ground occupied by the poles of the company in the highway in front of his premises. The authorities of his town having determined the necessity for the light and contracted with the defendant to furnish it, and the light being for a street purpose, we think no burden is placed upon the fee that was not within the implied contemplation of the parties at the time the land was taken and dedicated to highway purposes.

Our conclusion is supported by authority. In the case of *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, Earl, J., refers to the question we have had under consideration in discussing the right to construct a sewer in the town of Flatlands. He says: "If the legislature had authorized a system of sewerage in the town of Flatlands for the convenience, health and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers, with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such and the population is such that the sewer could be built in the avenue without the consent of the fee owners and without compensation to them."

In the case under consideration, as we have seen, the legislature has authorized the municipal authorities of the town to contract for the providing of light for street purposes.

Again, in the case of *Witcher v. Holland Water Works Co.*, 66 Hun, 619, an action was brought by an abutting owner to recover the possession of lands in a public highway, occupied by the defendant with water pipes and a hydrant. The village of Holland was unincorporated; a water pipe had been laid through the highway and hydrants had been established, from which the water might be taken for street purposes. It was held, in the General Term, that there was a public necessity for the water, and that it being for street purposes, the plaintiff was not entitled to recover, and that conclusion was affirmed in this court. 142 N. Y. 626. And in the case of *People ex rel. Woodhaven Gas Light Co. v. Deehan*, 153 N. Y. 528, we held that a grant by the authorities of a town to a gas-

light company to lay conductors for conducting gas through the public highways of the town was valid.

There is no question of public policy that is adverse to our contention. It may be that the owners of the fee in highways should not be burdened with sewers, conductors or wires, in which they have no interest or right to use, but which are intended for the use of other localities; but sewers, conductors and lighting wires intended for the use, benefit and improvement of the highway through which they pass, and of the abutting owners thereon, which promote the comfort and safety of the traveling public, stand upon a different footing and impose no burden upon the fee not intended by the grant for highway purposes.) * * *

Judgment reversed.

847. Highways. d. Additional burdens.

PECK *v.* SCHENECTADY RY. CO

170 NEW YORK, 298. — 1902.

MARTIN, J. — The purpose of this action was to enjoin the defendant from building an electric railroad upon Washington avenue in the city of Schenectady, N. Y., in front of the plaintiffs' premises and upon land of which they were the owners subject to a public easement for street purposes.

That the plaintiffs were the owners in fee of the portion of Washington avenue described in the complaint, and that the defendant, without the consent and obviously against the protest of the plaintiffs threatened and intended to construct and operate an electric railroad upon tracks laid upon the surface of that street and to supply power therefor by the erection of poles and wires to conduct the electricity necessary for the operation of its road from its power-house to and along such street was in effect found by the trial judge and unanimously affirmed by the Appellate Division. Therefore, in determining this appeal, those facts must be regarded as conclusively established.

The primary and the most important question involved upon this appeal is whether the use of a city street for the purposes of a street surface railroad operated by electric power, imposes an added burden upon the property rights of the owners of the fee subject to the public easement for street purposes. If this were an open question in this State much could be said to sustain the contention

of the appellant that the acquisition of the use, from the owner, of the land for a public street, includes the right to apply it to all the beneficial public uses for which it may be adapted, not only at the time of its acquisition, but such as may arise in future. It is strenuously claimed that an electric surface street railroad in a city, as constructed and operated at the present time, in its use by, and by reason of its necessity to, the people of the municipality, constitutes an essential feature not only of public use but of street use, and that such means of transportation have largely superseded the former use of streets, and are now the methods by which a great portion of the people are transported, and, hence, as the street was originally established for the accommodation of the traveling public the change in methods of transportation does not constitute a new servitude but only a new and necessary method of accomplishing the purpose for which the street was originally intended, and does not entitle the owners of the fee to additional compensation. This contention is not without force and there are not a few authorities in other jurisdictions which sustain it.

In this State, however, the clear weight of authority is adverse to that contention. *Craig v. Rochester City and Brighton R. R. Co.*, 39 N. Y. 404, is an important and leading case upon the subject. The plaintiff in that action was the owner of a lot on East avenue in the city of Rochester extending to the center of the street. The defendant asserted the right to construct a horse railroad therein without obtaining the plaintiff's consent or instituting proceedings to acquire the right to construct it across his premises. The trial court granted a perpetual injunction restraining the railroad company from building its road over the portion of the street of which the plaintiff owned the fee. The defendant appealed from the decision of the trial court to the General Term, where the judgment was affirmed, and then appealed to the Court of Appeals, where the decisions below were also sustained. There, as here, it was claimed that the defendant possessed the right to construct its railroad through the streets of a city, by virtue of the consent of the common council, without making compensation for damages to the owners of lots along the street over which the railroad passed. It was there urged that the building of such a road was not an infringement upon the rights, or any injury to the interests, of the owner in fee of the land in the street, as it was only a mode of exercising the public right of passage with which he had parted, and not such an additional or further appropriation as entitled him to pecuniary remuneration. This court decided adversely to that claim, and held that establishing and running a horse railroad in a public street of

a city was an imposition of an additional burden upon the land of an adjoining proprietor covered by such street, and that the latter could maintain a suit to perpetually enjoin the railroad company from laying down its track and from running its cars over the street. The same doctrine as to running steam cars upon a street or highway had been previously held in several cases, *Trustees Presbyterian Society in Waterloo v. Auburn and Rochester R. R. Co.*, 3 Hill, 567; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Davis v. Mayor, etc., of N. Y.*, 14 id. 506; *Mahon v. N. Y. C. R. R. Co.*, 24 id. 658; *Carpenter v. Oswego and Syracuse R. R. Co.*, 24 id. 655; *Wager v. Troy Union R. R. Co.*, 25 id. 526, a doctrine which has since been so firmly established that it is not even controverted by the defendant. *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98, 107; *McGean v. Met. E. R. Co.*, 133 id. 9, 15; *Coatsworth v. Lehigh Valley R. R. Co.*, 156 id. 451, 457.

In the *Craig* case the appellant insisted that there was a distinction between a railroad operated in the streets of a populous city by steam and one operated by horse power, and that the rule laid down in the former cases was inapplicable to the latter class of roads. This court, after examining the question, while conceding that there was a difference between a steam and a horse railway, in the manner in which the road was constructed and the speed with which the cars were propelled said: "But there is precisely the same exclusive appropriation of the track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation," and distinctly held that the building and operation of a horse railroad in the public streets of a city imposed an additional burden upon the land of an adjoining proprietor covered by a street, and that such a proprietor could maintain a suit to perpetually enjoin a horse railroad company from laying down its track in the street and from running its cars over it. While the appellant contends that the *Craig* case does not decide that the construction of a street surface railroad operated by horse power entitles the owner of the fee of the street to compensation or to the relief awarded in the case at bar, we think otherwise. Since the decision in the *Craig* case, it has been regarded as an authority holding that doctrine and has been followed with great unanimity by our courts.

In *Bloomfield and R. Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, 388, the question of the right of an owner of the fee of land in streets was again quite fully discussed, and it was there said: "The introduction of railroads in this State presented the question whether a railroad corporation could use a public highway for the purpose of constructing and running its road, and it was held that it imposed

an additional burden upon the soil of the highway besides what was included in the public easement; that the legislature had not the power to make such imposition within the meaning of the constitutional provision, which forbids the taking of property of the owner of the fee without compensation; and that the company can derive no title by any act of the legislature, or of any municipal authority, without the consent of the owner of the fee, or without the appraisal and payment of damages in the mode prescribed by law. *Fletcher v. Auburn and S. R. R. Co.*, 25 Wend 463; *Trustees of Presbyterian Society in Waterloo v. Auburn and Rochester R. R. Co.*, 3 Hill, 567; *Davis v. Mayor, etc., of N. Y.*, 14 N. Y. 506; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97; *Wager v. Troy Union R. R. Co.*, 25 id. 526. These cases settle the law, beyond peradventure, as to the right of railroad corporations to appropriate public highways to their benefit without compensation. At a later day an attempted distinction was sought to be made in favor of horse railroads in cities, and the question as to the right of these corporations to use the streets of cities for their roads and cars was presented in *Craig v. Rochester City and Brighton Railroad Co.*, 39 N. Y. 404, and it was there decided, after full consideration by the Court of Appeals, that the running and establishing of such a road, in the public streets of a city, was an imposition of an additional burden on the land of the adjoining proprietor, for which compensation must be made." In *Fobes v. R., W. & O. R. R. Co.*, 121 N. Y. 505, 515, this general question was discussed by Judge Peckham, who said that, under the decision of the courts of this State, "To construct even a horse railroad in a city street is to place a new and additional burden upon the land, the right to do which does not exist by reason of the general right of passage through the street, but if the adjoining owner of land is not the owner of the fee in the street, and the railroad company has obtained the proper authority, he has no right to compensation for such added burden, nor to complain of such use so long as it is not exclusive or excessive. The same reasoning applies as we have seen in the case of a steam surface railroad. Such a use of the streets would be an additional burden upon the land and, of course, if the adjoining owner had title in fee to the center of the street, subject only to the public easement, he would have a right of action, as held by the *Williams* and other cases." The doctrine of the *Craig* case was again recognized by this court in *Reining v. N. Y., L. & W. Ry. Co.*, 128 N. Y. 157, 163, where Judge Andrews, upon reviewing the cases, said: "These latter cases, as will be observed, decide that neither a horse nor steam railroad can be authorized in streets, the fee of which is in

the adjacent owner, without his consent, while the former cases hold that where the fee is in the municipality, horse railroads may be authorized against the will of the abutting owner and without making compensation. The distinction is made to rest on the location of the fee." In *Eels v. Am. T. & T. Co.*, 143 N. Y. 133, this court held that the State can neither appropriate to its own exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting poles therein for the purpose of supporting telegraph or telephone wires, and in that case the authority of the *Craig* case was again recognized and its principle applied. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 235, also recognizes the principle that the general purposes of a highway or street do not include the transportation of persons or property by railroads over them. The *Craig* case has also been followed in *Thayer v. Rochester City, etc., R. R. Co.*, 15 Abb. N. C. 52; *Matter of Gilbert El. R'way Co.*, 38 Hun, 438, 447; *Spofford v. Southern Boulevard R. R. Co.*, 15 Daly. 162, 165; *Eldridge v. R., C. & B. R. R. Co.*, 54 Hun, 194, 195; *Matter of Rochester Electric R'way Co.*, 57 id. 56, 60; *Matter of the Terrace*, 39 N. Y. S. R. 270, 272; *McCruden v. Rochester R'way Co.*, 5 Misc. Rep. 59, 61, 62; affirmed, 77 Hun, 609, 151 N. Y. 623; *Clark v. Middletown-Goshen Traction Co.*, 10 App. Div. 354; followed, 16 App. Div. 631; *Mangam v. Village of Sing Sing*, 11 App. Div. 212, 216; *Syracuse Solar Salt Co. v. R., W. & O. R. R. Co.*, 67 Hun, 153, 161.

The doctrine of the *Craig* case has now become a rule of property which this court cannot in justice overthrow. Although that case was decided by a divided court, yet it is obvious that the principle there stated has since been generally if not universally recognized as the law of this State and been followed with great uniformity by its courts, as will be seen by reference to the cases to which we have already referred. Therefore, notwithstanding the fact that many jurisdictions have held a contrary doctrine, still, a principle which has been so thoroughly engrafted upon the law of our own jurisprudence should not be lightly disregarded. We are of the opinion that the contention of the appellant in this respect cannot and ought not to be upheld. The doctrine that a horse railroad invades the property rights of the owner of the fee in a public street and imposes upon him a burden for which he is entitled to compensation, being fully established, it obviously follows that the building and operation of an electric road must be controlled by the same principle. Assuming, as we must, in view of these authorities, that the defendant's entry upon the plaintiffs' property in the street would constitute a trespass upon their property rights, it follows that the judgment appealed from must be affirmed.

The defendant, however, insists that if the proposed construction and operation of its railway would be an additional burden upon the plaintiffs' land, yet the only relief to which they are entitled is compensation for the damages which they may thereby sustain, and, therefore, as they have invoked the equitable powers of the court, it should compel them to accept just compensation as an alternative to the injunction. We think this court has no power to deal with that question. If it be conceded that the defendant has the right to exercise the power of eminent domain and to condemn the plaintiffs' interest in the street by proceedings instituted for that purpose, and also that the trial court or Appellate Division had authority to render such alternative relief, still, as the power of discretion existed in the trial court to award the latter or relegate the defendant to the former, whichever it should deem more proper, its adoption of the former, by omitting to render the alternative relief now sought, presents no question of law which this court can review. Although the courts of this State have often in cases somewhat similar awarded the defendant the alternative relief of paying an ascertained compensation as damages and denying a perpetual injunction if such damages were paid, when it was clear that the right of condemnation existed in the defendant, still we think the question whether a court of original jurisdiction shall award to a defendant such alternative relief or leave it to its proceedings to condemn, is one resting in the sound discretion of the trial court, a discretion which may be reviewed by the Appellate Division, but which presents no question of law reviewable by this court, especially if there be a dispute or doubt as to the legal right of the defendant to acquire the title sought by condemnation proceedings. *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423; *Pappenheim v. Met. E. R. Co.*, 128 id. 436. If the defendant had no legal right to acquire the property of the plaintiffs, a court of equity would not be required to grant to the defendant a right to which it was not legally entitled. If such is the case, obviously it cannot be held that the court below committed a legal error in not requiring the plaintiffs to transfer their property to the defendant to which it had no legal right, and to which it could legally acquire no title by condemnation. Under the circumstances we think the trial court was justified, in the exercise of a sound discretion, in leaving the parties to pursue such legal remedies as were necessary to enforce their respective rights, and was not required to decide in this action any disputed question as to the defendant's right of condemnation.

The judgment which was entered upon the decision of the trial court and affirmed by the Appellate Division provided that "The

defendant, its agents and, servants be, and they are, perpetually enjoined from operating a railroad upon any of the said part of Washington avenue and from doing any act tending thereto and thereabout, and from suffering any such act to be done in its or their name or behalf." It was evidently claimed at the Appellate Division that the provisions of this injunction were too broad and would, in effect, restrain the defendant from an entry upon the plaintiffs' land, even after a right to do so was acquired by condemnation. That court was satisfied that the judgment would have no such effect, and that if so it might be amended by application to that court. While we are disposed to think that the judgment would not have the effect claimed, still, it may well be modified by providing that it shall not interfere with or restrain the defendant from instituting proceedings for condemnation of the plaintiffs' rights, and that when the rights of the plaintiffs shall be thus acquired and the compensation awarded paid, it shall not be effective to restrain the defendant from entering upon such premises for the purposes for which they were condemned.

The judgment should be modified by adding thereto a provision that if the defendant shall acquire a right to the use of the land in question for street railway purposes, the judgment shall not be regarded as effective to restrain it from entering upon such premises for the purpose of building, maintaining and operating its railroad thereon, and as so modified the judgment must be affirmed with one bill of costs to the plaintiffs.

PARKER, Ch. J. (dissenting). — I do not disagree with my associates as to the scope of the decision in *Craig v. Roch. & C. B. R. R. Co.*, 39 N. Y. 404, nor do they disagree with my contention that the decision was a mistake. If the question were now presented to this court for the first time it would undoubtedly hold that the operation of a street surface railroad for the accommodation of passengers is a proper use, against which the owner of the fee to the center of the street has no legal ground of complaint, thus putting this court in line with the courts of other States in this country. But as the question comes now before us directly for the second time, the view of the majority is that in obedience to the doctrine of *stare decisis* we must follow the first decision although we do not agree with it. That position furnishes a greater measure of respect for precedent than I am willing to accord where the effect of it must be to injure in a greater degree the public interest which lies in the direction of speedy and cheap short distance transportation. In such a situation the court should, in my judgment, first frankly admit the error of the former decision and next proceed to place the law on the subject

on a sound basis. And especially should this be done where, as in this case, no substantial injury will result to the abutting property owners along the line of the existing street surface railroads, as sufficiently appears by the fact that out of the thousand of miles of such railroads in this State, the present is the first case where the claims of an abutting owner either for compensation or injunction has found its way into this court, and the instances are very few where the abutting owner has claimed, let alone received, compensation for alleged injury to his fee in the street. Tested by the experience of the past, therefore, no substantial injury will result to the abutting owner in the future by the decision I propose, while a contrary decision will be availed of to delay the construction of street surface railroads and compel them to acquire a right, which is practically of no value, by expensive condemnation proceedings, the taking of which will, in addition, consume much time. In the practical working out, therefore, it will result that corporations which can afford it will, in order to save time and legal expenses, pay a substantial price for that which is worth practically nothing. And it will likely also result that corporations which cannot afford it will not undertake to build. Thus, the development of the street surface railroad system of the State, which so greatly conveniences the public, will be retarded, if not prevented to some extent, notwithstanding the fact that the general purpose of such streets was from the beginning, and still is, for the accommodation of all the public who desire to pass over them, and not solely for that limited portion of the public who prefer to employ their own conveyances.

That it is the law in nearly all other jurisdictions that the building and operation of a street surface railroad upon an existing street of a city for the accommodation of local travel does not impose an added servitude upon the lands abutting upon the street, for which the owners of the fee are entitled to compensation, is supported by the following authorities: [*Citing authorities from twenty-seven jurisdictions*].

How the text writers view the decisions of the courts of this country will appear from the following quotations from Lewis on Eminent Domain, 2d ed., vol. 1, § 115, f.:

"It has been determined in numerous decisions and without dissent, except in the State of New York, that the use of a street by a horse railroad constructed and operated in an ordinary manner, falls within the purposes for which streets are established and maintained, and, consequently, that for any damages resulting from such use the abutting owner of property can recover no compensation whether the fee of the street is in him or in the public "

Other text writers are to the same effect. 2 Dillon on Municipal Corporations, 4th ed., § 722; Joyce on Electric Law, § 341; Cooley on Constitutional Limitations, 6th ed., 683; Keasbey on Electric Wires, 2d ed., § 145; Booth on Street Railways, § 83.

While it may be conceded that the isolation of our courts upon this subject does not furnish sufficient grounds to justify the overthrow of a precedent of so long standing, and it may also be conceded that the interest of street surface railroad corporations do not require it, it cannot, it seems to me, be doubted that the interest of the public and its right to enjoy the benefit of modern improvements in the methods of street travel by which is insured to them a cheap, convenient and rapid means of transportation over the streets of cities and to adjacent villages and towns, do authorize a reconsideration of that decision and a re-examination of the questions which led to the making of it, for the purposes of ascertaining whether the principles upon which it was based, were correct and should be continued, or are incorrect, and, therefore, require a practical reversal of that decision. In making such an examination, we would have a vast advantage over our predecessors, who are responsible for the decision in the *Craig* case, for the propelling of cars by electricity had not then been attempted, if it had been thought of, and no one imagined that the time would ever come when in our cities and villages, street surface railroads would accommodate the great majority of the local traveling public, carrying them rapidly from one place to another, leaving the private conveyance to carry but an infinitesimal portion of that great public which daily and hourly traverse the streets of our rapidly growing cities. Had they been able to anticipate what we have witnessed, the argument advanced to justify the holding that the rule of the *Williams* case, 16 N. Y. 97 — a steam railroad case and not a street case at all — was applicable to a street railroad operated for the convenience of those using the street, would not have been made. That wide distinction which in fact obtains between those two classes of cases should be by law maintained, especially when only the correction of a manifest error stands in the way.

Judgment accordingly.

847. Highways.

ROBERT v. SADLER.

104 NEW YORK, 229. — 1887.

FINCH, J. — The constitutional question in this case has been decided against the appellant in Hubbard against the same defendants, which respected the laying out and opening the same street or avenue involved in this appeal.

But a further question not in that case is raised in this. The findings of fact established that the grade of the avenue was fixed and a contract for its construction made with one Curran. By the terms of that contract he was required to cover the roadway to a depth of fifteen inches with gravel, hard-pan or other materials approved by the commissioners. The land within the road lines crossing plaintiffs' premises was higher than the grade fixed and required a removal of the earth to the depth of such grade and possibly fifteen inches below it. The contractor not only removed this material above grade and used it upon the avenue for the purpose of filling and construction, but he dug pits in the roadway to a depth of six feet below the grade in order to get gravel with which to perform his contract without paying for it, and it is found that these pits thus made are "intended and required" to be filled up again with earth before the avenue is completed. The complaint alleged that the pits were dug on "the sidewalk" of said avenue, and the answer admits that "the gravel pits of which the plaintiffs complain have been dug for the purpose of obtaining gravel to be used on the roadway." It is conceded that the public took only an easement for a street or avenue over the plaintiffs' premises, and that they retained the fee in that part of the land on which the pits were dug. The justification which has succeeded goes upon the ground that the acts complained of were embraced in the easement and authorized by it. The question involved was properly raised by exceptions. The courts have held that where, to reach and prepare the surface of the road in accordance with its grade line, superincumbent material is necessarily removed, it may be used upon other parts of the road and on the premises of other land owners, and that where there has been no negligence in construction consequential injuries necessarily resulting cannot be recovered. It was said in *Pumpelly v. Green Bay Company*, 13 Wall. (U. S. Sup. Ct.) 166, 181, that this class of decisions "have gone to the uttermost limit of sound judicial construction" and "in some cases beyond it." The obser-

vation was just. To take merely an easement in land leaving the fee in the owner, and then, by advancing stages of judicial endurance, sap the value and utility of the fee by adding its benefits to the easement is scarcely consistent with a policy which is at the same time sedulously protecting the rights of abutters, having no fee in the street whatever, to their easements of light and air and access. It is perfectly well settled that in a case like the present the public acquire only a right of way with the powers and privileges *incident* to that right, *Jackson v. Hathaway*, 15 Johns. 447, 452, and that the owner of the fee retains his exclusive right in all mines, quarries, springs of water, timber and earth for all purposes not incompatible with the right of way. The question in every case turns upon what is "incident" to the construction or maintenance of the right of way. In *Higgins v. Reynolds*, 31 N. Y. 156, stone was taken from the limits of a highway and its value recovered. In *Niagara Falls Suspension Bridge Company v. Bachman*, 4 Lans. 523, it was said that gravel might be removed to other parts of the road, but it is quite apparent that this was gravel necessary to be removed in order to get the highway to its grade. In *Fisher v. City of Rochester*, 6 Lans. 225, the work done was the construction of a sewer and the contractor used stones excavated from within the street limits. It was held that they belonged to the land owner. In *Kenney v. Williams*, 14 Barb. 629, the owner of the fee took away sand from within the limits of the highway but without injury to the public right of travel, and his action was sustained. In *Denniston v. Clark*, 125 Mass. 216, the gravel removed was a bank above the grade necessary to be cut through, and such as afterward, from natural causes, fell down from the side slopes and filled the ditches which it became necessary again to open. These are the cases cited by the General Term. None of them sustain the conclusion reached. Those which are not adverse justify only the taking of earth or soil which the process of construction or repair requires and necessarily compels to be removed. I have found no case in this State which goes further, and am unwilling to pass beyond those limits. Here the pits were dug to be filled again. Concededly the process was to take from the landowner valuable material and substitute a poorer quality. Digging the pits was not only no incident necessarily or naturally growing out of the construction but a deliberate destruction of the grade when reached and which did not need to be disturbed, but, on the contrary, compelled replacement and repair of the mischief done. Of the two cases cited from other States one goes no further than we here concede to be just. *City of New Haven v. Sargent*, 38 Conn. 50. The court is careful to

speak of the soil taken as that "which must necessarily be removed by some one in grading the street" The other, *Bissell v. Collins*, 28 Mich. 277, seems to go further because the "major portion of the gravel was taken from below the grade of the street." The report of the case furnishes no details, and it may be that the gravel removed was loosened and made superfluous at the point of removal in the ordinary process of grading. If it goes further we do not think its doctrine should be followed.

The cases which hold that the fee in a highway devoted to the perpetual easement of the public use is of only nominal value, need not be considered. If such value is in any case a question of law which the court may determine, the smallness of the value does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. No invasion of the property rights of the citizen can safely be deemed trifling.

Judgment reversed.

847. Profits à prendre.

PIERCE v. KEATOR.

70 NEW YORK, 419. — 1877.

CHURCH, CH. J. — It is important to determine the nature of the right reserved in the deed of Pierce and wife to the New York and Oswego Midland Railroad Company. The reservation is in the following words: "Said parties of the first part also to have the privilege of mowing and cultivating the surplus ground of said strip of land not required for railroad purposes." The appellant contends that this right of mowing and cultivating was an easement appurtenant to the remaining portion of the farm, and would pass to the grantee of the remainder of the farm without description or specification. The term easement has sometimes been applied to rights in or over land without strict regard to the recognized distinctions between the different kind or class of rights. These distinctions may be impaired and even obliterated by the circumstances attending and the manner of their creation.

An easement is a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil. The essential qualities of easements are: First. They are incorporeal. Second. They are imposed upon corporeal property. Third. They confer no right to a participation in the profits arising from such

property, and Fourth. There must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. Bouvier's Dict. Title, Easements; Wash. on Easements, Ch. 1, § 1; 4 Sandf. Chy. R. 89.

The right to profits, denominated profit *à prendre*, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. It is, in its nature, corporeal, and is capable of livery, while easements are not, and may exist independently without connection with or being appendant to other property. 2 Wash. on Real Property, 26 (3d ed.), 276; 22 Wend. 433. The right reserved in the deed of Pierce and wife was a right to profits in the land, and was not, therefore, in strictness, an easement. From the nature of the right we can see no connection between it and the ownership of the farm. The right to mow and cultivate this strip was in no way necessary to, or even useful, to the remainder of the farm, and it was not, therefore, appurtenant. It might have been regarded in the nature of an easement if the reservation had been made to Pierce, as owner of the farm, or on account of being the owner, but the language reserves the right to the parties of the first part, not to their heirs and assigns, nor to the owners of the farm, nor for the benefit of the farm or such owners. As the terms of the reservation indicated a personal privilege, and as there is nothing in the nature of the right reserved connecting it in any manner with the ownership or use of the remainder of the farm, there seems no alternative but to apply the established rules and recognized legal distinctions to the transaction. Ch. Walworth, in 22 Wend., *supra*, said: "For a profit *à prendre* in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself."

The counsel for the appellant cited, also, from Washburn on Easements a general rule, expressed as follows: "This right of profit *à prendre*, if enjoyed by reason of holding certain other estate, is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same."

The qualifications mentioned in these citations do not apply to the case at bar, for the reason before stated, that neither from the nature of the right, nor the terms of the grant, can it be affirmed that the right was enjoyed by reason of holding the farm, or on account of the estate. It is not like the case of a grant of land,

with the right to take wood from other land for the benefit of the estate granted. Wash. on Easements, p. 8; see, also, 48 Maine, 83; 4 T. R. 717.

It may be inferred that the right reserved entered into consideration for the conveyance of Pierce to the railroad company, but the case is destitute of any circumstance tending to establish an intention to affix the right as appurtenant to the remainder of the farm. The contiguous rights secured by the deed do not change the character of this. They are, from their nature, appurtenant to the farm, and presumptively necessary to its enjoyment. This necessarily disposes of the defendant's claim of title to the wheat, through the title to this right obtained by the deed given upon the foreclosure.¹

This strip of land conveyed by Pierce to the railroad company was excepted and reserved from the referee's deed, and was not intended to be conveyed; and if the words, "as conveyed," were intended as an adoption of the terms of the deed by Pierce to the railroad company, yet the defendant would take nothing by the reservation to mow and cultivate because, as we have seen, it was a reservation in favor of Pierce and wife personally, and would terminate upon the death of either. The uncertain character of this right to mow and cultivate as reserved in the deed of Pierce, is significant also of an intention not to fasten it, as an enduring easement, to the remainder of the farm. The use of the strip for railroad purposes would operate to suspend or terminate the right at any time, and the railroad company would have the right at any time to determine the necessity of its use for such purposes, and hence the right is practically revocable at pleasure and scarcely rises above the dignity of a personal license. We concur with the views expressed at Special and General Term, and it is unnecessary to elaborate them.

Judgment affirmed.

¹ Foreclosure of a mortgage which was upon the land when the deed to the R. R. Co., was given. On the sale one Wheeler took title and defendant justifies under him. The action is for a trespass for entering upon the R. R. strip and taking wheat. — ED.

848. Franchises.

MAYOR OF NEW YORK *v.* STARIN.

106 NEW YORK, 1. — 1887.

EARL, J. — This action was commenced to restrain the defendants from maintaining and operating a ferry between the city of New York and Staten Island.

The plaintiffs allege in their complaint that under what is called the Montgomerie charter the city of New York has the exclusive ownership of the ferry franchise between it and Staten Island, and the exclusive right to establish and regulate the ferries, with power to let, sell or otherwise dispose of them; that in violation of its rights, the defendants were operating a ferry between New York and Staten Island, and that they thus intercepted and unlawfully appropriated profits, rents and ferriage fees which belonged to it; * * *

In the consideration of this case it is important first to determine what a ferry is. In a general sense it is a highway over narrow waters. In 2 Washburn on Real Property, 3d ed., 269, it is said: "Ferries, that is, rights of carrying passengers across streams, or bodies of water or arms of the sea, from one point to another, for a compensation paid by way of a toll, are, by common law, deemed to be franchises and cannot, in England, be set up without the King's license, and in this country without a grant of the legislature as representing the sovereign power, and do not belong to the riparian proprietors of the soil." A ferry franchise is property, an incorporeal hereditament, and as sacred as other property. *Conway v. Taylor's Ex'rs*, 1 Black. 603. And the right to a ferry does not depend upon the right to, or the property in, the waters over which it passes, or in the soil under the water, or upon the shore at either end of the ferry. *Fay, Petitioner, etc.*, 15 Pick. 243, 253. A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers; or of travelers with their teams and vehicles and such other property as they may carry or have with them. *Broodnox v. Baker*, 94 N. C. 675. In a strictly ferry business property is always transported only with the owner or custodian thereof; and ferrymen who do nothing but a ferry business and have nothing but a ferry franchise are bound to transport no other property; and in the transportation of persons with their property they are not under the obligations of a common carrier, but are bound only to due care and

diligence. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32. But they may combine, and usually do combine with the ferry business, the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and as to such freight they are under the duties and obligations of a common carrier. As ferrymen they are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property; and as common carriers it is their duty to carry all freight and merchandise delivered to them.

No one has the right to set up a public ferry and charge tolls for the transportation of persons and property without the license of the sovereign. And at common law, it is believed, that one so doing was guilty of a crime and he could be proceeded against by writ of *quo warranto*; and so by our Penal Code it is enacted that "a person who maintains a ferry for profit or hire upon any waters within this State, without authority of law, is punishable by a fine not exceeding \$25 for each time of crossing or running such ferry." § 416.¹ And any person who invades the franchise of another by running a ferry is liable for any damage he causes such other person and may be restrained by the judgment of a competent court. The owner of a ferry franchise is bound to exercise his franchise for the public convenience, and if he fails to do so, his franchise may be forfeited by the sovereign for nonuser, and at common law he could be indicted. If he fails to establish and maintain a ferry he could not, in a civil action, restrain any other person from operating the ferry or recover any but nominal damages for his so doing. No court would restrain the operation of a ferry which was demanded by the public convenience simply because the franchise belonged to another who neglected or refused to use it. So, also, if the owner of an exclusive ferry franchise does not establish sufficient accommodations for the public, he may be proceeded against by the sovereign and compelled to discharge his public duties or his franchise may be forfeited.

It is therefore undisputed that if the plaintiffs have the ferry franchise which they claim, and the defendant, the Independent Steamboat Company, had established and was engaged in operating a ferry between New York and Staten Island, then this judgment was right and ought to be affirmed. * * *

The sovereign was competent to grant and the city to receive these ferry franchises. Such a franchise is property and the sovereign power is just as able to make an irrevocable grant of it as of

¹ Now § 415, Penal Code. - - Ed.

any other property. If it can grant a ferry franchise for a term of years, it can do so forever. By so doing it does not part with any political or governmental function. It still may regulate the conduct of the ferry for the public good and control the tolls to be charged; and it can resume the proprietary right in the franchise only by exercising the right of eminent domain or by forfeiture enforced through regular judicial proceedings. By this grant the city did not merely receive the political right to establish and regulate ferries, but it received the property in the ferry franchise as it received the other property granted to it by its various charters; and we do not find any evidence in the record that what it so received it has ever lost or been deprived of. * * *

We are, therefore, of opinion that it is reasonably certain, taking into consideration the topographical situation of the city, all the circumstances attending the grant, the language used in the various documents, the two sections of the charter and the purpose apparently sought to be accomplished, that the intention was that the city should have the exclusive ferry franchises all around the city, including the ferry franchises between it and Staten Island. * * *

If the city had failed to establish or cause to be operated any ferry for the public accommodation from any of the places between which and the city of New York the Independent Steamboat Company was operating its ferry, we would have had a different question to deal with. But no complaint is made that the ferry service between Staten Island and the city is not adequately performed under the city for the public convenience.

It cannot reasonably be questioned that the Independent Steamboat Company was operating a ferry between the city and Staten Island. It was engaged at regular times, with boats adapted to the purpose, in transporting, in consideration of tolls paid, travelers, with and without their personal property, over the waters between the city and that island. So far it was engaged in the ferry business, and its coasting license gave it no authority to invade the ferry franchises of the city. But it also carried on the business of a common carrier of freight between the city and the island, and that business it could do without any wrong to the city. The judgment, therefore, against the steamboat company is too broad, as it restrains the company from transporting any property between the city and Staten Island, whether such property be transported merely as freight or with the owner or custodian who accompanies the same. * * *

Judgment accordingly.

848. Franchises.

PEOPLE *v.* TAX COMMISSIONERS.

174 NEW YORK, 417. — 1903.

VANN, J. * * * The statute in question authorizes the assessment or valuation, for the purpose of general taxation, of all special franchises by a State board of tax commissioners appointed by the governor. L. 1899, ch. 712. The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. The general franchise of a street railroad company, for instance, is the special privilege conferred by the State upon a certain number of persons known as the incorporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a special franchise, or the right to do something in the public highway which, except for the grant, would be a trespass.

The statute, which is an amendment of the General Tax Law, declares, in substance, that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways or public places," such as railroads, gas-pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate and is "deemed to include the value of the tangible property of a person, copartnership or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise and taxed as a part thereof." § 2, clause 3. This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment roll.

Prior to the passage of this act general franchises had been taxed for the benefit of the State under a valuation made by a State officer,

with the sanction of the courts. L. 1896, ch. 908, §§ 182, 190; *People ex rel. W. & H. Co. v. Roberts*, 154 N. Y. 101. Special franchises, however, had never been lawfully assessed either by local or State authority, but were made taxable property by the act before us for the first time in the history of the State. *People ex rel. Manhattan R. R. Co. v. Barker*, 146 N. Y. 304; *People ex rel. Brooklyn City R. R. Co. v. Neff*, 19 App. Div. 590; affirmed on opinion of Cullen, J., below in 154 N. Y. 763. * * *

The remaining questions raised by the relators do not require elaborate consideration. We cannot sustain their position that the taxation of a special franchise impairs the obligation of a contract and thus violates the Federal Constitution. Art. 1, § 10. The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year or a certain percentage of receipts, as a consideration or "in full satisfaction for the use of the streets." There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. Such a stipulation would be void, for no municipality has power to withdraw property from the taxing power of the State, or to provide by ordinance or contract that it shall be free for all time from the common burden which property generally has to bear. Taxation is the rule, with every presumption to support it, while exemption is an exception, with every presumption against it.

The condition upon which a franchise is granted is the purchase-price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to State grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until by the act of 1899, amending the Tax Law, they were added to the other taxable property of the State. This is all that the statute does so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased and nothing exacted from the owner of the franchise that is not exacted from the owners of the property

generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of government. No burden is placed upon it except such as is borne by the homes of the people and money saved for support in old age.

While all attempts of municipalities to undermine or destroy franchises by changing the terms of the grant have been promptly repressed by the courts, there is no case which holds that a franchise, whether general or special, cannot be taxed the same as other private property. The relators accepted their franchises subject to the right of taxation that applies to all property in the State, and we agree with the learned referee that the special franchise tax takes nothing from the grant, exacts nothing as further compensation for the privilege and impairs no contractual obligation.

* * *

904. Cross remainders. Contingent remainders. "Perpetuities."

PURDY v. HAYT.

92 NEW YORK, 446. — 1883.

ANDREWS, J. — The surrogate erred in declining to entertain jurisdiction to construe the will. The construction of the will was necessary to determine the questions arising on the accounting, and in such a case jurisdiction to construe a will attaches as incident to that proceeding. *Riggs v. Cragg*, 89 N. Y. 479; *In re Verplanck*, 91 id. 439. It becomes necessary, therefore, in deciding this appeal to consider the dispositions of the real estate made by the testator and to determine as to their validity.

It is claimed on the part of the appellants that by the will three successive life estates were created in the testator's farm, viz., one to continue during the joint lives of the testator's sisters, Jane and Catherine, another for the life of the survivor, and a third in the proceeds for the life of Elizabeth Brinkerhoff. If this claim is well founded it is, we think, impossible to resist the conclusion that both the life estates given to the testator's niece, Elizabeth Brinkerhoff, and the remainder to her children, are void, the life estate by force of the express terms of section seventeen of the article of the Revised Statutes relating to the creation and division of estates, and the remainder because it suspends the power of alienation

beyond the period allowed by law. How far the claim of the appellants can be sustained will be now considered. [*The discussion of the question as to the life estate will be found at pp. 904-906, supra*].

We are now prepared to consider the nature and character of the several estates for life, and in remainder, created by the will. We are of opinion that by the true construction of the will, the devise to the testator's sisters, Jane and Catherine, vested in them a life estate in the farm as tenants in common, with cross-remainders. That they took the estate devised, as tenants in common, is declared by the express language of the statute. The statute declares that "every estate granted or devised to two or more persons in their own right, shall be a tenancy in common, unless expressly declared to be a joint tenancy." 1 R. S. 727, § 44. [*N. Y. R. P. L.*, § 56.] By the common law a grant or devise to two or more persons, without more, created a joint tenancy. *Lorrillard v. Coster*, 5 Paige, 228. This rule of the common law was abrogated by the legislature at an early period, 1 Green. Laws, 207, § 6, and the rule as then enacted, and re-enacted in the Revised Statutes, has ever since been the law of this State. * * * The testator gives to the two sisters the use and occupation of the farm during their respective lives, and the intent that the surviving sister should have the use of the whole farm after the death of the other is clearly indicated by the restriction of the power vested in the executors to sell the farm, to a sale to be made "after the decease of my sisters, Jane and Catherine," and a sale before that time would have been unauthorized. But the purpose of the testator, that his surviving sister should enjoy the whole estate after the death of the other, can be accomplished without construing the original estate in the two as a joint tenancy. There seems to be no objection to a limitation to two as tenants in common for life, and of the share of the one first dying to the survivor for life. See cases cited by Nelson, J., 14 Wend. 338 *et seq.* The raising of cross-remainders by implication is not unusual, and where such an implication is justified by the language of the will and will accomplish the purpose of the testator, it is the duty of the court so to construe the will as to give effect both to the statute and to his intention. 1 R. S. 748, § 2.

The remainder given to the children of the testator's niece, Elizabeth, is contingent, both within the rule of the statute and of the common law. It is inferable from the facts stated that no children of the testator's niece were born until after his death, nor, so far as appears, until after the death of his two sisters. The remainder is limited to any children of the testator's niece, which "she may leave," and the gift over takes effect in case of her death, "not

leaving lawful issue." The remainder is not to the children of the testator's niece, as a class, but to such children as she may leave at her death. The children now living may not survive their mother, and whether they will ever be entitled to take under the will depends upon that contingency, and whether any of her present children will survive her cannot, of course, be known until her death. This brings the remainder precisely within the statute definition of a contingent estate, which declares that future estates are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain, and within the fourth class of contingent remainders mentioned by Mr. Fearne. 1 R. S. 723, § 13; Fearne on Contingent Remainders, 9. In this case the remainder, when created, depended upon a double contingency, viz.: the birth of children to the testator's niece and their survivorship of the mother. One of these contingencies has happened, the other is still uncertain. That the remainder in this case is contingent, is, we think, settled by decisions in this State upon similar language, in cases arising since the Revised Statutes. *In re Ryder*, 11 Paige, 185; *Savage v. Burnham*, 17 N. Y. 571; *Carmichael v. Carmichael*, 4 Keyes, 346.

Having thus ascertained the nature of the estates for life and in remainder given by the will, it only remains to apply the test of the statute to determine their validity. The law permits, as we have seen, the creation of only two successive estates in the same property. The two sisters of the testator took, as we have held, an estate in the farm as tenants in common with cross-remainders for life. The life estate of his sister Jane, who first died, terminated on her death, and her enjoyment constituted one life estate in her share. A second life estate in that share then vested in her sister Catherine, and was spent at her death. The limit of the statute as to that share was then reached, and no subsequent life estate therein could be limited either in the land or the proceeds. The third life estate in the proceeds of that share attempted to be created in the testator's niece Elizabeth was therefore void, and the corpus of the share vested in the children of Elizabeth then living by force of the gift in remainder, and the seventeenth section of the statute, or descended on the death of the testator's sister Jane to the testator's heirs-at-law, as in the case of intestacy. The remainder could not take effect for the reason that it was contingent, and the remaindermen were not ascertained, and could not be until the death of the testator's niece. The other alternative alone remained, viz.: the devolution of the title in the undivided half of the farm upon the testator's heirs, subject to the power of sale vested in the

executors. The result, therefore, is that there was no valid disposition of the fee in the undivided half of the farm, and it descended to the testator's heirs, who, upon the sale under the power, became entitled to one-half of the proceeds of the sale, and consequently to the subsequently accruing income therefrom.

But the devise to the testator's niece of a life estate in the proceeds of the farm, with remainder to her children, though void as to the share devised for life to the testator's sister Jane was, nevertheless, valid as to the share of his sister Catherine. When his sister Catherine died, but one life estate in her original share had run. On the death of the testator she took a distinct and several freehold estate for life in one-half of the farm, although her particular share was not set off or partitioned, and of that share, though undivided, she was solely and severally seized. 1 Co. Litt. 875; 4 Kent, 368; *Collumb v. Read*, 24 N. Y. 505. There was no devolution of her share upon her sister, for the plain reason that her sister first died. There was, therefore, no objection to a limitation of an additional life estate in the share of the one of the testator's two sisters who should survive, for this would be simply giving a second life estate in that share; and as it is the duty of a court to carry out the intention of a testator so far as is consistent with the rules of law, we think the devise to the testator's niece Elizabeth for life should be held valid to the extent of entitling her to the income from the half of the proceeds of the sale of the farm. The validity of the remainder as to this share may also, we think, be sustained. Whether we regard the limitation as one of real or personal property, the absolute title will vest at the expiration of two life estates, viz.: the life estates of the testator's sister Catherine, and of his niece Elizabeth. The death of the latter will point out and ascertain the persons entitled in remainder, and this satisfies the statute.

It is no objection to the validity of a remainder in fee that it is limited in favor of persons not in being when the limitation is created, or not ascertainable until the termination of a precedent estate, provided only that the contingency upon which the remainder depends must happen within, or not beyond the termination of the prescribed period for the vesting of estates. *Gilman v. Reddington*, 24 N. Y. 9; *Manice v. Manice*, 43 id. 303.

The question as to whether the remainder can be sustained as to the share of the sister of the testator, last dying, in view of the statute of perpetuities, is in one aspect a novel one. It is apparent that the power of alienation was suspended by the contingent limitation in remainder, and such suspense could not lawfully exceed two lives, and in a single case, a minority in addition. There was,

under the will, a limitation for three lives as to the share of one of the two sisters of the testator, but upon which share that limitation would operate, could not be known until one of the sisters should die, and that event would render it certain that the unlawful limitation in remainder was of the share of the sister so first dying. The question therefore arises, whether it wholly defeats the remainder, that it could not be ascertained, until one life estate was spent, which of the shares would be unlawfully suspended. We perceive no good reason why such a result would follow. The rule is well settled that where by the terms of the instrument creating an estate, there may be an unlawful suspension of the power of alienation, the limitation is void, although it turns out by a subsequent event, as by the falling in of a life, no actual suspension beyond the prescribed period would take place. *Hawley v. James*, 16 Wend. 121. But this rule relates to cases where, if the limitations take effect, in their order, as contemplated by the grantor or deviser, some of the estates limited will not vest within the prescribed period, and they are cut off as too remote, although it may happen that the estates so cut off, would, by events subsequently happening, take effect within two lives.

The case here is not, we think, within this principle. In the one case the vice affects the whole limitation, and in the other, the limitation of a part only of the property devised, the only uncertainty being as to the part the title of which will be unlawfully suspended, and this will be ascertained within the period of a single life. Where the precedent or particular estate is given to several persons as tenants in common, the remainders limited upon the estates of a part of the tenants in common, may fail, without affecting the remainders limited upon the estates of the others. *Fearne on Rem.* 193; *Hawley v. James*, *supra*. We think, therefore, the unlawful suspension under the will in question, affected only the share of the estate given for life to the testator's sister Jane.

Judgment accordingly.¹

¹ See, however, *Dana v. Murray*, 122 N. Y. 604, at p. 617, where it is said: "It may be claimed, however, that as to the undivided one-fourth originally taken by the surviving life tenant under the will, that as to that interest only two life estates have been created. The case of *Purdy v. Hayt* (*supra*), adds weight to this claim and presents a serious question. But at this time it is impossible to tell who will be the surviving life tenant, or whose one-fourth interest would be within the provisions of the statute. The case is, therefore, presented, where three-fourths of the life estate devised is void under the statute whilst the other one-fourth may be valid, but it cannot be determined which is valid or which condemned until after the death of three of the life tenants, The person being unknown and the claim contingent, we incline to the view that this is also within the condemnation of the statute."

952. Entireties.

BARBER v. HARRIS.

15 WENDELL (N. Y.), 615. — 1836.

ONE Yates, in 1811, deeded certain land to David Harris and Maria, his wife, and their children, Peter, David, Erasmus, Rachael, Maria, Edwin Augustus and Angelica, "to each and every of them for and during the natural lives of said David Harris and Maria, his wife, and the survivor of them, and after their decease to their said children [*naming them*] and to their heirs and assigns forever, as tenants in common — and also such other children as shall hereafter be born. . . ." In 1819 Harris and wife executed a mortgage to plaintiff. It is alleged that the execution thereof by Mrs. Harris was defective. The mortgage has been foreclosed and plaintiff, the purchaser at the sale, now brings ejectment for the premises. There were eight children of Mr. and Mrs. Harris living at the time of the trial.

NELSON, J. — * * * Whether the mortgage, as executed, was void and inoperative or not, was a question that could properly arise, and of which the defendant might avail himself. If it was void, nothing passed under it to the plaintiff, who was bound to show an execution of the instrument that would bind the interest of the defendant in the premises, whatever it might be. The deed from Yates to the defendant and his wife and children conveyed to them an estate which they held as tenants in common, the defendant and his wife together being the owners of one share, and that probably only for their lives. The husband and wife, in contemplation of law, are but one person, and they are therefore incapable of holding either as joint tenants or tenants in common.¹ 2 Bl. Com. 182; 16 Johns. 115; 8 Cow. 277; 2 Bl. 1214. Each is seized of the entirety, *per tout et non per my*; being but one person, there can be no moiety or separate estate between them; and the husband, therefore, cannot forfeit or alien the estate, because the whole of it belongs to the wife as well as to him. Crui., tit. 18, Joint Tenancy, ch. 1, § 35; 5 T. R. 654; 2 Bl. Com. 183. If a grant is made to husband and wife and a third person, the husband and wife have one moiety and the third person the other; so if the grant be to the husband and wife and two others, the husband and wife take one-third only. Litt., § 291; 1 Inst. 853; 2 Vern. 120. We need not, however, pursue this inquiry, nor express any definite opinion upon the true construction of the deed to the defendant,

¹ See, however, note, p. 959, *supra*. Some jurisdictions seem to be in accord with the text. *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397. — ED.

his wife and children, because, during the life of the husband, he, undoubtedly, has the absolute control of the estate of the wife, and can convey or mortgage it for that period.¹ By marriage he acquires, during coverture, the usufruct of all her real estate which she has in fee simple, fee tail or for life. If the wife survives, and is not precluded by her acknowledgment of the mortgage, she may then raise the question as to the nature and extent of the interest she took under this deed. The verdict and judgment in this case will not prejudice her rights. It is unnecessary, therefore, to express an opinion as to the sufficiency of the acknowledgment; though I do not intend, by thus waiving the question, to have it implied that I entertain any doubt upon it. Neither is it material whether the verdict find for the plaintiff an estate in fee or for life, as to his share in the premises, because the interests of the co-tenants, or heirs, they not being parties to the suit, will be unaffected by it.

It is perfectly plain from the terms of the deed that the defendant and wife are tenants in common with their children, those born since its execution as well as those mentioned by name therein. The whole estate vested in the grantees living and named, but became divested as to the other shares afterwards arising or opened to let in the after-born children. *Fearne*, 313, and cases cited; 4 Johns. 64; 12 Wend. 83; 3 T. R. 484; 2 Str. 1172; 1 Ld. Raym. 310. The consequence is, that the defendant and his wife having but one share, and there being eight children, only one-ninth of the premises are bound by the mortgage and, of course, no more passed to the plaintiff under it. According to the stipulation, the verdict should be amended so as to find for the plaintiff one-ninth of the premises described in the declaration, and for that he is entitled to judgment.²

¹ This is not the rule since 1848. See *Hiles v. Fisher*, 963, *supra*. — ED.

² Accord: *Wright v. Saddler*, 20 N. Y. 320; *Price v. Pestka*, 54 App. Div. (N. Y.) 59. Compare *Hilton v. Bender*, 69 N. Y. 75, where on a devise to Robert and Catherine, his wife, and Richard "as tenants in common and their heirs forever," it was held that the devise to the wife was as specific as to either of the others and they each took an undivided one-third. — ED

963. Estates by the entirety.

GROSSER *v.* CITY OF ROCHESTER.

148 NEW YORK, 235. — 1896.

HAIGHT, J. — This action was brought to restrain the city of Rochester and its contractor from constructing a sewer across the plaintiff's premises. The premises in question were conveyed to the plaintiff and her husband and are occupied by them as a residence. Under the deed they each became seized of an estate as tenants by the entirety. Prior to the commencement of this action the city of Rochester instituted proceedings to condemn a right of way for a sewer across the premises, but gave notice thereof to the plaintiff's husband only. Such proceedings resulted in the making of an award to the husband, which was paid into court. The city, by its contractor, then threatened to enter into possession of the premises to construct the sewer, and thereupon this action was brought.

We fully agree with the learned referee and with the court below, that the notice served upon the husband and his appearance in the proceeding did not make the wife a party nor bind her interest in the premises, and that as to her the city acquired no right in the land.

It is contended, however, on behalf of the city that the sewer would not work a permanent injury to the freehold; that the husband was entitled to the benefit, use, possession and control of the land during the joint lives of himself and wife, and, having such possession and control, he had the right and power to grant to the city the right to construct the sewer across the premises and maintain it during his life; that the plaintiff's rights have not been infringed, and that no action can be maintained by her until she shall become vested with the absolute and entire estate as survivor of her husband.

When land is conveyed to husband and wife they each become seized of the entirety, and upon the death of either the whole survives to the other. We are aware that, by the common law, the husband before the death of his wife could possess and control the land and take all the profits thereof for his own benefit. *Bertles v. Nunan*, 92 N. Y. 152. This right, however, followed the conveyance and inured to the husband under the general principle of the common law, and was not acquired by reason of the creation of a tenancy by the entirety. So that, when the disability of the wife was removed under the Married Woman's Act of 1848, and subsequent acts, she

was thereafter permitted to have, hold and enjoy whatever estate came to her by devise or conveyance, and the husband's right to the sole occupancy and possession terminated. Thereafter she became entitled to hold, enjoy and possess with him as if she were a tenant in common. *Hiles v. Fisher*, 144 N. Y. 306.

The construction of a sewer across the premises in question is a permanent injury and interferes with plaintiff's possession. It consequently follows that she has a present right to maintain the action.

Judgment affirmed.

968. **Entireties.**

MATTER OF ALBRECHT.

136 NEW YORK, 91. — 1892.

MAYNARD, J. — Upon the final accounting of the executors in this case, the legatees in the will objected to the account upon the ground that it did not include the interest of the decedent in a bond and mortgage executed to him and his wife in 1878 for the payment of the sum of six thousand dollars, money loaned, which was outstanding at the time of his death in 1886, and also at the time of the death of the wife, which occurred some two months later. It was claimed by the executors that upon the death of the husband the title to the bond and mortgage and to the money secured by it vested wholly in the wife by virtue of her survivorship, and upon her death belonged to her estate, to be distributed to her next of kin, and that no part thereof passed under the will of the husband to the legatees named therein. The surrogate sustained this claim and overruled the objections of the legatees, and his decision has been affirmed by the Supreme Court. It appeared from the evidence, and was found by the referee, that the husband and wife each invested the sum of three thousand dollars in the bond and mortgage, and the money which was loaned to the mortgagor was drawn from the savings banks, where each had deposits to his or her individual credit. Under these circumstances we think it was a joint investment by the husband and wife, and that each had an interest in the security taken therefor, to the extent of the amount contributed by him or her, and that upon the death of either such interest vested in the personal representatives of the deceased party.

There is no room here for the application of the doctrine which prevails where husband and wife take an estate in property as ten-

ants by the entirety. That relation can only exist where there is a conveyance of a vested interest in or title to real property.

Since the adoption of the Revised Statutes it has been the law of this State that a mortgagee acquires no title to the mortgaged property; that the mortgage is simply a chose in action, held as collateral security for the payment of a debt, and until foreclosure the mortgagor has the entire fee subject to the lien of the mortgage. Here the bond is the principal obligation and the rights of the joint creditors as between themselves upon the collection of the debt are not affected by the existence of the mortgage as collateral security for its payment.

It might be observed that if this was a case governed by the same principles which determine the rights of husband and wife where real property is conveyed to them during coverture, it would not necessarily follow that they would become tenants by the entirety. If nothing was shown to evince a contrary intent such would undoubtedly be held to be the relationship of the parties, as was decided in *Bertles v. Nunan*, 92 N. Y. 155. But this court has held in the recent case of *Miner v. Brown*, 133 N. Y. 308, that such a tenancy is not created where it appears from the character of the transaction that it was the intention of the parties that the grantees should take as joint tenants or as tenants in common. To the same effect is *Jooss v. Fey*, 129 N. Y. 17.¹ What would be the legal rights of the parties where, upon a purchase of real property, the husband and wife had each contributed from their separate estates equally or in any other ascertained proportion to the payment of the consideration does not as yet seem to have been the subject of judicial decision.

It is not necessary, however, to further pursue this mode of reasoning, for it has no value, except as it may be instructive by way of analogy. The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rest upon different grounds than those which support a tenancy by the entirety. We cannot affirm the decree of the surrogate without, in effect, ruling that if the wife had predeceased the husband he would have taken her share of the investment by virtue of his survivorship. But under the married woman's acts, she is to be regarded as if she were sole with respect to her property rights, and she may unite with her husband in the purchase of personal property with her separate funds, and the interest which each will acquire in the subject of the purchase will not be affected

¹ In these cases the decisions were based on the language used in the respective instruments. — Ed.

by the marital relation. The law now regards them as standing upon the same plane of equality as if they were strangers to each other.

We are aware that there are many authorities holding that where the husband purchases a security or makes a deposit, or subscribes for stock in the joint name of himself and wife and pays therefor with his own funds, upon his death the entire security belongs to the wife if she survives him. But the decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift *causa mortis*, which he may revoke in his lifetime and which does not take effect until his death if not previously recalled. While he lives his control over it is unlimited and at his death it becomes her absolute property, if she survives him, but if she does not, the gift is not consummated, and the husband retains the entire title. This was the rule laid down by Lord Eldon in *Wilde v. Wilde*, Roper's Husb. & Wife, Jacob's ed., vol. 1, p. 54, where it was held that if the husband purchased stock in the joint name of himself and wife it was *prima facie* a gift to her, in case of her surviving, unless evidence was produced of contemporaneous acts showing the contrary intention. But if the husband and wife each contribute to a joint investment or to the purchase of a security and the title is taken in their joint names to be held by them, their executors, administrators or assigns, as was the bond and mortgage in the present case, no presumption can properly arise from the nature of the act that either intended to make a gift of his or her share to the survivor. The just inference is that each regarded it as a loan of individual property upon the strength of the security taken, and they become tenants in common of the bond and mortgage with all the rights and incidents of such a relationship.

We are unable to find any reported case in this State where the question has been presented in this form, but the Supreme Court of Michigan held, in 1877, in the case of *Wait v. Bovee*, 35 Mich. 425, that where husband and wife, being each possessed of means, had made investments jointly, each supplying half, and had taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, did not take the whole by the right of survivorship; and that the rule which prevails as to the right of survivorship in the case of united holdings of real estate by husband and wife is not applicable to personalty. This view is supported by the principles of justice which should prevail in the determination

of the rights of parties, and is in accord with the spirit of modern legislation which has striven to place the parties to the marriage contract upon the same footing with respect to the acquisition and control of their individual properties as if the conjugal relation did not exist. The decree should be reversed, and the executors required to account for the interest of the testator in the bond and mortgage; but as the question is new, and it is apparent that the executors have acted in good faith, the costs of both parties should be paid out of the estate.

Judgment reversed.

973. Improvements and repairs by co-tenant.

COSGRIFF *v.* FOSS.

152 NEW YORK, 104. — 1897.

VANN, J. — The question presented by this appeal is whether a tenant in common, who is also a lessee of his co-tenant, can be allowed in partition for improvements made upon the property in the course of his tenancy, which enhanced its value, and were made with the knowledge, but without the consent, of the co-tenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him upon the premises, the increased income from which was not shared with the co-tenant.

At common law a tenant in common, who has made permanent improvements, as distinguished from ordinary repairs, upon the common property, cannot recover from his co-tenant any part of his expenditures for that purpose, unless they were made at the request or with the consent, express or implied, of the latter. *Mumford v. Brown*, 6 Cow. 475; *Jackson v. Bradt*, 2 Caines, 302; *Taylor v. Baldwin*, 10 Barb. 582, 590, 626; *Putnam v. Ritchie*, 6 Paige, 390, 405; *Crest v. Jack*, 3 Watts, 238; *Gregg v. Patterson*, 9 Watts & S. 197, 209; *Story's Eq. Jur.*, § 1235; *Knapp on Partition*, 10. In some States this is the rule, even when the expenditure was necessary to keep the property from going to ruin, while in others, repairs essential to preservation may be made at the expense of the co-tenants, in proportion to their respective shares, without their consent, especially if such consent is unreasonably withheld after due request. It is strictly limited to repairs, however, and does not extend to improvements not essential to protect the property, but designed to

enhance its value. *Loring v. Bacon*, 4 Mass. 575; *Beaty v. Bordwell*, 91 Pa. St. 438; *Stackable v. Stackpole*, 32 N. W. Rep. 808; *Wiggin v. Wiggin*, 43 N. H. 561; *Alexander v. Ellison*, 79 Ky. 148; *Hancock v. Day*, 36 Am. Dec. 293.

The rule of courts of equity upon the subject is more liberal and extends to improvements in special cases, as, in an action of partition, for instance, the court acts upon the principle that the party who asks for equitable relief will be required to do what is equitable himself. The rule, however, is carefully limited to those cases where special circumstances give rise to strong equitable rights. *Putnam v. Ritchie*, 6 Paige, 390; *Ford v. Knapp*, 102 N. Y. 135.

Some authorities sanction repairs that are absolutely necessary to preserve houses and mills, already erected and in being, but refuse to extend the rule to other kinds of property. *Dech's Appeal*, 57 Pa. St. 467, 472; *Anderson v. Greble*, 1 Ashmead, 136, 139. Chancellor Kent says: "One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them, though the rule is limited to those parts of the common property and does not apply to fences inclosing wood or arable land." 4 Kent. 370. Other cases permit improvements to be set off against rents and profits, but not charged against the body of the estate unless made with the knowledge and consent of the other owners. *Pickering v. Pickering*, 63 N. H. 468; *Luck v. Luck*, 113 Pa. St. 256; *Jones v. Jones*, 23 Ark. 212. Where one tenant in common, who was in possession, supposing himself to be the legal owner of the entire premises, erected valuable buildings thereon, he was held entitled to an equitable partition so as to give him the benefit of his improvements. *Town v. Needham*, 3 Paige, 546. So in an action for partition, where actual division is possible, the co-tenant who has made substantial improvements upon one parcel, is usually allotted the part that he has enhanced in value or so much thereof as represents his share in the whole tract. Freeman on Co-tenancy and Partition, § 509; 17 Am. & Eng. Enc. of Law, 758. But when the property is so situated that actual partition is out of the question, even courts of equity, in this State, do not require contribution for improvements, as distinguished from repairs, except in the case of mills, houses and the like, under circumstances of special necessity. The erection of a new and independent building, the improvements of farming lands by fencing or drainage, the opening of mines or quarries, or the making of changes that are in no sense designed to protect or preserve the property, but simply to improve it and increase its value, do not warrant the court in requiring a co-tenant who has not consented to contribute to the

expense. This is just, as an extension of the rule from repairs to general improvements, in the nature of new erections, might enable one co-tenant to "improve" the other out of his share in the property. * * * The leading cases in this State are *Scott v. Guernsey*, 48 N. Y. 106, which is relied upon by the respondents, and *Ford v. Knapp*, 102 id. 135, which is relied upon by the appellant. In the former case two remaindermen, without the consent of the others, but with the consent of the life tenant, erected buildings upon the premises, under an agreement with the life tenant that they might put up the buildings and receive the rents. One building erected in 1833 increased the value of the land by \$750, and another erected in 1841 by \$200. In 1854, when the life tenant died, the rents received had largely exceeded the value of the buildings and the interest on the investment. It was held that the remaindermen who thus improved the property were not entitled to any compensation therefor, and, upon partition, could not exact reimbursement from, or claim a lien upon, the shares of their co-tenants. The court said: "There was no consent, mistake, or other equitable ground in this case for relieving the party who made his investment with full knowledge of the facts, voluntarily, and without any inducement offered by other co-tenants. Had the appellants offered to share their rents, upon being paid a due proportion of the value of the improvements after the termination of the life estate, it might have afforded a better ground to claim compensation. The appellants are not within the reason of any of the adjudged cases, where relief has been granted in partition for money expended in improvements by one of several tenants in common."

In *Ford v. Knapp* "the defendants were tenants in common with one Whittaker of a mill property badly run down and out of repair." Whittaker's interest was sold upon execution to the defendants, "but subsequently judgment creditors redeemed and acquired the title of the debtor." "During the fifteen months between the sale and redemption, the defendants expended a large amount upon" a gristmill on the premises. Some of the machinery, adapted to and once used for merchant milling, was out of date and not worth repairing, while that necessary for custom work was still in use, but "dilapidated and inefficient." The dam was repaired, a new water wheel made and the machinery so changed as to do good custom work, which was classed by the referee who decided the case as repairs, "while the addition to the buildings and the introduction of new machinery and appliances for a merchant mill he classed as improvements. These repairs and improvements largely increased the market value of the property. Before they were made a gener-

ous estimate of that value did not exceed \$8,000, while on the sale in partition it brought about double that amount." The Supreme Court refused "any allowance either for repairs or improvements."

This court, referring to *Scott v. Guernsey*, said: "Here were reasons enough for denying any equity to the improving tenant, and the case stands solidly upon its facts and is not open to criticism. But it does not deny the duty of a court of equity in a proper case to give its relief upon condition of an allowance for improvements, and does not undertake to specify all the cases in which such equity shall be recognized. Nor shall we undertake any such dangerous or impossible effort. The authorities leave us at liberty to consider whether, upon the facts and circumstances of this particular case, the improving tenant ought to be protected, and furnish us the power to grant the protection if it may justly be demanded." After alluding to some of the facts of the case then at hand, the court continued: "The defendants acted in the presence of a peculiar and unusual emergency; they acted in entire good faith; the repairs were necessary and not merely a venture or speculation, and the improvements were in the line of *restoration* and not of new and strange enterprise. What they did was natural and normal to the use and character of the property and such as joint owners of equal ability might be expected to join in making. They offer to share in the increased income thus secured, and in every respect appear to have acted fairly." The court sent the case back for a division of the proceeds of the sale according to the principles stated in the opinion, and for an accounting of the income and profits which the defendants offered to make.

We do not regard the two cases thus reviewed as in conflict. In the one special equities existed, while in the other they did not, and judgment went accordingly. In the earlier case those who made the improvement did it as a business venture, and they had received back from it not only the principal and interest, but also a large profit, which they did not offer to share with their co-tenants. In the latter case those who made the improvements did not make them as a business venture, but to save the property and prevent the "business and custom" of the mill from drifting "into other hands." What they did was "in the line of restoration," not of independent construction, and when they had done it and had doubled the value of the property, they offered to share the increased profits with their co-tenants. The improvements were made upon a mill and mill dam, which, owing to their peculiar nature, seem always to have appealed strongly to courts of equity for aid through contribution toward repairs and reasonable improvements, so as to

keep pace with the times, accommodate the public, and prevent loss of custom.

In the case before us we find no such equitable strength in the claim of the appellant. He sustained the double relation to his co-tenants of tenant by lease and tenant in common. Under the former relation he was entitled to no repairs, but was bound by a covenant in the lease to make such as would keep the premises in their normal condition, except depreciation by use and damages by the elements. The improvements were made mainly for the purpose of extending his business and increasing his sales, in which his co-tenants had no interest. He had the right, by express contract, to remove all his structures during the term of his lease. The nature of the property did not permit decay, and there was no controlling necessity for making the changes and additions. If they had not been made the premises would not have depreciated in value. Some of the work was done after this action was commenced and a part even after the trial was in progress. It does not appear that the appellant offered any share of the profits to his co-tenants, or, to what extent the value of the premises was increased, or, unless inferentially, that they would sell for any more on account of the improvements. His erections were in the nature of new and independent construction to enable him to quarry more rock and sell it, and thus, *pro tanto*, he consumed the property. They were not "in the line of restoration," but of a business venture.

We know of no well-considered case in this State that would authorize an allowance for improvements under these circumstances. It would be a dangerous extension of the rule governing the subject, which is always applied with caution, to permit one co-tenant to run the other in debt, against his will, for unnecessary improvements. Equity requires contribution from tenants in common only to prevent injustice, and, unless the rule is kept well in hand, it is liable to cause more injustice than it prevents.

Judgment affirmed.

976. One co-tenant buying in the property.

CARPENTER v. CARPENTER.

131 NEW YORK, 101. — 1892.

ANDREWS, J. — * * * The plaintiffs are the children of the testator's two sons, Smith S. Carpenter and Jesse L. Carpenter, and the widow of the latter, and the defendants are the widow and the

six children of the testator, who survived him and are still living. The evidence clearly shows that soon after the death of the testator the defendants entered into a scheme to obtain through a foreclosure of the "Duryea" and "Downing" mortgages, title to the property covered thereby, for the purpose of cutting off the interest of the children of the deceased brothers therein. To this end in September, 1880, they procured the holders of the mortgages to commence foreclosures and under judgments obtained in the foreclosure actions, the property was sold in March and April, 1881, and was bid in by one of the sisters for the amount due on the mortgages respectively, and costs, and immediately after the execution of the referee's deeds the purchaser conveyed to the mother (now deceased) a life estate in the "Homestead" farm, and to each of her five brothers and sisters one-fifth part of the "Homestead" farm, and of the "Downing" farm in fee. Before conveying to her brothers and sisters, Sarah J. Osborn, the purchaser of the foreclosure sales, executed to the holder of the "Downing" mortgage a new mortgage on the lands covered by that mortgage, in payment of the mortgage foreclosed, and to her brothers, Coles A. Carpenter and Charles W. Carpenter, as executors, a mortgage for \$5,000 on the "Homestead" farm to secure them for money advanced by them out of the estate of James S. Carpenter, to pay the holder of the Duryea mortgage the sum due on that mortgage, and the costs. It is unnecessary to state in much detail the facts tending to show that the foreclosure of the two mortgages mentioned was contrived by the defendants for the purpose of accomplishing the scheme for depriving the children of the two deceased brothers of their share in the inheritance.

The holders of the mortgages had made no demand of principal or interest on their securities. They had allowed them to stand for many years after they became due, without seeking to enforce collection. The interest had been paid up to November 1, 1879, and the foreclosures were commenced in September, 1880. The mortgages were amply secured upon property worth many times their amount, and there is not the slightest reason to suppose that any measure would have been taken at the time by the mortgagees to foreclose the mortgages if they had not been prompted to do so by the defendants. The holder of the Duryea mortgage testified that he was approached by the defendant Coles A. Carpenter, one of the executors, who said: "He would like to have me foreclose the mortgage; that it would be a favor to them all, in order to settle up the affairs of the estate." The proof is less explicit as to how the foreclosure of the Downing mortgage was brought about, but

the circumstances surrounding the transaction preclude any doubt that it was by the active intervention of the defendants.

The judgment in this case adjudges that the title to the "Homestead" farm and to the "Downing" farm, acquired by the defendants under the foreclosure, and the deeds in severalty subsequently made, is held subject to a trust in favor of the plaintiffs, to the extent of a one-fourth interest in the property, and we are asked to reverse the judgment on the ground that the defendants did nothing more than they had a legal right to do, for the purpose of disencumbering their shares of their father's estate of the mortgages and separating their interests in the property.

It would be a matter to be regretted if we should be compelled by any principle of law to uphold a transaction so repugnant to every sentiment of honor and which is instinctively condemned in the forum of conscience. We assent to the claim of the learned counsel for the defendants that before a plaintiff can invoke the action of a court to give him redress of any sort, he must show that at some point in the history of his grievance a right, not ethical merely, but cognizable in the domain of law, has been violated, or that some trust duty owed toward him by some one has been actively or passively disregarded. But that a duty cognizable by the law has been violated in this case by the defendants cannot, we think, admit of doubt. It is probably true that neither the principal nor interest of the mortgages was a charge upon or payable out of the personal estate of James S. Carpenter in the hands of his executors, 1 Rev. St. 749, § 4, and the general direction in the will to his executors "to pay all just and legal demands against his estate," is insufficient to charge the personal estate with mortgage debts.

But the executors and the other defendants, together with the children of the two brothers deceased, were tenants in common of the real estate. The issue of the deceased brothers were also interested in the personal property of the testator, the extent of which interest could not be ascertained until an accounting by the executors. The executors took possession of and controlled the real estate from the death of the testator, and received the rents and profits from that time and held them for the common benefit of all the parties interested. It appears that there were several tenement houses on the "Homestead" lot; that the executors continued to work a clay bed on the premises, selling material therefrom. It is claimed by the defendants that no rents or profits had been received up to the foreclosure, out of which the interest on the mortgages could have been paid. The trial judge refused to find this to be true. The executors kept no account of the rents and profits.

They seem to have been handed over to the mother. In the absence of clear proof on the subject, a court, in view of the circumstances, is justified in assuming that the rents and profits of the realty were available and sufficient to have paid the comparatively small amount due for interest on the mortgages, and this clearly is all that the mortgagees, upon the facts shown, would, in any event, have required. The executors not only omitted to use the rents and profits for this purpose, or to pay their own share of the interest, but they also loaned the funds of the estate to pay one of the mortgages, for this was the substance of the arrangement in respect to the Duryea mortgage.

The transaction by which some of the tenants in common claim to have acquired the whole estate to the exclusion of their co-tenants, cannot be upheld within the principle of many cases. *Van Horne v. Fonda*, 5 Jo. Ch. 388; *Knolls v. Barnhart*, 71 N. Y. 474; *Rothwell v. Dewees*, 2 Black U. S. 613; *Dubois v. Campau*, 24 Mich. 361. The defendants and the plaintiffs had a community of interest in a common title, arising under the devise. The defendants, or some of them, were in the actual possession and control of the common property. They were bound to do nothing with a view to prejudice the interests of the plaintiffs. They could not buy in an outstanding title to defeat the right of their co-tenants. If the foreclosure of the mortgages was a proceeding hostile to the defendants, and they had not been in default, and their purchase was made of necessity to protect their own rights, with full knowledge of the situation on the part of the plaintiffs, the moral, and perhaps the legal, aspect of the case would be altered. But to permit the plaintiffs, all but two of whom were infants, to be cut off by a proceeding instigated by the defendants for that very purpose, and in the absence of any effort on their part to avert the danger, and when they were in actual possession of the common property, receiving the rents and profits, is not a mere ethical grievance, but one which the law will recognize and redress. We think the judgment below, so far as it respects the "Homestead" and the "Downing" property, stands upon a firm, equitable and legal foundation.

976. Co-tenant's accounting.

ZAPP v. MILLER.

109 NEW YORK, 51. — 1888.

PECKHAM, J. — * * * The next point made by the defendant's counsel is, that the courts below erred in charging the defendant with the rent of the rooms occupied by him after the execution and delivery of the deeds to defendant by the plaintiff, because, as he says, assuming the deeds were void, the parties were then tenants in common of the real estate, and there being no agreement to pay rent he was not liable to his co-tenant for his mere use of the common property. The counsel cites a number of cases holding that the mere occupation by one of several tenants in common of an estate does not make the occupant liable to his co-tenant for the rent of the premises. Such are the cases of *Woolever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 id. 300; *Roseboom v. Roseboom*, 15 Hun, 309. These cases refer to the leading one of *Henderson v. Eason*, 9 Eng. L. and Eq. 337, where such a proposition was decided, and there is no doubt of its correctness. But that case, and all the others resting upon it, contains the qualification that the other tenants shall not be excluded or ousted from the possession of the premises or their title denied, in which event the other tenants may maintain ejectment to recover possession and then an action to recover the mesne profits. 1 Co. Litt. 784; 4 Bac. Abr., title Joint Tenants L., 518. And in order to prove an ouster it is not necessary to prove a violent ejectment, or as one of the cases has it, it is not necessary to prove the party was set out by the shoulders. It may be inferred from circumstances. *Doe ex dem. Fisher v. Prosser*, 1 Cowp. 217; *Hornblower v. Reed*, 1 East, 568; *Goodtitle v. Tombs*, 3 Wils. 118, cited in 1 Coke, 906; 4 Kent m. p. 370, note a.

Obtaining title to the whole property held in common, by virtue of fraud and undue influence practiced on the co-tenant, who thereupon leaves the premises is, as we think, an ouster of such co-tenant and would enable him to bring ejectment. There is no question raised here as to the form of the action, and under our liberal system of pleadings and the abolition of forms of actions, there was enough shown to render it proper and right in this action to charge the defendant with the rent under the modified judgment of the General Term. * * *

1061. Estoppel in deed.

TEFFT *v.* MUNSON.

57 NEW YORK, 97. — 1874.

EARL, C. — The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that, ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed. *Work v. Welland*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 id. 533; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 567; *Jackson v. Bull*, 1 John. Cas. 81, 90; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 29 Maine, 183. And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties but all privies in estate, privies in blood and privies in law; and, in such case, the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case, Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it; and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then con-

veyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title is, ordinarily, a nullity, and constructive notice to no one; the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage. The case of *White v. Patten*, *supra*, is entirely analogous to this. In that case the plaintiff derived his title from the mortgage, made to him by one Thayer, containing covenants of seizin, warranty, etc., and recorded February 19, 1834. At the time of the execution of this mortgage the title was not in Thayer, but in one Perry, his father-in-law. Perry afterwards, by deed, recorded August 2, 1834, conveyed the land in fee simple to Thayer, who conveyed the land by mortgage to the defendant, recorded the same day. The counsel for the defendant used the same arguments, in a great measure, which have been urged upon our attention by the counsel for the plaintiff in this case, both as to the title and the registry of the mortgages; and yet the court held, in a very able opinion, that the plaintiff had the prior and better title.

I am, therefore, of opinion that the judgment should be affirmed with costs.

REYNOLDS, C. (dissenting). When Martin B. Perkins gave the mortgage to the loan commissioners he had possession, but no title to the mortgaged property. He had forged a deed of the premises from Gamaliel Perkins to himself, and caused it to be put on record in the clerk's office of the county of Washington; and by this device imposed upon the loan commissioners. The forged deed was, of course, a nullity, and could not in the eye of the law have any effect by way of constructive notice or otherwise. It conveyed nothing, and was not a "conveyance" within the meaning of the recording acts, and did not affect the title to the land "in law or equity." It may be assumed, therefore, that the loan commissioners took the mortgage, knowing that Martin B. Perkins had no title, it being very clear that they acquired no legal rights by being imposed upon against any one, save Martin B. Perkins. They got no interest in the land, either in law or equity. It is not in principle unlike the case of a forged negotiable promissory note, where a *bona fide* holder for value can have no protection. It follows, therefore, that the entry of the mortgage in the books of the loan office at the time it was made was of no legal consequence whatever, except as against

the mortgagor. It was no notice under the recording acts, for it did not, in the remotest degree, affect the title to the land described in it. The mortgage contained a covenant of title, and it seems to be clear that a title subsequently acquired by Martin B. Perkins would ordinarily inure by estoppel, or otherwise, to the benefit of the mortgagees if other rights have not intervened. The title to the mortgaged premises was in Gamaliel Perkins, from the 18th of January, 1848, to the 16th of December, 1859, when he conveyed it to Martin B. Perkins. By this conveyance the mortgage given by Martin B. Perkins to the loan commissioners in October, 1850, acquired legal vitality by way of estoppel, or in some other form, and if it had then been in any proper form recorded, constructive notice of its existence, as a valid lien upon the property, would have been given to all the world. It is urged that there was no necessity of making any further record of the mortgage, because the title in the mortgagees comes under the warranty by way of rebutter or estoppel. This will not do. It is sufficient to say that by virtue of the transactions under which the defendants look to enforce the lien of the mortgage, the title to the land is affected, and such a paper must be properly put on record to bind subsequent purchasers in good faith. If this be not so it is impossible to see how a subsequent *bona fide* purchaser can have any protection, and when it is said to be impossible to record the estoppel which gave the mortgage vitality, it may be answered: that, until the estoppel became operative, the mortgage was a nullity and the record of it no notice whatever. When, however, Martin B. Perkins obtained the title to the premises it became, by some operation of the law, valid against him; but it was of no greater force or effect than if he had on that day given it to the loan commissioners. It then, for the first time, affected the title to the land, and in order to bind subsequent purchasers in good faith, must be duly recorded, and this was not done in any such way as to operate as constructive notice under the recording acts.

It is not questioned but that the plaintiff is to be protected as a *bona fide* purchaser for value, unless the mortgage given in 1850, and then entered in proper order in the books of the loan office, which, at the time, did not affect the title to the land in any way, was constructive notice of the lien. It is well settled that a conveyance that is not duly recorded according to law, even when the actual title has passed, is not effectual as constructive notice. *Frost v. Beekman*, 1 John. Ch. R. 288; *Lessee of Heister v. Futner*, 2 Binney, 40. Much less can it be that a conveyance which does not affect the title can give any legal notice whatever. In the very

best aspect of the defendant's case the record of the mortgage was made out of the order required by law and failed to give notice to anybody dealing with the title to the land. *The N. Y. Life Ins. Co. v. White*, 17 N. Y. 469; *Sawyer v. Adams*, 8 Vt. 172. In this view the deed of the plaintiff was first recorded and he is entitled to protection in his title.

The judgment should be reversed with costs, the mortgage declared no lien upon the land of the plaintiff, and the loan commissioners perpetually enjoined from attempting to enforce it.

Judgment affirmed.

1064. Estoppel as to boundaries.

BALDWIN v. BROWN.

16 NEW YORK, 359. — 1857.

SELDEN, J. — It is unnecessary, in the view I take of this case, to decide the question raised upon the construction of the deed from Thomas to Joseph Brown. It is undoubtedly a general rule that, where the lands conveyed are described by courses and distances, and also by reference to natural objects or fixed and permanent monuments, if there is a discrepancy between the two, the former description must yield to the latter. The reason is that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent. This, however, is by no means an inflexible rule. Where there is anything in the description which shows that the courses and distances are right, they will, of course, control; because the primary object, in all cases, is to arrive at the real intent of the parties. For instance, where it is apparent upon the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include that precise quantity, but the description by fixed monuments would embrace more or less, it is clear that the former should be followed. To do otherwise would be to defeat the plain intent of the parties. It is obvious, too, that the reason for relying upon monuments, in preference to courses and distances, applies with much greater force to such as are natural and permanent than to those which are artificial, especially where the latter were erected as the result of a survey by courses and distances. But without pausing to inquire how these and other qualifications of the rule in question might affect the present case, I pass to the consideration of another point.

The referees have found that the disputed line was actually surveyed and run prior to the execution of the deed from Thomas to Joseph Brown, in 1808; that the grantor and grantee united in building a fence upon the line so run; and that this fence was maintained, by the original parties and by those claiming under them, substantially upon the same line, from the time of its erection by Thomas and Joseph Brown to the year 1852, when this suit was commenced. That during this entire period, of more than forty years, the original parties and those succeeding to their rights treated the fence as the true division line between them, and occupied and cultivated their respective lands accordingly.

These facts would seem to bring the case clearly within the settled rule in this State, which forbids the disturbance of a practical location which has been acquiesced in for a long series of years.

The counsel for the appellant takes the ground that the rule in question is based upon the idea of an agreement, either express or implied, as to the location of the line, and he cites numerous cases to show that an agreement which is founded upon a mutual mistake of facts is not obligatory upon the parties. But I apprehend the counsel is in error in assuming that a parol agreement, either actual or supposed, fixing the boundaries, lies at the foundation of the rule. It is true that several of the cases make this suggestion, and speak of the long acquiescence of the parties as affording evidence of such an agreement. It is difficult, however, to support the rule upon such a basis. If acquiescence for a great number of years in an erroneous location is obligatory upon the parties merely as evidence of a previous parol agreement, then it must follow that any other proof establishing such an agreement would be equally conclusive upon them. If it is the agreement which binds, the nature of the proof, provided it be competent, is, of course, immaterial.

Hence, upon this theory, a deed may be made to convey land not at all described in it, by means of a mere parol agreement, adopting boundaries entirely different from those mentioned in the deed. There are several *dicta* in this State which go, perhaps, to that extent, but no adjudged case. On the contrary, whenever the question has directly arisen it has been held otherwise. In *Jackson v. Douglas*, 8 John. 367, there was a virtual agreement as to the line, and possession taken and continued for eight years in accordance with it; and yet the court held that this did not settle the question of boundary. Again, in *Stuyvesant v. Dunham*, 9 John. 61 when a crooked line having been maintained for more than twenty-five years, the parties had mutually agreed that the line was in reality straight between two admitted termini, yet on one of the

parties acting upon this agreement, and running a straight line, the other was held not bound.

It seem impossible to hold that a mere parol agreement, adopting a line different from that described in the deed, is obligatory, without violating the statute of frauds, both in its letter and spirit. It is said in some of the cases, by way of sustaining the doctrine, that the agreement does not transfer the title, but simply determines the boundaries of the land described; a distinction, the soundness of which may well be doubted. The supposition of such an agreement, in cases of long acquiescence in an established line is, as I apprehend, entirely superfluous. The acquiescence in such cases affords ground not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance. The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles; and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years. In all cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has continued for a long period, rarely less than twenty years. In *Jackson v. Bowen*, 1 Caine, 358, it was thirty-six years; in *Jackson v. Dysling*, 2 id. 198, forty years; in *Jackson v. Vedder*, 3 John. 8, the same; in *Jackson v. Dieffendorf*, id. 269, thirty-eight years, and in *Jackson v. McCall*, 10 John. 377, forty-one years.

If the only effect of acquiescence is to prove a previous parol agreement, there must be many cases where such acquiescence for a few years only, attended by other corroborating circumstances, would afford evidence as strong as acquiescence alone for a much longer period; and yet no such case has ever arisen. In *Kip v. Norton*, 12 Wend. 127, an acquiescence of four or five years, and in *Adams v. Rockwell*, 16 id. 285, of eleven years, were held insufficient. There may be cases in which an express agreement recognizing an erroneous boundary will conclude a party; as where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed. Such cases, if they exist at all, rest upon a different principle, viz., that of estoppel *in pais*, and have no bearing upon the question under discussion.

It follows from this reasoning that it is no answer to the proof of

acquiescence in this case, that parties are not bound by an agreement entered into under a mutual mistake as to facts. The plaintiff is precluded, upon principles of public policy, from setting up or insisting upon a line in opposition to one which has been steadily adhered to upon both sides for more than forty years. If necessary, in order to establish this line, the law will presume a conveyance in accordance with it. This is decisive of the case, without regard to the question whether the plaintiff's claim is barred under the statute concerning adverse possession.

It is clear that there can be no recovery of the small strip of land in possession of the defendant, in consequence of the removal of the fence for the purpose of clearing up the ridge. That removal was made by the mutual consent of the parties, and it was as much the duty of the plaintiff as of the defendant to restore the fence to its original location. At all events the plaintiff was bound to give the defendant notice to replace it before commencing a suit. The demand of possession proved in the case makes no reference to the strip in question.

The judgment of the Supreme Court should be affirmed.

Judgment affirmed.

1075. Acknowledgment or attestation of deeds.

CHAMBERLAIN *v.* SPARGUR.

86 NEW YORK, 603. — 1881.

FINCH, J. — Out of the complicated and somewhat peculiar transaction spread before us in this case, a single distinct and definite question is raised, and the only one necessary to the disposition of this appeal. The plaintiff claims under a deed from Mrs. Woodward, never in fact acknowledged by her, or attested by a subscribing witness. The defendants hold under subsequent deeds and leases properly executed and acknowledged. Whether these shall prevail or yield to the prior and unattested conveyance is the question which has been argued, and which depends for its solution upon the statute which dictates the consequences of an omission by the grantor to attest or acknowledge his deed. That statute is in these words, viz.: "Every grant in fee of a freehold estate shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its delivery . . . its execution and

delivery shall be so attested by at least one witness, or if not so attested it shall not take effect as against a purchaser or incumbrancer until so acknowledged." § 137, art. 4, title 2, chap. 1, part 2, R. S. The respondents construe the word "purchaser" literally and generally, while the appellant insists, with much of argument and illustration, that it means, and must be taken to mean, "purchasers in good faith and for value." Such, he contends, the defendants were not, and, therefore, unprotected by the mandate of the statute.

It is said that the precise question has never been decided, and remains open to our judgment, untrammelled by direct authority. That appears to be substantially true. The cases in the Supreme Court did not necessarily decide it. *Goodyear v. Vosburg*, 57 Barb. 243; *Roggen v. Avery*, 63 id. 65; *Genter v. Morrison*, 31 id. 155; *Voorhees v. Presbyterian Church of Amsterdam*, 17 id. 108. If in the first of these cases the question was really involved, since the referee found that the subsequent purchaser took his conveyance, with knowledge that the grantees in the unattested deed claimed to own the timber, the title to which was in dispute, it is nevertheless evident that the true construction of the statute was not discussed, and its literal was assumed to be its real meaning without debate. In this court the question came up before the Commission of Appeals, and resulted in a disagreement which divided the members of the court, sitting at the time, equally. *Roggen v. Avery*, 65 N. Y. 592. No opinions accompany the report of the case, and we only know the fact of the disagreement. There is, therefore, no such weight of judicial opinion or control of authority as to relieve our labor, or lessen our responsibility.

It must be, and is frankly conceded, that the language and literal reading of the act favors the construction of the defendants. But we are warned on the one side that the strict letter of the law is not to master its obvious spirit and intent; and on the other that we are judges and not legislators, and must not assume to make exceptions or insert qualifications, however justice may seem to require it. Both warnings are just and sanctioned by authority, and must have their influence upon our judgment.

Is the true spirit and intent of the statute so at war with its letter as to compel a construction which interpolates words not in the act itself? And what is, in truth, that spirit and intent? If it is merely the protection of subsequent purchasers, and a desire to secure justice among them, there is great force in the argument that he only should be shielded who deserves protection, and the purchaser who holds an attested deed, having paid nothing and parted with

nothing, ought not to be preferred to the prior purchaser whose deed is unattested, but who has paid for a title. But we do not think the statute was framed solely for the protection or the benefit of the grantees. It had also and equally in view the safety and protection of grantors. The greater dignity of the freehold, in the eye of the ancient law, is assigned by Kent as the reason for requiring more of form and solemnity in the conveyance of land than of personal property. Kent's Comm. *450. The old authorities fully warrant the explanation. The deed was so called because it was the most solemn and authentic act that a man could perform in the disposal of his property. It was required to be on parchment or paper, since the writing upon them could be least altered and vitiated. Ten requisites to its complete effect were stated and discussed, with very quaint and curious precision, and they were declared to be appointed "to hinder the parties from surprise." Touch. 50; Coke Lit. 35b, 36a; Viner's Abridgment, vol. 13, p. 21. It is plain, therefore, that the solemnities which were thrown around the due execution of a deed of land originated not in care for the grantee alone, but even more for the safety of the grantor. When he came to part with his freehold, to transfer his inheritance, the law bade him deliberate. It put in his path formalities to check haste and foster reflection and care. It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation. But even this was not all the purpose and aim of the forms attending the executed deed. An element of public policy, a wisdom having a broader range, entered into the requirements. The importance of the act made it useful and wise to guard as completely as possible against fraud and hinder attempts to divest the inheritance by deception or crime. The requisite formalities aided seriously in accomplishing this purpose, and placed added difficulties in the way of fraud or forgery. When, therefore, the statute under consideration provided that the unattested deed should have no effect against purchasers and incumbrancers, it aimed at something more than merely the protection of innocent purchasers. It made effective and useful the prescribed formalities. It gave them force and power, and protected the grantor against his own recklessness and haste, and shut the door to an appreciable extent upon opportunity for fraud. We do not think, therefore, that the spirit and intent of the statute is at war with its letter, but that both concur and are in harmony. The grantor, who has signed a deed, unattested and unacknowledged, is left with the power of

effectively conveying by a later deed properly executed. The party who has taken the imperfect instrument does so at his peril, and with eyes open to the consequences. The grantor may, nevertheless, convey, and it matters not upon what consideration or for what purpose. That concerns him alone. The contrary construction would make the unattested and unacknowledged deed quite as good as the perfect and regular one, while the latter remained unrecorded. Each alike would yield only to the rights of the innocent purchaser, obeying the requirements of the law. It is in this connection that our attention is drawn to section 144 of the same title, which provides that "every grant shall also be conclusive as against subsequent purchasers from such grantor . . . except a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by conveyance that shall have been first duly recorded." It is claimed that the unattested and unacknowledged deed is a "grant" within the meaning of this section, and so is void only as against innocent purchasers. We do not think that is its meaning.

It is true that the unattested deed is good as against the grantor, *Wood v. Chapin*, 3 Kern. 509, and so may fairly be called, in some partial or modified sense, a grant. But the revisers certainly did not mean a contradiction. They could not have intended to say in one section that an unattested deed should have no effect as against purchasers, and in another section, under the name of a "grant," declare that it should be conclusive against them except under special circumstances. This inconsistency the plaintiff would solve by adding qualifying words to the term "purchaser." We do not think the inconsistency exists. By the word "grant," in section 144, was plainly meant a perfect and duly executed grant, and not an imperfect and unattested one. Thus, understood, the two sections do not clash and are not inconsistent. They complete and execute one entire and systematic purpose. The imperfect and unattested deed has no effect against any purchaser or incumbrancer; but the perfect grant, duly acknowledged or attested so as to be fully operative as such, is conclusive against subsequent purchasers, save those who have bought in good faith and for value, and have first put their deeds on record. This last phrase shows clearly that the section was dealing with deeds that could be recorded, and, therefore, had no reference to those which, for want of attestation or acknowledgment could not go upon the record. That phrase, too, illustrates the fact, which many other sections further indicate, that the revisors perfectly understood how to say purchasers in good faith and for value when they intended to limit

a rule or a provision to such purchasers alone. The omission of these descriptive words in section 137, cannot, therefore, be deemed an inadvertance, but must be understood as intentional, and for a defined purpose. We have thus no difficulty in construing the statute literally and just as it reads. We find no reason for adding to it words not in the text, and feel that the path of safety is in the direction of a steady adherence to the unambiguous language of the act.

This construction answers the further claim that because Mrs. Woodward's unattested deed contained covenants of warranty it operated as an estoppel. Such a ruling would at once nullify the force of the statute, and compel us to hold that while, as against purchasers, there was no effective deed, its covenants were still operative as against such purchasers; that, though the grant is annulled, its incidental covenants can remain. We have not overlooked the suggestions as to possible evils or inconveniences attending the construction we have thus declared. They do not seem to us either necessary or serious.¹

Judgment affirmed.

1093. The recording acts.

CLARK v. McNEAL.

114 NEW YORK, 287. — 1889.

In 1856 Miller mortgaged certain premises to Impson. The mortgage was recorded at once. Through a series of assignments (the first executed in 1856), none of which has been recorded, Clark has become the owner of this mortgage.

In 1863 Miller conveyed the land to McNeal, who assumed and agreed to pay the mortgage. In 1873 he induced Impson to cancel the mortgage of record. This was done without consideration and without any notice to the real owner of the mortgage. In 1876 McNeal mortgaged the premises to Ramsdell & Co., who were notified at the time that the mortgage now held by Clark was a subsisting and first lien upon the lands. In 1877 the Ramsdell mort-

¹ The statute in question (§ 208 R. P. L.), applies to the attempted conveyance of an easement in fee. *Nellis v. Munson* 108 N. Y. 453. An unacknowledged and unattested deed is good as against the heirs of the grantor or one claiming under them. *Strough v. Wilder*, 119 N. Y. 530. In some states either an acknowledgment or attesting witnesses, or both, are necessary to the validity of the deed even as between the parties to it. — ED.

gage was assigned for full value and with a guaranty to the executors of DeWint. The executors accepted the assignment and recorded the same without actual knowledge of the above facts and without examining the records. This action is brought against all parties interested to cancel the satisfaction piece and establish the lien of the first mortgage as prior to that of the mortgage held by the executors of DeWint. Further facts appear in the opinion.

VANN, J. — The lien of plaintiff's mortgage was prior to that of the mortgage of Ramsdell & Co., before they assigned it to a *bona fide* purchaser, because they accepted the latter without actual notice of the existence of the former. But after the purchase of the Ramsdell mortgage by the executors of DeWint, in good faith and for full value, it became, in their hands, prior in lien to that of plaintiff's mortgage, owing to the protection afforded by the recording act. Upon the former appeal this court sought to protect the equity of plaintiff as against Ramsdell & Co., by permitting her to acquire the rights which the executors of DeWint had obtained by their purchase, including the guaranty contained in the assignment of the Ramsdell mortgage. *Clarke v. Mackin*, 95 N. Y. 346. Prior to the judgment of this court, however, the land in question had been sold under the decree based upon the Ramsdell mortgage, and Ramsdell & Co. had discharged their guaranty by payment of the deficiency. Otherwise the plaintiff could have acquired the Ramsdell mortgage and could have been subrogated to the rights of the holders thereof. If a sale had been made, she would have been entitled to have her mortgage first paid out of the proceeds, and after application of the residue upon the other mortgage could have collected from Ramsdell & Co. any deficiency then remaining. In order to accomplish the same result in the only way then available, a supplemental complaint was filed and the parties who were necessary, owing to the change of circumstances, were brought in. Upon the trial of the new issues, the court found that Ramsdell & Co. were virtually the purchasers at the foreclosure sale, and that the defendant Carvey took title from their representative upon being indemnified by them against loss by reason of plaintiff's claim to priority, of which claim he was fully informed. The situation is, therefore, the same as if Ramsdell & Co. now owned the premises through a purchase in their own names under the decree of foreclosure. The question presented is, whether such a purchase by them, under all the circumstances, would give them a title free from the lien of plaintiff's mortgage. The appellants claim that it would, upon the ground that a purchaser from one who is protected by the recording act against a prior unrecorded mortgage is himself pro-

tected, even if he had actual notice at the time of his purchase. It is clear that a sale to any one except Ramsdell & Co., or their representative, would have destroyed the lien of plaintiff's mortgage. But a sale to Ramsdell & Co., or to one who purchased for them, would not have this effect. As the lien of their mortgage, while they held it, was subject to that of the plaintiff's, so their title acquired under that mortgage would be subject to the same lien. By selling the mortgage they did not destroy plaintiff's equity, but simply prevented her from asserting it against a *bona fide* purchaser. If they had afterward bought the mortgage, the equity would have at once re-attached, and when they bought the land upon a sale under the mortgage, the equity of plaintiff's lien forthwith revived.

It is a familiar principle that where one purchases with full notice of the equitable claim of another to the same property, he will not be permitted to protect himself against that claim, but his own title will be postponed and made subservient to it. This is upon the ground that he is guilty of constructive fraud. If, however, he transfers to a *bona fide* purchaser, the latter not only takes a good title, but can transfer a good title even to one who purchases with notice of the facts, as otherwise the *bona fide* purchaser could not get the market value of his property. To this general rule, however, there is an exception. The principle of protection does not extend to the one guilty of the constructive fraud, even if he purchases from a *bona fide* purchaser.

The rule as stated in Story's Equity Jurisprudence, § 410, is, "that it is wholly immaterial of what nature the equity is, whether it is a lien or an incumbrance, or a trust or any other claim; for a *bona fide* purchaser of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. But if the estate becomes re-vested in him, the original equity will re-attach to it in his hands."

The rule and the exception are laid down in Pomeroy's Equity Jurisprudence, § 754, as follows: "If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice."

The authorities are uniform upon the subject, so far, at least, as

they apply to the facts of this case. *Schutt v. Large*, 6 Barb. 373, 380; *Ely v. Wilcox*, 26 Wis. 91; *Church v. Ruland*, 64 Pa. 432; *Quinn v. Fuller*, 7 Cush. 224; *Kost v. Bender*, 25 Mich. 515; Daniel on Negotiable Inst., § 805. * * *

Judgment affirmed.

1093. The recording acts.

GOELET v. McMANUS.

1 HUN (N. Y.), 306; 59 N. Y. 634. — 1874.

APRIL 10, 1871, W. Jeremiah gave his bond for \$3,000, secured by a mortgage upon certain lands, to John Jeremiah. This mortgage was not recorded at that time.

September 13, 1871, W. Jeremiah conveyed said premises to Mary Ann, wife of John. This conveyance was without consideration, and the grantee had actual notice of the mortgage to John and of its consideration.

January 2, 1872, the mortgage to John and an assignment thereof to one Morgan were put on record.

January 16, 1873, Mary Ann mortgaged said premises to one Andrews for \$2,000. He recorded said mortgage on the 21st and transferred it to one Herman on the 22d. Herman had no notice of the first mortgage unless its record *after* the mortgagor had transferred the land to Mary Ann, the next person in Herman's chain of title, is constructive notice to him.

It was held in the Supreme Court that "when Morgan put his mortgage on record January 2, 1872, it was a complete and perfect lien, and that the lien acquired by Herman, under the mortgage to Andrews, was subsequent thereto." The opinion in the case, written by DAVIS, J., is not reported, but the reporter in a foot note states that the cases of *Van Rensselaer v. Clark*, 17 Wend. 25; *Ring v. Richardson*, 3 Keyes, 450, and *Schutt v. Large*, 6 Barb. 373, were followed. The case went to the court of last resort and was there affirmed "on opinion of DAVIS, J., in court below."

The following paragraphs from the opinion of COWEN, J., in *Van Rensselaer v. Clark*, will indicate the reasoning on which this case was decided:

"But it is said that Clark [*here Herman*] bought of Schuyler [*here Andrew, or Mary Ann*] on the faith of finding that his deed [*mortgage*] was first recorded, and that he shall not be holden to look further, and run the hazard of actual notice to Schuyler. In

Jackson v. Post [15 Wend. 588], it was held that the registry of a deed is notice to every one, from the time of its being recorded, even to a purchaser standing a second or further remove from the common source of title. The same case held that, having such notice, the purchaser takes at the peril of his immediate grantor's title being impeached by actual notice, though his deed was recorded previous to the adverse one. * * * Actual notice is a substitute for registry. * * * To entitle the purchaser to protection, he must be a *bona fide* purchaser in the strict sense of the term. He must not have notice when he buys. If the registry be notice, it takes away *bona fides*. Under the general Registry Act it is declared that every conveyance not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. 1 R. S. 756, § 1. [Now sec. 241 R. P. L.] * * * The condition of the subsequent purchaser, as being mediate or immediate from the common source of title, and his liability to be affected with notice, must be the same in both cases."¹

1094. Covenants.

ADMINISTRATORS OF BACKUS *v.* McCOY.

3 OHIO, 211. — 1827.

OPINION of the court by JUDGE SHERMAN:

THIS action being brought to recover damages for a breach of the covenant of seisin, in a deed from the defendant, McCoy, to the plaintiff's intestate, the counsel have not confined themselves to the question necessarily growing out of the demurrer, but have argued the general questions of when, under what circumstances, and to what extent the grantor, in a deed, is liable under the covenant of seisin. This covenant is one of very general use in conveyances of land, in this State, and it is important that all persons should understand its nature, the liability of the grantor thereon, and the security the grantee thereby acquires. This being the first time an action founded on this covenant alone, unconnected with covenants of the grantor's right to sell, for quiet enjoyment, or against incumbrances, has come before the whole court for adjudication, we have not confined ourselves to the determination of those questions alone, arising from the demurrer.

¹ The doctrine of these cases is said to be the prevailing one in this country. *Morse v. Curtis*, 140 Mass. 112, and *Day v. Clark*, 25 Vt. 397, are *contra*. See Tiffany on Real Property, p. 1096. — ED.

The covenant of seisin is made for the benefit of the grantee, in respect of the land. It is not understood as a contract in which the immediate parties are alone interested, but as intended for the security of all subsequent grantees. It is usually extended, in terms, to heirs and assigns, as well as executors.

If it can justly be considered as a real covenant, it will be annexed to and run with the land, and either go to the assignee, or descend to the heir, so long as the estate, such as it may be, to which the covenant is annexed, is in possession of the covenantee, or those claiming under him. But if the covenant of seisin is strictly a personal covenant, as it respects the course in which it shall go to the representatives of the covenantee, and must be broken, if at all, the moment the deed is executed, it can neither go to the assignee nor descend to the heir. The right of the grantee in such case would be a mere right of action for the recovery of damages, and upon his death would go to his personal representatives.

The English authorities, though not numerous on the covenant of seisin, show, that so long as the grantee, or those claiming under him, remain in possession of the land, the covenant of seisin will attend and run with the land, and that the heir or grantee, if evicted by paramount title, can recover upon this covenant. In Coke's Entries, 111, cited in 4 Johns. 74, a case is reported in which it was held that the heir might sustain an action on the covenant of seisin, he having been evicted after the death of his ancestor, who entered in his lifetime, and died seised. In *Lucy v. Livingston*, 1 Vent. 175; S. T., 2 Lev. 26, which was an action by the executors, on the covenant for quiet enjoyment, the breach assigned was that the plaintiff's testator was evicted in his lifetime. It was held by the court, "that the eviction being to the testator, he cannot have an heir, or assignee of his land, and so the damages belong to the executors, for they represent the person of the testator." In the recent case of *Kingdon, Executor, v. Nottle*, 1 Mau. & Selw. 355, the court held that the covenant of seisin was a real covenant, running with the land, and would pass with the estate, to the assignee, or devolve upon the heir; and that the executor could not sustain an action without showing an eviction or some special damage sustained by the testator. In *Kingdon v. Nottle*, 4 Mau. & Selw. 53, the devisee brought his action on the same covenant and recovered; the court repeating the same doctrine that the covenant of seisin is a real covenant and runs with the land. In *King v. Jones et al.*, 5 Term, 418, the grantor covenanted that he would make further assurance upon request of the purchaser. The ancestor of the plaintiff requested further assurance, which was refused; when he

died, and his heir, the plaintiff, was afterward evicted, by title paramount, and it was held, that the heir could sustain an action; that it was a covenant running with the land, and the ultimate damage not being sustained, in the lifetime of the ancestor, the covenant with the land devolved upon the heir. The decision was affirmed, on error, in the court of the King's Bench. 4 Mau. & Selw. 188. It seems to be well settled by these recent decisions that when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty, and where he has been evicted by paramount title, he is the party damaged by the non-performance of the grantor's covenants, and for such breach may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seisin as a real covenant attendant upon the inheritance, it will form a part of every grantee's security, and make that which otherwise must be either a dead letter or a means of injustice a most useful and beneficial covenant. A dead letter, when an intermediate conveyance has taken place between the making of the covenant and the discovery of the defect of title, and the covenantee refuses to bring suit. A means of injustice, when, after the covenantee has sold and conveyed without covenants, he brings, and sustains an action on the ground that the covenant was broken the moment it was entered into, and could not thereafter be assigned. When lands are granted in fee by such a conveyance as will pass a fee, and the grantor covenants that he is seized in fee, we can perceive no objection, legal or equitable, to this covenant, as well as the covenant of warranty, passing with the land, so long as the purchaser, and the successive grantees under him, remain in the undisturbed possession and enjoyment of the land.

We are aware that the Supreme Court of New York have taken somewhat of a different view of this covenant; but highly as we respect the decisions of that court, and much as we regret now to differ from them in opinion, we feel bound to express the result of our own judgments in every case submitted to our consideration.

The Supreme Court of Massachusetts, 2 Mass. 433, have held that a seisin in fact of the grantor, at the time the deed was executed, was a sufficient compliance with the covenant of seisin in the deed. This determination appears to us to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant

of seisin is not broken until the purchaser, or those claiming under him, are evicted by title paramount. He has a seisin in deed, as contradistinguished from a seisin in law, sufficient to protect him from liability, under his covenant, so long as those claiming under him may continue so seised. Actual disseisin, or the actual adverse possession of the lands of another, is the commencement of a right which, by lapse of time, may ripen into a perfect title in the disseisor or possessor; and, during the time that the grantee of such disseisor remains in the undisturbed possession of the lands by reason of the conveyance of such disseisor, he cannot maintain an action upon the covenant of seisin. No breach of such covenant will have taken place if the grantor was seised in deed at the time of the conveyance, however that seisin may have been acquired. If the grantor, at the time of executing this conveyance, was in possession of the land, either as disseisor or under color of title, it cannot be said that he was not seised of an estate in the premises. When the grantor is not seised, either in deed or in law, at the time of conveying, the covenant of seisin must be broken at the moment of executing the deed containing it, and becomes thereby a mere *chose in action*, and no longer annexed to or passing with the land. This is the case when the grounds are vacant and the grantee has no title. But when the grantor is, at the time of the conveyance, in possession under color of title, claiming a fee, the covenant of seisin is a real covenant annexed to the land, and passes with it to the heir or assignee, until he who has the paramount title may assert it, and evict the person in possession, when it becomes a mere claim to damages, to be enforced by him who has been evicted, and, like any other, when in action, no longer assignable at common law.

The rule of damages under a covenant of seisin where a breach has been shown, is the consideration money and interest. It is the value of the land, as ascertained by the parties, and the money comes in lieu of the land lost by the non-performance of the covenant. Damages cannot be awarded either for the increased value of the land or the improvements made. In the latter, the legislature have provided an ample remedy in favor of the occupying claimant; and awarding the former would, in many cases, inflict a severe penalty on grantors who conveyed in good faith, having perfect confidence in their title to the lands they conveyed. If the grantor has practiced any fraud in the sale, the grantee may have his remedy by an action on the case, in the nature of a writ of deceit. It is not unfrequently the case that in conveying large tracts of land, especially in the Virginia military district, the grantor is seised, in the manner he covenants, of part only of the land sold.

and by means of interfering claims, defective entries or other causes, he has no valid title to the residue. The measure of damages in such a case is the same proportion of the consideration money and interest as the value of the lands of which the grantor was not seised is to the value of the whole; the consideration money being considered the value of the whole premises.

1094. Covenants.

WILLSON v. WILLSON.

25 NEW HAMPSHIRE, 229. — 1852.

ACTION for the breach of covenants of seisin, of quiet enjoyment, of good right to convey, of general warranty, and of warranty against incumbrances.

GILCHRIST, C. J. — In relation to the rule of damages in covenants like those in the present case, it is to be noticed that here there is no allegation of fraud, nor is the matter complicated by the fact that the consideration actually paid is different from that expressed in the deed. The conveyance contains five covenants; of seisin, for quiet enjoyment, of good right to convey, of general warranty and of warranty against incumbrances. Does the same rule of damages apply upon a breach of each of these covenants? Are the damages in each case of such a different nature that one rule is not applicable to all and, if so, what reason exists for the distinction? These questions necessarily arise upon the case before us. There has been but little conflict in the decisions in this country as to the true rule of damages upon a breach of the covenant of seisin. It is important that there should be a certain measure of damages and that their extent should be limited. A rule rigid in limiting the plaintiff to a definite sum in one class of cases, but flexible and yielding to the equitable considerations in cases of apparent hardship, cannot be applied in practice without incurring the danger of committing great injustice. The judgment of the Supreme Court of New York, in the case of *Pitcher v. Livingston*, 4 Johns. 1, has recommended itself to other tribunals by the simple and safe rule it established, and by the good sense of its reasoning. In that case an action was brought to recover damages for a breach of the covenant of seisin and for quiet enjoyment. It was held that the plaintiff was entitled to recover as damages only the amount of the consideration expressed in the deed, with the interest thereon, and the costs of the suit attending the eviction. Van Ness, J., said

that the covenant of seisin which related to the title was the principal and superior covenant, to which the covenant for quiet enjoyment, which went to the possession, was inferior and subordinate, and that no case could occur where the grantee could recover a greater amount in damages for the breach of the latter than of the former. The opinion of Spencer, J., was, that under the covenant for quiet enjoyment, the plaintiff might recover the value of the improvements he had made upon the premises. The reasoning both of Kent, C. J., and of Van Ness, J., was, that there was a strong analogy between the covenant for quiet enjoyment and the ancient covenant of warranty, and that as in the latter the satisfaction recovered in land was to be equivalent to the value of the lands granted as it existed at the time when the covenant was made, the court was bound to adopt a correspondent rule when satisfaction was sought to be recovered in money in a personal action on the covenant for quiet enjoyment. Kent, C. J., said that it was a necessary consequence of the judgment of the court in the case of *Staats v. Ten Eyck*, 3 Caines, 111, that the increased value of the land could not be recovered under either of those covenants; that when the covenant for quiet enjoyment followed a covenant of seisin in the same deed, the intent of the instrument taken together appeared manifestly to be that the one covenant was merely auxiliary to the other, as the one covenant related to the title and the other to the future enjoyment of that title; that the covenant for quiet enjoyment respected the possession merely, and it would seem to be unreasonable and very inconsistent for the plaintiff to recover under one covenant the whole value of the estate as it was intended to be conveyed, and under another covenant in the same deed, distinct and increased damages, because he was not permitted to enjoy that estate; that there was no precedent to authorize any greater recovery under the covenant for quiet enjoyment than under the covenant of seisin; that the universal silence in the books on a point which so frequently gave occasion for litigation, was a strong argument to prove that no such rule existed as that contended for by the plaintiff, and that the intention of the covenant of seisin, as uniformly expounded in the English law, was only to indemnify the grantee for the consideration paid.

Whatever expectations of a rise in the value of the land purchased may exist must be confined to the purchaser. They do not constitute an element of the bargain. The contract looks to the land only, and its price, and to those matters it should be confined. Such seems to be the substance of the reasoning of the court.

In the case of *Bender v. Frombeyer*, 4 Dall. 436, the action was on

the covenant of seisin and of good right to convey. The standard of damages upon a breach of the latter covenant was stated in the well-considered opinion delivered by Tilghman, C. J., to be "the value of the land at the time of making the contract."

In Massachusetts the damages upon a breach of the covenant of good right to convey are the consideration paid and interest. *Marston v. Hobbs*, 2 Mass. 432; *Smith v. Strong*, 14 Pick. 128.

Although the rule of damages upon the breach of the covenant of seisin has been established in this State, we have referred to other decisions upon this point because they have an incidental bearing on considering the question of the damages upon a breach of the covenant of good right to convey.

It is said by Green, J., in the case of *Moody v. Leavitt*, 2 N. H. Rep. 174, that the price paid for the land is the measure of damages in an action on the covenant of seisin. In the case of *Ela v. Card*, 2 N. H. Rep. 175, it was held that where the covenant was broken as to part of the land conveyed, the measure of damages will be such a proportion of the purchase money and interest as the value of that part bears to the value of the land conveyed. That the price paid is the measure of damages, appears also from the case of *Morse v. Shattuck*, 4 N. H. Rep. 229. And in the case of *Parker v. Brown*, 15 N. H. Rep. 188, it was held that the measure of damages for a breach of the covenant of seisin is the value of the land at the time of the conveyance.

The covenant of good right to convey has been called synonymous with the covenant of seisin; it certainly follows as a necessary consequence that a person who is seised has a right to convey the estate of which he is so seised. *Richest v. Snyder*, 9 Wend. 422. The line which separates the damages in the different covenants is sometimes rather indefinite, but still the more intelligible mode will be to consider them separately, as far as practicable.

The two covenants are said to be synonymous in the case of *Willard v. Twitchell*, 1 N. H. Rep. 177. Where no land passes by the defendant's deed to the plaintiff, he has lost no land by the breach of these covenants; he has lost only the consideration he has paid for it. This he is entitled to recover with interest. *Bickford v. Page*, 2 Mass. 455, 461; *Chapel v. Ball*, 17 id. 213; *Jenkins v. Hopkins*, 8 Pick. 346.

But where the grantee's loss has been actually less, he has been limited to the amount of injury sustained. Where the grantee purchased in an outstanding paramount title, as he had been all the time in possession, he was allowed to recover only the amount paid to perfect the title with interest from the time of payment. *Spring v.*

Chase, 22 Me. Rep. 502. Where the defendant, being tenant for life with remainder over, conveyed with a covenant of seisin in fee, in an action on this covenant, the plaintiff, having been in possession from the time of the conveyance, was allowed to recover only the consideration paid without interest, deducting therefrom the value of the life estate. *Tanner v. Livingston*, 12 Wend. 83. So where the grantor was not seised at the execution of the deed, but subsequently acquired a title which inured to the grantee by estoppel, he not having been disturbed in his possession, it was held that he could recover nominal damages only. *Baxter v. Bradbury*, 20 Me. 260. The court said that the rules established to determine the measure of damages have been framed with a view to give the party entitled a fair indemnity for the damages he has sustained. So the defendant may show in reduction of damages that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it. *Barnes v. Learned*, 5 N. H. Rep. 264. But whether the covenant of good right to convey is or is not strictly synonymous in all cases with the covenant of seisin, all the authorities concur in applying the same rule of damages in both cases.

As to the covenant against incumbrances it is said by Parker, C. J., in the case of *Loomis v. Bedel*, 11 N. H. Rep. 87, that where the grantee has extinguished the incumbrance, he can recover no greater sum than the amount paid, with compensation for his trouble and expenses. And there are authorities which hold that he cannot recover even the amount thus paid, where it exceeds the consideration money and interest. *Dimmick v. Lockwood*, 10 Wend. 142. The rule of damages varies from a nominal sum to the consideration money and interest, and it is impossible to apply a rule which shall comprehend all cases of damages arising from the existence of an incumbrance. To a certain extent, however, the cases may be classified, and then the rule of damages is simple and easy of application.

It seems to be well settled that if the incumbrance is still contingent, and no injury has been sustained by the plaintiff, he can recover only nominal damages. *Delavergne v. Norris*, 7 Johns. 358; *Stanard v. Eldridge*, 16 id. 255; *Baldwin v. Mann*, 2 Wend. 399; *Jenkins v. Hopkins*, 8 Pick. 350; *Leffingwell v. Elliott*, *ibid.* 455; *Tufts v. Adams*, *ibid.* 547; *Brooks v. Moody*, 20 Pick. 474.

Where the incumbrance has been removed, the general rule in Massachusetts fixes the damages at the amount paid to remove the incumbrance. The court say, "the rule is that for such incumbrances as a covenantee cannot remove, he shall receive a just com-

compensation for the real injury resulting from the incumbrance." *Bachelder v. Sturgis*, 3 Cush. 201. Where the incumbrance is changed into a title adverse and indefeasible, the plaintiff is entitled to recover the money he has paid for the land, with interest. In such case the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance, nor can he enter upon and enjoy the land, and it would be idle to require him to purchase it in order that he might be entitled to his damages for the breach of the covenant against incumbrances. Indeed, such a state of facts comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee so that he can be evicted. *Jenkins v. Hopkins*, 8 Pick. 349. The case of *Chapel v. Bull*, 17 Mass. 221, decided that where a tenant in common sold his purport, covenanting against incumbrances, while proceedings in partition were pending, and the land was exposed to auction by the sheriff and sold, there was a breach of the covenant against incumbrances, and that the measure of damages was the consideration money and interest. It is said by the court in *Jenkins v. Hopkins*, that the principle which constitutes a difference between the case of *Chapel v. Bull* and the cases in which it has been held that for a breach of the covenant against incumbrances, nominal damages only can be recovered unless the incumbrance had been removed, is, that in the latter case the plaintiff is in possession of the estate, is undisturbed in the enjoyment and may remain so; whereas in the former case the plaintiff is not in possession, nor can he enter without being a trespasser upon one who has the title, and who is presumed to be in possession according to his title.

But where such circumstances exist as enable the plaintiff, although out of possession, to obtain it by the payment of a certain sum, he can recover that sum only, as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum. *Tufts v. Adams*, 8 Pick. 549. In this case the land was incumbered by a mortgage and Parker, C. J., said that it appeared reasonable that the proper rule of damages should be to give the amount due upon the mortgage with the costs of the suit upon the mortgage against the plaintiff, and thus he will be enabled to redeem the lands from the funds of the defendant. If he should not redeem, but suffer the equity to be foreclosed, then if there shall be any loss he will have no right to complain. In the case of *White v. Whitney*, 3 Metc. 89, it was said by the court that where there is a paramount title by an outstanding mortgage, very small in amount in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of

redemption to redeem. In such case it would be quite unreasonable to hold that the covenantee on such an eviction should recover damages to the full value of the estate.

So far as a party can be indemnified by applying a general rule to cases arising under this covenant, it would probably be as little productive of injustice to adopt as the measure of damages the sum paid to remove the incumbrance, where it did not exceed the consideration money and interest. The damages should be proportioned to the actual loss stated in the declaration and proved. It is held in New York that the purchaser cannot recover beyond the consideration and interest and costs. *Dimmick v. Lockwood*, 10 Wend. 142.

In actions arising upon the covenants of warranty and for quiet enjoyment, it has been held by high authority, that the plaintiff is entitled to recover the value of the land only at the time of the purchase. *Staats v. Ten Eyck*, 3 Caines, 111. Kent, C. J., said that the rule at common law on a warranty on a writ of *warrantia chartae* was that the demandant recovered in compensation only for the land at the time of the warranty made, and that he did not find that the law had been altered since the introduction of personal covenants. In the United States the two covenants are treated as synonymous, with some exceptions, and the measure of damages is the same in both. But upon the question, what shall be the measure of damages, there is much conflict among the authorities. If we treat these covenants as similar in principle to the ancient warranty, where the warrantee recovered of the warrantor lands whose value was computed as at the time of the warranty, we shall be limited by the consideration and interest. But if we consider the covenants as contracts of indemnity, we shall open up the question whether the plaintiff should recover for the increased value of the premises consequent upon a rise in the price of the property, or upon the improvements made upon the land since the date of the deed.

The value of the land at the time of the eviction is the measure of damages in Connecticut. *Sterling v. Peet*, 14 Conn. 204; in Vermont, *Park v. Bates*, 12 Vt. 387; and in Massachusetts, *Gore v. Brazier*, 3 Mass. 523; *White v. Whitney*, 3 Metc. 89; and in Maine, *Hardy v. Nelson*, 27 Me. 525. The decision in *Gore v. Brazier*, was said there to be "conformable to principles of law applied to personal covenants broken, to the ancient usages of the State, and the decisions of our predecessors supported by the practice of the legislature."

In this State, the question whether the measure of damages should be the value of the land at the time of the ouster or at the time of

the purchase, has been discussed to some extent, but left unsettled. *Loomis v. Bedel*, 11 N. H. Rep. 87.

In New York, in the case of *Staats v. Ten Eyck*, 3 Caines, 111, it was held that under the covenant for quiet enjoyment, the plaintiff was not entitled to recover any damages on account of the increased value of the land. In the subsequent case of *Pitcher v. Livingston*, 4 Johns. 1, the same doctrine is reaffirmed. Van Ness, J., says that "one, and perhaps the principal reason why the increased value of the land itself cannot be recovered, is because the covenant cannot be construed to extend to anything beyond the subject-matter of it, that is, the land, and not to the increased value of it subsequently arising from causes not existing when the covenant was entered into;" and that for the same reason the covenantee ought not to recover for the improvements; also, that if the *increase* of value ought to be taken into view, by parity of reasoning it would be proper, and what would be required by a just reciprocity, to take into consideration any contingent *diminution* of value, which was never heard of. He further says that when the deed contains both the covenant of seisin and for quiet enjoyment, and there is an eviction occasioned by a total want of title in the grantor, upon the other doctrine if the property at the time of eviction be worth one-half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin, recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin and resort to the covenant for quiet enjoyment, and then recover the whole amount; and that this is not reconcilable with any principle of law or justice. He considers the covenant for quiet enjoyment as more strictly analogous to the ancient covenant of warranty than any of the other modern covenants. The same view of the law is taken by Kent, C. J., and by the rest of the court, excepting Spencer, J., whose opinion was that the plaintiff should recover the value of the improvements. This case was followed by *Bennet v. Jenkins*, 13 Johns. 50; *Kinney v. Watts*, 14 Wend. 38; and by *Peters v. McKeon*, 4 Denio, 550.

The decisions which agree with this view of the law are far more numerous than those on the other side, but it is not necessary to refer to them particularly. We do not assume that this measure of damages will always afford a perfect remedy. But it is predicable of every general rule that it will not suit all cases. It is truly said by Kent, C. J., in *Pitcher v. Livingston*, 4 Johns. 21, that "on a subject of such general concern and of such momentous interest as

the usual covenants in a conveyance of land, the standard for the computation of damages, whatever that standard may be, ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed." And this rule has the benefit of certainty. The equity of a contrary rule is very questionable. Let us suppose that after a sale the land increases in value, either by a rise in its price or by the improvements made upon it by the purchaser. A third person recovers the land by a paramount title, and the buyer sues the seller on the covenants in his deed. He recovers the value of the land at the time of the eviction. He loses nothing, the seller pays for the improvement, and the owner alone profits by the transaction. Now there may be no *mala fides* in any one of the parties, and the case supposed is not an extreme one. It will happen where the parties act in good faith, and the owner happens for a time to be ignorant of his legal rights. The other rule, which makes the consideration paid the measure of damages, has at least the recommendation of dividing the loss between the buyer and the seller, for the seller loses the consideration, and the buyer loses the value of the improvements.

We have no disposition to extend our references to authorities upon this point, for the reasoning is exhausted by the leading cases we have cited. But we may add that in 4 Kent's Com. 477, the learned author says, "the ultimate extent of the vendor's responsibility under all or any of the usual covenants in his deed, is the purchase money with interest, and this I presume to be the prevalent rule throughout the United States." We think it the better rule, and as such it must govern the present case.

1100. Covenants.

HUYCK *v.* ANDREWS.

113 NEW YORK, 81. — 1889.

EARL, J. — In March, 1880, the defendant conveyed to Maria W. Huyck, plaintiff's intestate, by what is commonly known as a full covenant deed, certain land situate in the town of Coeymans, in the county of Albany, which, as described in the deed, contained the whole of Hawneycroix creek within its boundaries. Prior thereto Amos Briggs had received a deed of adjoining land on the east side of the creek, which conveyed to him with the land an easement, as follows: "The right to the use of the whole of the water of the said Hawneycroix kill or creek; also the right to erect and maintain

a dam across said creek, and to connect same to the opposite bank thereof, at such place as the dam now is, and to extend the same, by an embankment or otherwise, from the bank at the water's edge to the high bank or hill west thereof, and the right also, from time to time, to go onto and upon the land on the opposite side of said creek, for the purpose of erecting and maintaining said dam or dams, and of using thereof the land for that purpose."

Upon the land thus conveyed to Briggs there was a paper mill, and there had been erected a dam across the creek to the westerly side thereof; and he and those under whom he held had used the waters of the creek for the purposes of that mill for many years. Subsequently to the conveyance to Mrs. Huyck, Briggs entered upon the land and built an embankment westerly from the edge of the creek to the high bank upon her land. Afterward she brought this action for the breach of the covenants contained in her deed by the existence and use of the easement which Briggs had in the land conveyed to her. She recovered, and the defendant has appealed to reverse her judgment. He claims that the easement owned by Briggs was open, visible and well known to Mrs. Huyck at the time she took her deed, and that, therefore, the covenants in the deed do not protect her against it. It is true that she knew that the paper mill and dam across the creek were there, and that the waters of the creek had been used for many years for the purposes of the mill. But it does not appear that she knew the full extent of Briggs' easement, or that she had any knowledge whatever that he had any paramount right to the exclusive use of the waters of the creek or to maintain his dam where it was located as high as he wished. But even if she had such knowledge, that fact furnished no defense to this action.

The deed entitled her to a perfect title to all the land which it purported to convey, free from any incumbrance thereon, and it is no defense to her action that at the time she took it she knew of some incumbrance or some defect in the title. Proof of such knowledge would be quite important in an action brought by her grantor to reform the deed, but as a defense to an action upon the covenants contained in the deed it is of no importance whatever. That the covenant against incumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this State, and there is no hint in any of them that knowledge by the grantee of the existence of the easement at the time of the conveyance makes any difference. An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion

or lawful use out of or over the estate of another. An incumbrance, within the terms of the covenant against incumbrances, is said to be "every right to or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance," *Prescott v. Trueman*, 4 Mass. 627, and the breach of such a covenant takes place at the instant the conveyance is made.

There is, in this State, one exception to the rule that the existence of an easement constitutes a breach of the covenant against incumbrances, and that is in the case of a highway. It was held in *Whitbeck v. Cook*, 15 Johns. 483, that it is not a breach of the covenants that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in this State. It was based upon the peculiar nature of highway easements and the general understanding with reference to them. Spencer, J., writing the opinion, said: "It must strike the mind with surprise that a person who purchases a farm, through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken, by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements, and the rule of that case has not been applied to any other. While there was not in the deed there under consideration any covenant against incumbrances, yet the *ratio decidendi* is equally applicable to such a covenant; and since that decision it has always been understood in this State that such a covenant is not broken by the existence of a highway.

In *McMullin v. Wooley*, 2 Lans. 394, it was held that the right to take water by means of a pipe laid beneath the ground from a spring on the premises conveyed, constituted a breach of the covenant against incumbrances. In *Roberts v. Levy*, 3 Abb. Pr. N. S. 311, it was held that a covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected upon the lots should be set back a specified

distance from the street on which the lots fronted, constituted an incumbrance upon the lots to which it applied; and if subsequently conveyed by deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed. In *Rea v. Minkler*, 5 Lans. 196, it was held that the existence and use of a private right of way over the granted premises was a breach of warranty, and *Blake v. Everett*, 1 Allen, 248, *Russ v. Steel*, 10 Vt. 310, and *Wetherbee v. Bennett*, 2 Allen, 428, are to the same effect. In *Scriver v. Smith*, 100 N. Y. 471, where the owner of land upon a stream conveyed the same with a covenant of quiet enjoyment, and subsequently an owner below, under and by virtue of a paramount right, raised the height of a dam upon his land and thereby flooded the land conveyed, it was held that there was substantially an eviction and a breach of the covenant. In *Mitchell v. Warner*, 5 Conn. 497, it was held that a pre-existing right in a third person to take water from the land conveyed is a breach of a covenant against incumbrances. In *Morgan v. Smith*, 11 Ill. 194, it was held that an easement authorizing one to dam up and use the water of a branch running over the land conveyed, and to use the water of a spring upon it, is a breach of the covenant against incumbrances. In *Medler v. Hiatt*, 8 Ind. 171, there was a conveyance of land, with covenants against incumbrances, through which there was a stream of water, and at the time of the conveyance there was across the creek, a short distance below the land conveyed, a dam which backed the stream up so as to overflow a large quantity thereof. The action was brought upon promissory notes given for the purchase-price of the land. The defense set up was breach of covenant against incumbrances. To this defense the plaintiff replied, *inter alia*, that the defendant, when he purchased the land, knew of the existence of the dam and of the right to flow back the water; and to this reply the defendant demurred. The demurrer was overruled, and upon appeal the judgment upon the demurrer was reversed. The court said: "It is conceded that the action of the court in overruling the demurrer raises the main question in the case, and in support of that ruling it is insisted that, as the appellant received a deed for the lands with full notice of the dam, and the right to continue it, the law presumes that he took the conveyance subject to the incumbrance. The rule of decision on this subject, as evinced by various authorities, is, to some extent, unsettled. None of the authorities, however, sustain the position that mere notice to the vendee at the time he receives his deed, of an existing incumbrance, excludes it from the operation of an express covenant against incumbrances. . . . The plaintiff's reply contains

nothing from which a contract relative to the easement can be inferred. It is true the defendant knew of the incumbrance, but mere notice of it does not indicate even an intent to relinquish any remedy he might have under the covenants in his deed." In *Hovey v. Newton*, 7 Pick. 29, the action was covenant upon a lease of water-works and buildings, with the whole control of the water in the pond, except the right which one Bangs had to take water in logs to his garden, and a similar right reserved to the lessor; and the court held that parol evidence was not admissible to prove that, in the intention of the parties to the lease, there was likewise an exception of the right which the county of Worcester had exercised for more than twenty years, of occasionally diverting part of the water for the purpose of cleansing the county gaol, and which diversion was well known to the parties at the time of making the lease. In *Mohr v. Parmelee*, 11 J. & S. 320, a party-wall was wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party wall by the proprietor of the other by reason of a prior grant, and it was held that it constituted an incumbrance upon the land on which it stood; that when a title is incumbered by such an easement a right of action immediately accrues, and that whether the covenantee had or had not knowledge or notice of its existence is immaterial, both as regards his right of action and the question of damages. In 2 Greenleaf on Evidence, § 242, it is said: "A public highway over the land, a claim of dower, a private right of way, a lien by judgment or by mortgage or any other outstanding, elder and better title is an incumbrance, the existence of which is a breach of this covenant. In these and like cases it is the existence of the incumbrance which constitutes the right of action, irrespective of any knowledge on the part of the grantee or of any eviction of him." In 2 Dart on Vendors and Purchasers, 6th ed., 886, the following language is used: "Although the fact of the purchaser having notice of the defect cannot prevent the covenants for title from extending to it, since extrinsic evidence is inadmissible for the purpose of construing a deed, yet in an action to rectify the covenant that fact can be used as the basis of an inference that it could not have been the intention of the parties that the covenant should include a defect of which both parties were aware." To the same effect are the following authorities: *Beach v. Miller*, 51 Ill. 207; *Barlow v. McKinley*, 24 Iowa, 70; *Gerald v. Elly*, 45 id. 322; *Butt v. Riffe*, 78 Ky. 352; *Burk v. Hill*, 48 Ind. 52; *Kellogg v. Malin*, 50 Mo. 496.

In *Mott v. Palmer*, 1 N. Y. 564, the action was to recover damages for breach of the covenant of seisin because the grantor did not at

the time of the conveyance own certain fence rails constituting part of a fence, and Bronson, J., writing one of the opinions, said: "That parol evidence was inadmissible to control the legal effect and operation of the deed is too plain a proposition to be disputed. If the plaintiff had been told at the time that Brown owned the rails, and more, if the rails had been expressly excepted by parol from the operation of the grant and covenant, it would have been no answer to the action. A deed cannot be contradicted in its legal effect any more than it can in its terms."

To support the contention of the appellant, his counsel has placed much reliance upon the cases of *Kutz v. McCune*, 22 Wis. 628 and *Memmert v. McKeen*, 112 Penn. St. 315. In *Kutz v. McCune* it was held that an easement obviously and notoriously affecting the physical condition of the land at the time of its sale, is not embraced in the general covenant against incumbrances. In *Memmert v. McKeen* it was held that incumbrances are of two kinds — first, such as affect the title; and, second, such as affect only the physical condition of the property; that where incumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not the title, but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition and with reference thereto. We do not yield assent to these authorities. They have no sanction in any of the cases decided in this State, and have no adequate foundation in principle or reason. They open to litigation upon parol evidence in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest or dominion over the land, and that he may rely upon them for his security. If open, visible and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or incumbrances upon the land; but it should

be incumbent upon the grantor, if he does not intend to covenant against such defects and incumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made between incumbrances which affect the title and those which affect merely the physical condition of the land conveyed is quite illusory and unsatisfactory. Easements not only affect the physical condition of the land, but they affect and impair the title. The owners of them have an interest in and dominion over the servient tenement, which frequently may largely impair its usefulness and value. The rule contended for would operate very unjustly and would be quite difficult to administer in many cases. In this case, while the grantee knew of the existence of the dam and of some use of the water, she did not know of the right to extend the dam from the edge of the water to her high land on the west side of the creek, nor did she know of the right Briggs had to use the entire water of the stream.

We are, therefore, of opinion that Mrs. Huyck was entitled to the protection of the covenant against incumbrances.

Judgment affirmed.

SHATTUCK *v.* LAMB.

1100.

65 NEW YORK, 499. — 1875.

EARL, C. — The action was to recover damages for an alleged breach of the usual covenant of warranty for quiet enjoyment contained in a deed, made by defendant to plaintiff, of land situate in Yates county. At the time of the execution of the deed, a portion of the land was in the actual possession of one Campbell, under paramount title, and the plaintiff was not able to obtain possession of such part. He once entered upon the land and Campbell sued him for trespass and recovered on the strength of his title. During the pendency of that suit, plaintiff sued Campbell in ejectment and was defeated by his superior title. Plaintiff gave defendant notice of both actions, and requested his assistance in prosecuting the one and defending the other. A verdict having been taken for plaintiff at the Circuit, he was defeated and judgment given to the defendant at the General Term, upon the sole ground that plaintiff never having been in possession of the land had not been evicted therefrom, and hence that there was no breach of the covenant.

The sole question, therefore, for our consideration is, whether the covenant for quiet enjoyment in a deed of land is broken, so as

to enable the covenantee to maintain an action thereon, where the land at the time of the execution of the deed was in the possession of a third person under paramount title, and thus the covenantee was unable to obtain possession? This question is not free from doubt under the decisions of the courts of this State. The language of the covenant is broad enough to cover a case like this, as well as one where the covenantee has obtained possession and has then been evicted by one having a superior title. There is just as much reason for applying it to one case as the other, and both cases seem to be equally within the presumed intention of the parties. The rule that there must be an eviction before there can be a recovery upon such a covenant has its foundation in the reason that the covenantee who has obtained possession should not be permitted to recover for breach of covenant for a mere failure or defect of title, so long as he is left in possession, as he may never be disturbed, and thus may never suffer damage; and the rule had its origin and was first announced, at a time when conveyances of land were made by livery of seisin and possession always accompanied the transfer of title. It is not applicable to a case where the covenantee has not been able to obtain possession for the reason that another was in possession under paramount title. There must doubtless be in every case what is equivalent to an eviction. The covenantee must be either kept out or put out of possession. In the former case there is a *quasi* or constructive eviction sufficient to give effect to the covenant.

The only case which I have been able to find decided, either in England or this country, which is nearly, if not quite in point for the defendant, is that of *Kortz v. Carpenter*, 5 J. R. 120. That was an action for breach of a covenant for quiet enjoyment, and the declaration alleged a breach of this covenant, "and that the premises described, etc., at the time of executing the deed, and a long time before, etc., to-wit, time out of mind, were adversely, by lawful title and right, held, possessed and enjoyed by the proprietors and claimants of the great or Hardenbergh patent, etc., and so the plaintiff says," etc. The defendant demurred to the declaration, because the plaintiff alleged "no eviction, nor any disturbance to or interruption of the plaintiff in the enjoyment of the premises, nor any act alleged to have been done in relation to the premises since the deed was executed." There was joinder in the demurrer, and the case was disposed of by a *per curiam* opinion, as follows: "This case cannot be distinguished from that of *Waldron v. McCarty*, 3 J. R. 471. The covenant for quiet enjoyment goes to the possession and not to the title. It appears to be a technical rule that nothing

amounts to a breach of this covenant but an actual eviction or disturbance of the possession of the covenantee. 8 Co. 89, b; Comyn's Rep., *Anon.*, 228. The defendant is therefore entitled to judgment." That case seems to have been summarily disposed of, and for the broad doctrine laid down there was little or no authority. In the case of *Waldron v. McCarty*, the covenantee obtained possession of the premises, and was in possession when he sued for breach of the covenant, never having been evicted, and hence that case was entirely unlike the later one for which it was cited as authority. The case of *Kortz v. Carpenter* was unlike the one now under consideration in this, that in that case there was no allegation that the covenantee had made any efforts or taken any legal proceedings to obtain possession; and that consideration may have influenced the decision, for at that time it was supposed that there must have been an eviction by process of law before suit could be maintained upon such a covenant. *Greenby v. Wilcox*, 2 J. R. 1; *Lansing v. Van Alstyne*, 2 Wend. 564. It has, however, since been settled in this State that there need be no eviction by process of law, but that a covenantee may voluntarily surrender possession to one having paramount title, and then maintain his action for breach of covenant. *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 id. 600; *Fowler v. Poling*, 6 Barb. 165. [*The Court then cites and discusses* *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120; *St. John v. Palmer*, 5 Hill, 599, 601, and *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. 36, *as favoring the doctrine of Kortz v. Carpenter*, and, *on the other side*, *dicta in Withers v. Powers*, 2 Sandf. Ch., 350, *note*, and *Gardner v. Keteltas*, 3 Hill, 330, and continues:] In *Winslow v. McCall*, 32 Barb. 241, the action was for breach of covenant of warranty and quiet enjoyment, and the premises conveyed were, at the time of the conveyance, in the possession of a third person, and the covenantee was never actually in the possession, yet it was held that he could recover.

It will thus be seen that the rule to be applied to such a case as this is not thoroughly settled in this State; at least not so thoroughly settled as to forbid further consideration. The claim that an action for breach of covenant for quiet enjoyment cannot be maintained when, at the time of the conveyance, the premises were actually in the possession of a third person under a paramount title, and the covenantee has not been able to obtain possession, has received but little countenance outside of this State. The rule is otherwise in England, as was admitted by Judge Cowen, in *Beddoe's Executor v. Wadsworth*, 21 Wend. 126. [*The English cases of* *Clarke v. Harper*, 6 Vin., 427; *Hacket v. Glover*, 10 Mod., 143, and *Ludwell v. New-*

man, 6 *T. R.*, 458, are then examined.] In *Platt on Covenants*, 327, it is said, that to qualify a party to support an action on a covenant for quiet enjoyment some positive act of molestation or some deed amounting to a prohibition of enjoyment must be proven, but that "it is not to be understood that an ouster or expulsion must take place in order to found a suit; it is enough that the quiet enjoyment of the covenantee be invaded or prevented."

The rule, as thus shown to exist in England, has been generally followed in this country. In *Caldwell v. Kirkpatrick*, 6 *Ala. N. S.* 60, the covenantee was never in possession, and it was held that to constitute a breach of the warranty for quiet enjoyment it is not necessary there should be an actual expulsion, and that the covenant secures a legal entry as well as the enjoyment. [*The following cases are next considered: Banks v. Whitehead*, 7 *Ala. N. S.* 83; *Murphy v. Price*, 48 *Mo.* 247; *Moose v. Vaile*, 17 *Ill.* 185; *Playter v. Cunningham*, 21 *Cal.* 229; *Cummings v. Kennedy*, 3 *Littell (Ky.)*, 118; *Clark v. Estate of Conroe*, 38 *Vt.* 469, tending to the same conclusion.] In *Duvall v. Craig*, 2 *Wheat.* 62, Judge Story says: "Assuming that an averment of an entry and eviction under an elder title be, in general, necessary to sustain an action on a covenant against incumbrances, it is clear that it cannot be always necessary. If the grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an elder title, this would certainly be equivalent to an eviction, and a breach of covenant." In *Noonan v. Lee*, 2 *Black (U. S.)*, 507, Mr. Justice Swayne says, that, "in all cases where there is adverse possession by virtue of a paramount title, such possession is regarded as eviction, and involves a breach of the covenant of warranty." See also *Grist v. Hodges*, 3 *Dev. (N. C.)* 200.

In some of the cases cited the covenant sued on was a covenant of warranty; but it has been held that, so far as concerns the question under consideration, there is no difference between a covenant of warranty and a covenant for quiet enjoyment. *Rea v. Minkler*, 5 *Lans.* 196, and cases cited.

In *Rawle on Covenants*, 4th ed., 154, after a criticism of many cases, the rule is laid down as follows: "The rule, as best supported by reason and authority, would seem to be this: When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken without any other act on the part of either the grantee or claimant; for the latter can do no more toward the assertion of his title, and as to the former, the law will compel no one to commit a trespass

in order to establish a lawful right in another action." In 2 Hill on Real Property, 383, it is said that "actual entry of the plaintiff is not necessary to constitute eviction. His deed gives him constructive possession, which is equivalent to entry." In 3 Washburn on Real Property, 398, it is said: "If covenantee find another in possession under a paramount right when he takes his deed he may have an action upon this covenant (for quiet enjoyment) without being obliged to subject himself to the hazard of an action of trespass by first entering upon the premises and being ousted."

No further citation of authorities is necessary or useful. The defendant, when he executed the conveyance to the plaintiff, had neither title nor possession to give. The plaintiff endeavored to obtain possession and was prevented by Campbell, who was in possession under paramount title. His case would have been no stronger if Campbell had let him into actual possession and then immediately ousted him by process of law or a voluntary submission to the superior title. The facts show a constructive eviction. The deed was inoperative as a conveyance, but the covenant must have effect. I can perceive nothing in the language, or in the nature of the covenant for quiet enjoyment, which requires first possession and then an eviction before a breach can be alleged. But, if such were the case, I would hold, for the purpose of giving effect to the covenant, that the grantor was estopped from denying that there was a possession for an instant and *eo instanti* an eviction by the paramount title.

It follows that the judgment of the General Term must be reversed and judgment ordered for the plaintiff on the verdict with costs. All the judges concur in this opinion except

DWIGHT, C. (dissenting). The question in this cause is, whether a covenant for quiet enjoyment is broken by a vendor, when his vendee is unable to take possession, the grantor having no title and the premises being held adversely by one having title. The covenant in the present case does not contain a warranty of title, but simply of quiet and peaceable possession by the grantee.

I think that it must be deemed to be the law of this State that there can be no breach of such a covenant unless the grantee had either actual or constructive possession of the premises, and that possession was in some way disturbed, either actually or constructively. As there may be a constructive possession, so there may be a constructive eviction. Accordingly, if no possession of any kind passes to the grantee, there can be no eviction or disturbance of any sort, and an action will lie. The covenant for quiet enjoyment cannot be made equivalent to the covenant of seisin. An

action will lie upon the latter, though there be no eviction or disturbance of possession. A defect of title will suffice. But in the case of the covenant for quiet enjoyment, the fundamental fact is that there has been *possession*, and after it has taken place, it has been broken up, or in some way disturbed, by persons having a legal right to interfere with it, so that it cannot be said that the covenantee has had quiet and peaceable possession.

The principles that have been thus briefly stated are fully supported by the authorities. There is a difference in view as to the point whether a constructive possession will suffice, or whether actual possession is not indispensably necessary. I do not find any conflict upon the point that the covenant is not broken where no kind of possession is possible, either actual or constructive. The present case will be disposed of upon the ground that no possession of any kind passed to the grantee, to which the covenant for quiet enjoyment could attach.

Before proceeding to consider that branch of the case, reference will be made to the authorities establishing the necessity of possession as a preliminary to a breach of the covenant.

I. The cases which maintain or assert the necessity of *actual* possession and eviction are *Waldron v. McCarty*, 3 J. R. 471; *Kortz v. Carpenter*, 5 id. 120; *Kerr v. Shaw*, 13 id. 236; *Webb v. Alexander*, 7 Wend. 281, 284; *Beddoe v. Wadsworth*, 21 id. 125; *St. John v. Palmer*, 5 Hill, 599, 601, per Bronson, J.; *Rindskopf v. Farmers' Loan and Trust Company*, 58 Barb. 36, 49. * * *

II. There is, however, a class of cases which, while they concede the necessity of possession and disturbance in the case of this covenant, maintain that both may be constructive. This view has been presented with prominence by Mr. Rawle in his work on *Covenants of Title*, pages 220-227, ed. 1852. He relies greatly upon the case of *Grist v. Hodges*, 3 Devereux, 200, and the opinion therein by Ruffin, J. * * *

I do not think that a recovery is maintainable in the case at bar on either the theory of an actual or constructive possession. There was plainly no actual possession. Nor was there any of a constructive nature. A constructive possession can only pass when the conveyance made is not unlawful. Campbell, in the case at bar, having the title to the land, and being in adverse possession, the attempted conveyance from Lamb to Shattuck was simply void, and, on account of its absolute invalidity, could by no possibility confer upon Shattuck a constructive possession within the view of *Grist v. Hodges*. By 1 Revised Statutes, p. 740, § 147, "every grant of land shall be *absolutely void* if at the time of the delivery

thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." The Code of Procedure recognizes this rule in requiring, in case of such an assumed grant, that an action to recover the land shall be brought in the name of the grantor. Ruffin, J., argued, in *Grist v. Hodges*, that, as between the grantor and grantee, the title passed, so that the grantee was put into constructive possession. That result cannot follow in the case at bar, since nothing passed — the title remaining in the grantor. This view is plainly to be inferred from the language of the Supreme Court of the United States in *Noonan v. Lee*, 2 Black (U. S.), 499, 507. The grant in that case contained only the covenant of warranty. A third person was holding adversely under a paramount title. The court said: "The statute of Wisconsin, of 1849, permits a grantor out of possession to make a valid conveyance of lands held adversely by another. In all cases where there is adverse possession by virtue of a paramount title of lands *thus* conveyed, such possession is regarded as eviction, and involves a breach of the covenant of warranty." P. 507. This is substantially affirming that if the grant is lawful, the purchaser is put into constructive possession, in accordance with the rule in *Grist v. Hodges*, *supra*.

This position is not in conflict with the view that the grantor, as between him and the grantee, is estopped from setting up any claim to the property purported to be conveyed. *Jackson v. Demont*, 9 J. R. 55, and kindred cases.

On these grounds the plaintiff has no cause of action on the covenant, and the judgment of the court below should be affirmed.

Judgment reversed

1111. Assignment.

BREWSTER v. CARNES.

103 NEW YORK, 556. — 1886.

MILLER, J. — Under the Revised Statutes, 1 R. S. 763, § 41,¹ the recording of an assignment of a mortgage is not of itself notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.

The section of the statute above cited cannot be said to apply to the facts which are presented for consideration in the case under

¹ Now § 271, R. P. L. — Ed.

advisement as is apparent from a careful reading of the same. The defendant who made the payment was not the mortgagor, nor his heir, nor his personal representative. He was the purchaser of the equity of redemption and became seized of the premises subject to the mortgage. He was not, therefore, a party named in the statute, or from its phraseology intended to be embraced within its terms. If the statute was designed to include a purchaser of the mortgaged premises it no doubt would have so stated and thus made it manifest that such was its intention. Nor was the payment made to the mortgagee, the party named, but to a third person who claimed to act for the owner of the mortgage without any authority at any time to receive payments upon the principal.

It would seem, therefore, that the statute cited does not embrace any such case as is presented by the evidence here, and if the payments made can be upheld it must be upon some other and entirely different ground.

This is sought to be done and reliance is placed upon *Jones on Mortgages*, § 791, and *Heermans v. Ellsworth*, 64 N. Y. 159, which, it is claimed, bear upon the construction which is to be given to said section of the Revised Statute. In *Jones on Mortgages* the notice, it is said, must be given to the owner of the equity of redemption in order to protect the assignee against payments made in good faith by the mortgagor or the party liable to pay the mortgage to the assignor; that the recording of the assignment is not of itself such notice of the assignment as will afford such protection. The rule stated would seem to be in direct conflict with the general rule relating to the effect to be given to the assignments of mortgages when placed on record, and to conveyances to subsequent purchasers of the mortgaged premises who take title subject to the mortgage. It is a well-established principle of law that the assignment of a mortgage and the satisfaction of the same are conveyances within the meaning of the Recording Act. *Van Keuran v. Corkins*, 66 N. Y. 77; *Westbrook v. Gleason*, 79 id. 23, 25; *Decker v. Boice*, 83 id. 215; *Bacon v. Van Schoonhoven*, 87 id. 446.

Taylor, to whom the payments in controversy were made by defendant Carnes, was the owner of the mortgage and assigned the same to Mrs. Webster, which assignment was recorded on the 14th of July, 1877. This was before the payment from Carnes to Taylor, in 1880, was made, and was a notice to all subsequent purchasers or incumbrancers of the mortgaged property, and to all persons who might afterward have any dealings with Taylor in regard to the mortgage. Carnes, in making payments on the mortgage after the recording of the assignment, was a purchaser subsequent to Mrs.

Webster, whose title, by virtue of the assignment, was previously recorded.

Under the Recording Act, therefore, Carnes was chargeable with notice that the mortgage, which he intended to pay, had been assigned by Taylor to another party, Mrs. Webster, who subsequently assigned her rights therein to the plaintiff.

The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee save as excepted by the statute. *Viele v. Judson*, 82 N. Y. 32. In the case cited it is laid down in the opinion by Finch, J., that the recording of an assignment furnishes protection against any subsequent assignment of the same mortgage or any unauthorized discharge, and is notice that the rights of the mortgagee are gone and that he can neither assign nor discharge the instrument. This case is directly in point and very distinctly covers the question presented. The record of the assignment here, as in the case cited, was an ample protection to the plaintiff's claim and notice to Carnes that Taylor had disposed of his interest in the mortgage.

In *Heermans v. Ellsworth*, *supra*, the action was upon a demand against the defendant for money loaned by the plaintiff's assignor, and it was held that it is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment, and that in an action upon the demand where such a payment is established the burden of proving notice prior to payment is upon the plaintiff. No question arose as to constructive notice or the effect of the Recording Act, and the case cited, therefore, is not in point.

Inasmuch as, upon the recording of the assignment, Carnes had constructive notice thereof it is not material whether he had notice otherwise sufficient to put him upon inquiry that Taylor had ceased to be the owner of the mortgage. * * *

Judgment reversed.

1118. Foreclosure.

MOULTON *v.* CORNISH.

138 NEW YORK, 133. — 1893.

MAYNARD, J. — * * * The equitable remedy known as a strict foreclosure of a real property mortgage has never been recognized in this State save in a very limited class of cases.

In England it was the prevailing method of procedure until the enactment of the statutes of 15 and 16 Victoria, ch. 86, § 48, known as the Chancery Improvement Act. It had its root in the common-law doctrine that, upon the execution of the mortgage, the mortgagee acquired the fee of the land, and upon default in payment a right to the possession, and the mortgagor had no estate or interest therein and no right of possession after default had been made in the payment of the mortgage debt. The mortgagee's remedy was by ejectment, and in a court of law it was not an available defense for the mortgagor to plead that he was willing and ready to pay the debt if he had once suffered a default to occur. In order to mitigate the hardships of this relation equity permitted the mortgagor and his privies to redeem by discharging the mortgage debt and by restoring to him the possession of the land if the mortgagee had taken possession. As it might be uncertain whether the mortgagor or subsequent lienors would ever avail themselves of the right of redemption, it was, while outstanding, a serious impediment to the alienation of the mortgaged property, and equity would, therefore, entertain an action to compel the parties entitled to this right to exercise it by paying within a reasonable time the amount of the mortgage debt, or be forever barred or foreclosed of the right of redemption; and in case of redemption the decree provided that the mortgagee should reconvey the lands to the mortgagor or other party redeeming.

This proceeding has been termed a strict foreclosure, but it is apparent that it has no appropriate place in a system of laws and jurisprudence where it has been declared that the mortgage does not operate as a conveyance of the legal title, but is only a chose in action constituting a lien upon the land as security for the debt or other obligation of the mortgagor. The courts of this State have refused to adopt it as an authorized remedy in ordinary cases, and in this respect have followed the practice of the civil rather than of the common law. In the *Am. & Eng. Encyclopædia of Law*, vol. 8, 186-7, tit. Foreclosure, it is stated that strict foreclosure is very rarely resorted to in the American courts; that in a large majority of the States it is not recognized; that in two it is the usual mode of procedure; and that in six of the States, including New York, it is permitted in exceptional cases.

The plaintiff here rests her right to this remedy principally upon the fact that she was the owner of a prior mortgage which she had foreclosed, and that she became the purchaser of a part of the mortgaged property at the foreclosure sale, and that the defendant's subsequent mortgage was not cut off or affected by the foreclosure

because she did not make him a party to the foreclosure action. Before the sale occurred she had full knowledge that the defendant was the owner of the second mortgage, and leave was given her by the court to make him a party to the action and so conclude him by the judgment, which she declined to accept, but caused the sale to proceed and purchased the property upon such terms that both expressly and in legal effect her purchase was subject to the lien of the defendant's mortgage.

Upon such circumstances no case was made for a resort to this unusual, exceptional and severe remedy. It is insisted that, under the provisions of the Civil Code¹ relating to foreclosure actions, such a judgment as the one entered herein cannot be rendered in any case; but it is unnecessary to determine that question upon this appeal. We may assume that, in a proper case, jurisdiction still exists to relieve a purchaser at a foreclosure sale, who finds that by reason of some defect in the proceedings the lien of a subsequent incumbrance has not been extinguished; but the facts here shown are not sufficient to authorize the exercise of that jurisdiction. We think that in such cases the purchaser must show that he purchased in good faith, relying upon the regularity and sufficiency of the foreclosure proceedings, and that the subsequent lienor had knowledge of the sale and permitted the purchaser to make the purchase without disclosing the existence of his incumbrance or calling attention to the defect in the proceedings. In *2 Jones on Mort.*, § 1540, p. 421, it is stated that a strict foreclosure is proper "where a mortgagee or purchaser is in possession under a legal title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances, as in case one has purchased in good faith at a mortgage sale which is not conclusive against some incumbrancer not made a party to the suit, and the purchaser has gone into possession." The cases have been very rare in this State where the remedy has been invoked, but we fail to find a case where it has been applied to relieve a party who buys with full knowledge of the outstanding incumbrance and subject to it. * * *

The right to a judicial sale of the mortgaged property to pay the mortgage debt is in this State one of the incidents of the mortgage contract, and if the mortgagor is in default the mortgagee is entitled to the enjoyment of this right unimpaired. It can only be secured to him by a sale, in an action or proceeding to which he is a party; for in all such cases the sale is made for the benefit of all the parties interested, and the proceeds are distributed among them in the order of the priority of their respective liens. * * *

¹ § 1626 N. Y. Code Civ. Pro. — Ed.

Where it is a second mortgage and the mortgagee is made a party to the foreclosure of a prior mortgage, full effect is given to this power of sale by means of the sale directed in the action or proceeding, which, as we have seen, is made for the benefit of all the parties served with process or notice. It is not necessary to hold that in no case can the right to sell be held in abeyance; but the right cannot be denied or suppressed unless some adverse dominating equity requires it. If in this case the plaintiff had purchased and taken possession in ignorance of the existence of defendant's mortgage, and the defendant, having knowledge of the prosecution of the foreclosure action, had made no disclosure of his incumbrance upon the property, and the purchaser was thus misled to his prejudice, it might well have been held that it would be inequitable to permit the defendant to exercise the power of sale in his mortgage, and it might properly have been decreed that unless he reimbursed the plaintiff his interest in the property should be deemed extinguished. Other cases might be suggested where such form of relief would be just. But in all cases equitable grounds for such a procedure must be shown. It is not a matter of discretion with the trial court whether a remedy of this kind shall be applied. The proofs must bring the case within the exceptional class in which it is permitted, and then the measure of the relief to be granted or the conditions upon which it will be allowed are to a certain extent discretionary.

As to this defendant the plaintiff is only a mortgagee in possession. It is true she has also acquired the title of the mortgagor and has extinguished the liens of all other incumbrancers who were made parties to the foreclosure action.

But she occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor and an assignment of the other incumbrances and had gone into possession. As to the defendant, her mortgage is still unforeclosed and the estate, which the mortgagor had when he executed the defendant's mortgage, is still subject to its lien. The plaintiff may at any time foreclose her mortgage as against the defendant, notwithstanding the former defective foreclosure. *Brainard v. Cooper*, 10 N. Y. 356; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33; *Franklyn v. Howard*, 61 How. Pr. 43. It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of defendant's mortgage. She will be as fully protected upon such a foreclosure as she would have been upon the original foreclosure had she made him a party to it.¹

Judgment accordingly.

¹ See also *Denton v. Ontario County Nat. Bk.*, 150 N. Y. 126. — ED.

1122. e. Effect of tender.

KORTRIGHT *v.* CADY.

21 NEW YORK, 343. — 1860.

DAVIES, J. — The common law recognized two kinds of landed security respectively known as the *vivum vadium* and *mortuum vadium*. The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt. The creditor took actual possession of the estate and received the rents and applied them from time to time in liquidation of the debt. When it was satisfied the debtor might re-enter and maintain ejectment, and it was said to have been called *vivum vadium* because neither debt nor estate was lost. This mode of security is said not to have been very general, and it was superseded by the *mortuum vadium*, or mortgage, so called because on breach of condition the estate was rendered indefeasible in the mortgagee and absolutely lost to the mortgagor. Littleton, § 332, thus describes the *mortuum vadium*, or mortgage: "Item: if a feoffment be made upon such condition that if the feoffer pay to the feoffee at a certain day, etc., forty pounds of money, that then the feoffee may re-enter, etc. In this case the feoffee is called the tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*; and it seemeth that the cause why it is called a mortgage is, for that it is doubtful whether the feoffer will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition, etc. And if he doth pay the money, then the pledge is dead as to the tenant." Upon the execution of such a mortgage the legal estate vests in the mortgagee subject to be defeated on performance of the condition by the mortgagor. To divest the estate of the mortgagee it was necessary for the mortgagor to make payment at the day according to the condition of the mortgage; or if at the appointed day legal tender of the money was made and refused the condition was satisfied equally as if payment had been made and the mortgagor or his heirs might re-enter. This appointed day for the payment of the money, to secure which the mortgage was given, became known in legal parlance as the law day. But a distinction was taken between a sum in the nature of a gift secured on the land and where the security was given to secure a debt due. The former was, in the case of a tender and refusal, absolutely lost:

but the latter, the debt, was regarded as still subsisting as a personal duty and might be recovered by action at law. As if A borroweth a hundred pounds of B, and after morgageth lands to B, upon condition for payment thereof, if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition; but yet the debt remaineth and may be recovered by action of debt. But if A, without any loan, debt or duty preceding, enfeoff B of land upon condition for the payment of a hundred pounds to B, in the nature of a gratuity or gift, in that case, if he tender the hundred pounds to him according to condition and he refuseth it, B hath no remedy therefor. Co. Litt. 209b. Littleton, in § 335, says that it is to be remembered that when such tender of the money is made, and the feoffee refuse to receive it, then the feoffee hath no remedy by the common law, because it shall be accounted his own folly that he refused the money when a lawful tender of it was made to him. The same writer, in § 338, says that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit and fully discharged forever afterwards. Coke, in his Commentaries, in reference to these rules, as applicable to tenders and their effect, says it is to be implied that the tender is made at the due time and place according to the condition. The reason for this is obvious, under the rules already stated, as applicable to the absolute vesting of the estate in England in the mortgagee upon the condition broken. If tender or payment was not made at the law day according to the condition, the estate vested absolutely in the mortgagee; and by the strict rules of the common law all interest or right therein of redemption passed from the mortgagor. If the mortgage debt was afterwards paid by the mortgagor, a reconveyance of the estate by the mortgagee was necessary to vest the same in the mortgagor. By the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. The doctrine of forfeiture of the common law was decidedly opposed to this principle. In the eye of equity the absolute forfeiture of the estate, whatever might be its value on the breach of the condition, was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The courts of equity, therefore, stepped in to moderate the severity with which the common law followed the breach of the condition. Leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit

what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal and interest and costs notwithstanding the forfeiture at law. Thence grew up the system in England of filing bills in equity to redeem, and in this State the filing of bills in equity by the mortgagee to foreclose and cut off this right of redemption in the mortgagor.

The rule in England was therefore ancient and well settled that payment on the law day extinguished the interest of the mortgagee in the lands mortgaged, and tender and refusal at the same time produced the same result. But payment after and acceptance did not revest the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity and file his bill to redeem. The only question presented for our consideration in this case is whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage though the debt remains. In this State the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing and referred to in it, and that the mortgagor remains the owner of the estate mortgaged and may maintain trespass as against even the mortgagee. *Runyan v. Mersereau*, 11 Johns. 534. The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. *Kemble v. Wallis*, 10 Wend. 374. This is to be taken with the reservation already stated that the debt or duty remained and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt. *Coit v. Houston*, 3 Johns. Cas. 243. * * *

The only remaining question to be considered is whether the tender in this case was well made, it not being followed with the

allegation of *touts temps prist*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien and does not operate to discharge the debt or sum owing. In the latter case the averment of *touts temps prist*, followed up by bringing the money into court, is essential to a good plea of tender. *Hume v. Peploe*, 8 East, 168; *Giles v. Hartis*, 1 Lord Ray. 254. But if a man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same or to render it in court. Co. Litt., note to § 335. The same principle was held by the Supreme Court of this State in *Hunter v. Le Conte*, 6 Cow. 728, and cases there cited.

Judgment reversed.

1122. Tender.

TUTHILL v. MORRIS.

81 NEW YORK, 94. — 1880.

RAPALLO, J. — * * * But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been duly made of the full amount due it will discharge the lien and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt

it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law and could not be enforced, even in equity, does not entitle a party to come into a court of equity and have it decreed to be surrendered or extinguished without paying the amount equitably owing thereon. Even securities void for usury would not be canceled by a court of equity without payment of the debt with legal interest until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but, on the contrary, recognizes it by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.

We are of opinion, however, as already stated, that no sufficient tender was shown and that on both grounds the judgment should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

1122. 5. Dedication.

PEOPLE *v.* UNDERHILL.

144 NEW YORK, 316. — 1895.

PECKHAM, J. — * * * We think the evidence in this case was sufficient to show a dedication by the proper parties of Lafayette avenue as a public street. The criticism made that the deeds from Nelson and others to Everett, and from Everett to Underhill, make no mention of Lafayette avenue as being a public street, we think is not well founded. Both deeds refer to Lafayette avenue and they refer to it as designated on the map then on file in the office of the register of the county of Westchester, and they bound their land along the center of the avenue. It is not necessary, we think, under these circumstances to state that they mean by the word "avenue" a public street. The word, as used in the deeds and upon the map, furnishes evidence of a dedication and implies a public street, and the intention to dedicate the land for a public street would not be made plainer by adding that they mean by the word "avenue" a public street, to be called Lafayette avenue.

We are of opinion, however, that there was no sufficient evidence of acceptance of this dedication either by way of user or by any formal and conclusive action on the part of those public authorities of the village of Sing Sing who would have the authority to accept

a dedication to the public. The trial court eliminated one way of showing acceptance by the user of the street and, we think, properly so. There was really no evidence of user as a street. The street never has been used and is not now used as a public highway for the passage of men and vehicles from Highland avenue to Spring street. The only user proved was of a couple of hundred feet east from Spring street, and that was used by the people who were building houses and for their accommodation only, and it was almost an impossibility to drive or ride from that point east to Highland avenue; indeed, Cartwright himself had a fence across Lafayette avenue. There being no user there must have been proof of an acceptance by some formal and unambiguous action on the part of the authorities of the village having that power and showing unmistakably an intention to accept the land thus dedicated and for the purpose to which it was to be put.

As was said in the case of *Niagara Falls Susp. Bridge Co. v. Bachman*, 66 N. Y. 261, at 269, "to constitute a public highway by dedication there must not only be an absolute dedication, a setting apart and a surrender to the public use of the land by the proprietors, but there must be an acceptance and a formal opening by the proper authorities or a user." In *Holdame v. The Village of Cold Spring*, 21 N. Y. 474, the same doctrine is announced, and it is there said that an acceptance of the dedication, either by user or by formal act of the public authorities, must be shown before a dedication becomes complete. To the same effect is the case of *Speir v. The Town of New Utrecht*, 121 N. Y. 420, although the question there was more in regard to the character of the user than to the formal action on the part of the public authorities. It was there held that the mere fact that a portion of the public had traveled over the road for twenty years would not make it a highway; that the user must be like that of highways in general and the road must not only be traveled upon but it must be kept in repair, taken in charge and adopted by the public authorities. That was on the question of user. In this case no formal acceptance of this dedication on the part of the public authorities has been shown. The various items of proof referred to by the counsel for the people for the purpose of showing something equivalent to a formal acceptance, we think, are wholly inadequate to meet that requirement. So far as working the street is concerned, the only evidence that the public authorities had ever worked it at all consists of the statement made by the clerk of the village that the village had laid a sewer in the street for a couple of hundred feet east from the line of Spring street, and he believed that some sidewalk had been there laid.

Under what circumstances he did not say. The people who built the few houses along the western end of Lafayette avenue may have asked the village to lay a sewer for their accommodation and also a sidewalk as far along the street as the houses continued to the east from Spring street. The authorities may have complied with their request. But that is no formal acceptance of a dedication of the whole street from Highland avenue to Spring street, a distance of nearly 1,300 feet, by any public authority of the village authorized to speak or act for it in such case and thus to bind the village by its action. There is no evidence of any such acceptance. The village has done no act from which an acceptance of this dedication can properly be inferred. It is claimed that a map of the street was made and filed. That mere fact is wholly immaterial. There was a map laying out a general system of sewerage for the southern portion of the village, and it would, in any event, very properly include the land in question which might be thereafter drained by the sewer, although such street was not then opened or accepted as a public highway. There is also evidence that electric lights had been placed in one portion of the street, but under what circumstances, or upon what conditions or how many, was not stated, and that water pipes had also been laid in the street the same distance as the sewer for the accommodation of those few houses above mentioned. It is seen that the village has done no work whatever on any portion of this street other than the 200 feet directly east from Spring street, and there is no evidence under what circumstances such work was done, or that it was done by such authority as might bind the village on a question of acceptance of a dedication of land for a street. The mere assessment by assessing officers of lands which they described as being on Lafayette avenue is no evidence whatever of a proper acceptance, nor, under the circumstances, was the putting up of signs at each end of the street naming it Lafayette avenue. The authorities of the village had directed signs to be placed at the corners of all the streets in the village, without designating any particular street or in any manner deciding that Lafayette avenue was a public street of the village and the resolution had been referred to a committee to carry out its purposes. That committee referred it to the clerk, who employed a painter, who painted various signs, and among them he included Lafayette avenue, and the sign was put up. The directing of a sidewalk to be laid at the entrance of this street on Highland avenue is no evidence of an acceptance of Lafayette avenue. In fact, there is an entire absence of proof of any unequivocal act on the part of the village authorities showing a formal acceptance of the avenue in question from Spring street to Highland avenue.

What rights the abutting owners on the avenue may have as between each other and as against the defendant Mrs. Underhill, as one of such owners, by reason of the various deeds from Thomas Nelson and others recognizing the existence of Lafayette avenue, it is not necessary here to discuss or decide. They may have easements or rights of way among themselves not touched by this proceeding. *Hennessy v. Murdock*, 137 N. Y. 317; *Cunningham v. Fitzgerald*, 138 id. 165; *Lord v. Atkins*, id. 184. We simply say that the people in this criminal action have failed to show that the defendants were guilty of maintaining a nuisance by obstructing a public highway called Lafayette avenue at the place described in the indictment, and the jury should, therefore, have been instructed to acquit them.

Judgment reversed.

SUPPLEMENTARY NOTES.

10.¹ **Northern Bank of Ky. v. Roosa.** With the Ohio statute compare New York Code Civ. Pro., §§ 1251 (but see *Taylor v. Wynne*, 30 N. Y. St. Reporter, 352), 1250 and 1430.

14. **Johns v. Johns.** Shares in joint stock associations are personalty in New York. *Matter of Jones*, 172 N. Y. 575.

20. Add:—

5. RIGHTS OF ACTION FOR INJURIES TO LAND.

Regarded as property-rights these are personalty. *Griswold v. Met. El. Ry. Co.*, 122 N. Y. 102. As to sale of a right to injure land, see *Ford v. Livingston*, 140 N. Y. 162.

6. LIENS ON LAND OR ON INTERESTS IN LAND.

Liens as security for the payment of a charge or debt are now personalty.

42. **Webster v. Parker.** Compare the New York statute, Code Civ. Pro., § 1369.

44. **Despard v. Churchill.** See also *Cross v. U. S. T. Co.*, 131 N. Y. 330. But see comment in Tiffany on Real Property, p. 16, n. 46.

65. Add:—

(4) CRIMINAL PROSECUTION.

The common law of crimes, except in the case of arson and burglary, afforded little, if any, protection to property rights in land. Modern penal codes frequently supply this omission. See N. Y. Penal Code, §§ 635-637, 639-640c, 643, 646, 650, 654. For arson and burglary, *id.*, §§ 486-508. As to forcible entries and detainers, see *id.*, §§ 465-467; also N. Y. Code Civ. Pro., §§ 2233 and 1669.

70. **March v. Berrier.** Compare *Dunning v. Ocean Nat. Bk.*, 61 N. Y. 497; *Ford v. Livingston*, 140 N. Y. 162, and *Wheeler v. Kirtland*, *supra*, 698. See § 2359, N. Y. Code Civ. Pro. As to the respective interests of vendor and vendee under a land contract, see *Palmer v. Morrison*, 104 N. Y. 132; *Williams v. Haddock*, 145 N. Y. 144, and N. Y. Code Civ. Pro., §§ 1028, 1253, 1874, 1875, 2749, 2779-2783, 2786, 2793, subd. 2, and 2712, subd. 9.

¹ Figures in full-face type refer to pages in the body of the book. In preparing these notes two recent text-books on real property have proved especially useful—Tiffany (1903), and Reeves (1904).

71. Craig v. Leslie. The clause of the will referred to gives all the testator's estate to certain persons "on special trust" to sell both chattels and land, on certain terms as to credit, and then it continues: "In the second place I give and bequeath to my brother, Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him accordingly as the payments are made."

86. Van Rensselaer v. Hays, note 1. For the law as to New York manor lands see Reeves on Real Property, p. 389, note. See also Fowler's History of the Law of Real Property in New York, pp. 29, 84, 119, and Fowler's Real Property Law of the State of New York, pp. 87, 113-114, 214, 453-457.

99. Grandona v. Lovdal. See also *Countryman v. Lighthill*, 24 Hun (N. Y.), 405.

108. Deerfield v. Arms. See *Warren v. Chambers*, p. 1003, and *Halsey v. McCormick*, p. 1006, *supra*.

114. Noble v. Sylvester. For attempt at constructive severance, see *Lac. Fert. Co. v. Lake G. & F. Co.*, *supra*, p. 1146.

116. Surface or standing waters. *Curtis v. Ayrault*, at pages 126 and 130, *supra*. Read *Barkley v. Wilcox*, pp. 837 and 1151, *supra*, and see *Jeffers v. Jeffers*, 107 N. Y. 650; *Peck v. Goodberlett*, 109 N. Y. 180; *Waffle v. N. Y. C. R. R. Co.*, 53 N. Y. 11, and *Noonan v. Albany*, 79 N. Y. 470. Compare the reasoning in *Tremblay v. Harmony Mills*, 171 N. Y. 598.

116. Garwood v. N. Y. C. & H. R. R. Co. Riparian owners are entitled to these rights, even though not owning the bed of the stream or sea. See *Halsey v. McCormick*, 13 N. Y. 296. Proprietors of lands on tide waters have also certain other rights, for which see *Mather v. Chapman*, 351 *supra*, at p. 352.

120. Heath v. Williams. In some of the states where irrigation on a large scale is necessary, the common-law doctrine of riparian rights is in force with perhaps a more liberal rule as to what constitutes "reasonable use" in this respect. In most of the arid states, however, a right of prior appropriation is recognized which is not of common-law origin nor dependent upon prescription. In some such states a constitutional or statutory provision has been based upon the new doctrine. See article "Irrigation" in Vol. 17 Am. and Eng. Encyc. of Law. A similar rule as to prior appropriation of water for mining purposes exists in some jurisdictions. See *Atchison v. Peterson*, p. 1153, *supra*.

133. Delhi v. Youmans. Read *Forbell v. City of New York*, reported *supra*, at p. 1160, and see *Reisert v. City of New York*, 174 N. Y. 196.

Delhi v. Youmans "was an action for a perpetual injunction, restraining the defendant from digging upon his own land, for a lawful purpose, the result of which was the diversion of the water and preventing its flowing or percolating into two large and valuable springs on adjoining land, which supplied the village of Delhi with water."

136. Washington Ice Co. v. Shortall. Ownership of ice depends upon the ownership of the soil underlying the water on which the ice is formed. Compare cases printed on pp. 141 and 146, *supra*. So as to rights to fish in and hunt upon such waters, pp. 360, 361, *supra*. All such rights are subject in this country to the right of the public to navigate the stream if it is practically navigable.

Running waters and the waters of lakes and ponds having outlets are, in this country, for purposes of ownership, to be classed either as "public" or as "private." Under the earlier common law all non-tidal waters are "private," even though practically navigable and subject to navigation rights; the beds of such waters belong to the riparian proprietors. Many of our states still adhere to this rule. Under the civil law, and the rule of many of our states, all waters practically navigable are "public," and the bed belongs to the state. See *Wood v. Fowler*, p. 146, *supra*.

In all our jurisdictions tidal waters are "public," and their beds belong to the state.

In most jurisdictions boundary rivers and the "Great Lakes" are "public waters." *Ill. Cent. R. Co. v. Illinois*, 146 U. S. 387; *Matter of Commissioners*, 37 Hun. (N. Y.) 537. In New York the Hudson and Mohawk are public streams, even above the ebb and flow of the tide. *People v. Canal Appraisers*, 33 N. Y. 461, explained in *Smith v. Rochester*, 92 N. Y. 463. In Massachusetts and Maine, under ordinances of 1641 and 1647 and other legislation, all ponds containing more than ten acres (known as "Great Ponds") are held by the state in trust for the public. *Wattuppa Reservoir Co. v. Fall River*, 147 Mass. 548 (154 Mass. 305). Most large ponds and small lakes in New York are private property, even though practically navigable. As to Cazenovia Lake, see *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102; Heinlock Lake, *Smith v. Rochester*, 92 N. Y. 463; *Neal v. Rochester*, 156 N. Y. 213; Hinckly Pond (45 acres), *Gouverneur v. Nat. Ice Co.*, 134 N. Y. 355; Skaneateles Lake, *Sweet v. Syracuse*, 129 N. Y. 316; Lake Champlain, *C. & St. L. R. R. Co. v. Valentine*, 19 Barb. 484.

Riparian owners on opposite sides of a "private" stream own each to the thread thereof unless there is a clear intent to the contrary. *Halsey v. McCormick*, 13 N. Y. 296; *Matter of Brookfield*, 176 N. Y. 138; *Deerfield v. Arms*, 108, *supra*. If the stream belongs to one of the riparian proprietors the other usually owns to low-water mark on his side. See *Halsey v. McCormick*, 13 N. Y. 296.

The sovereignty of the national government extends over tide water to the three-mile limit. *Manchester v. Massachusetts*, 139 U. S. 241. The title of a proprietor on tide water extends only to high-water mark. The ownership of the shore, beach or strand is in the state in trust for the public. *Coxe v. State of New York*, 144 N. Y. 396. For the rule in Massachusetts, Maine and New Hampshire, see *Mather v. Chapman*, 351, *supra*, p. 353, and *Barker v. Bates*, 355, *supra*, note. As to the control of New York city over its water front, see *Sage v. The Mayor*, 154 N. Y. 61, and *Matter of City of New York*, 168 N. Y. 134.

See the Public Lands Law, chap. XI., General Laws, §§ 70 and 71, for grants of land under water in New York.

146. Wood v. Fowler. Laws of N. Y. 1895, ch. 953, regulates the taking of ice in the public waters of the Hudson and similar statutes may exist in other states.

149. Higgins v. Kusterer. Read *Van Rensselaer v. Mould*, p. 1163, *supra*. The sale of the right to take ice from a pond may create a profit à prendre either in gross or appurtenant. *Huntington v. Asher*, 96 N. Y. 604. See also *State v. Pottmeyer*, 33 Ind. 402. Ice stored in ice houses is personalty. *Ward v. People*, 3 Hill (N. Y.), 395, 6 Hill (N. Y.), 144.

160. Purner v. Piercy. See *Drake v. Wells*, p. 182, *supra*. For the New York rule as to fruit ungathered, see Code Civ. Pro., § 2712, subd. 6.

164. Batterman v. Albright. See *Duffus v. Bangs*, 43 Hun, 52 (122 N. Y. 423), as to nursery stock.

173. In re Chamberlain. See also *Kain v. Fisher*, 6 N. Y. 597. Williams on Executors, in a much cited passage, at page 712 (7th Eng., 6th Am. Ed.) says: "It seems, however, that the artificial grasses, such as clover, saintfoin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements," and in a note, "4 Burns E. L. 299. No case seems to have occurred where these matters have come in question. The general right seems to have been admitted in *Graves v. Weld*." For that case see p. 403, *supra*.

176. As to effect of an oral exception or reservation of nursery trees, see *Smith v. Price*, *supra*, 163. See also *Brooks v. Galster*, 51 Barbour (N. Y.), 196.

177. Saltonstall v. Little. *Boyce v. Washburn*, 4 Hun (N. Y.), 792, *accord*.

179. Kilmore v. Howlett. See *St. Regis Paper Co. v. S. C. Lumber Co.*, 173 N. Y. 149. Here the lumber company agreed "not to sell the land so as to prevent the complete fulfillment of the contract and further * * * that the purchaser should have an equitable interest in the wood for advances." It was held that this agreement was not merely one for a sale of chattels.

187. Fructus industriales. Are these (while still rooted in the soil) realty with some of the legal incidents of personalty; or are they personalty, passing with the land under some circumstances as an incident thereto? See *supra*, 191, 207, 209, 402, 214, 215, 216, and compare p. 149 and *Bagley v. Columbus So. R'y*, p. 1164, *supra*. Should the maturity or immaturity of a standing crop affect the question? *Supra*, pp. 188, 199, 217.

197. Lane v. King. The lease was executed after the mortgage was given.

209. Sherman v. Willett. 2 R. S. 82, § 6, is now § 2712, subd. 5, Code Civ. Pro.; 2 R. S. 87, § 25, is now § 2717, Code Civ. Pro.

211. Separate sale or mortgage of crop in ground, by one not the true owner of the land, but holding under adverse claim, see *Stockwell v.*

Phelps, 34 N. Y. 363, explained in *Samson v. Rose*, 65 N. Y. 411, at pp. 419 and 430, and in *Van Etten v. Currier*, 3 Keyes, 329, at pp. 331 and 333. With *Sexton v. Breese* compare *Austin v. Sawyer*, p. 31, *supra*.

217. Ellithorpe v. Rødesil. See further as to the Iowa rule as to mature and immature crops, *Hecht v. Dettman*, p. 199, *supra*, and compare opinion of Christiancy, J., in *Tripp v. Hasceig*, *supra*, 188, at p. 191.

218. Note 1. Fixtures. 1. The older definition, based on the maxim *quicquid plantatur solo, solo cedit*: "Fixtures are things, in their inherent nature chattels, which have been so annexed to real property as to be deemed a part of it." 2. The more modern definition, due to the numerous exceptions now recognized to the older rule: Fixtures are "personal chattels annexed to or used in association with land, and removable by the person who so annexes or uses them." Reeves on Real Property, § 10. 3. A still more recent definition is that embodied in the note at page 218 of the text. For discussion of *Walker v. Sherman*, see p. 274, *supra*.

Buildings and fences are presumptively part of the land. A clear intent to the contrary must appear before they can be treated as chattels. See the cases herein at pp. 257, 280, 283, 286, 289, 307, 309, 312, 319, 325, 328, 330, 332 and 335. For the English rule as to wooden buildings merely resting on solid foundations, see *King v. Otley*, 1 B. & Ad. 161, followed in *Carlin v. Ritter*, 68 Md. 478, but repudiated in *Landon v. Platt*, 34 Conn. 517, 524.

224. An article brought on the premises for permanent actual annexation, but never affixed, does not become part of the realty. *Woodman v. Pease*, 17 N. H. 282. Compare p. 17, Reeves, and examine cases there cited.

231. Snedeker v. Warring. To be constructively annexed the chattel must be, (1) specially adapted to that part of the realty with which it is used, (2) appropriated to such use, and (3) reasonably necessary to the completion of such part of the realty. A door key is a good example. See also p. 254, *supra*, for a case of articles temporarily severed in fact, but constructively still annexed.

234. Ward v. Kilpatrick. See also *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1. When the article in question is a constituent part (or complementary) of a structure which is part of the land, it is itself "realty" and no question as to its removability should ever arise as between any parties whatever. The possibility of repair, by the person removing, with other materials, does not enter into the question. Even an agreement by the parties before annexation that it should remain personalty should not avail. *Voorhees v. McGinnis*, 48 N. Y. 278. These rules are frequently relaxed in the case of machinery. *Voorhees v. McGinnis*, 48 N. Y. 278.

If the attempt to remove the article would reduce it to its crude materials or seriously injure it, it should not be regarded as removable. See *McRea v. Bank*, *supra*, 271, at bottom of p. 272. But compare *Van Ness v. Pacard*, *supra*, p. 312.

242. *Murdock v. Gifford.* Distinguished in *Potter v. Cromwell*, 40 N. Y. 287, p. 292, and in *McRea v. Cent. Nat. Bk.*, 271 *supra*, pp. 273 and 275. See also p. 279, *supra*.

245. *McKeage v. Hanover Fire Ins. Co.* **Contra, Johnson v. Wiseman*, 4 Metc. (Ky.) 357, and *St. Louis R. Mfg. Co. v. Carroll*, 72 Mo. App. 315, a radiator case. The weight of authority seems to be with the principal case. For gas and water pipes under floors and in walls, see *Cohen v. Kyle*, 27 Mo. 122. As to carpets, window shades, etc., see *Cosgrove v. Troescher*, 62 App. Div. (N. Y.) 123.

248. *Hoyle v. P. & M. R. R. Co.* P. 253, ch. 779, Laws of 1868, is now § 91 of the New York Lien Law.

257. *Leonard v. Clough.* That the chattel if it has not lost its identity as such may be reserved by parol on a sale of the realty, has been held in *Pea v. Pea*, 35 Ind. 387, and *Smith v. Odom*, 63 Ga. 499. *Contra, Bond v. Coke*, 71 N. C. 97.

260. *Tyson v. Post.* Tyson and others owned certain land on which they put up the plant and machinery of two marine railways. Later the owners of the land agreed to convey the premises to Carroll. Carroll arranged with Post to furnish \$6,200 of the purchase price. Post paid this over to Tyson *et al.*, the owners, and they and Carroll agreed with Post, orally, that he should have title to the plant and machinery as security for his advance, and be entitled to remove them at any time from the premises. Then, at the request of Carroll, Tyson *et al.* deeded the premises to one Cooney, and Cooney gave them back two mortgages for the balance of the purchase money. This action is brought to foreclose those mortgages. Post claims the right to remove the property in question. Tyson *et al.* deny it. Plaintiffs succeeded on the trial, but the judgment was reversed by the General Term of the Supreme Court. Plaintiffs appealed, giving (as required by law) a stipulation for judgment absolute against them in case they should be beaten on the appeal.

271. *McRea v. Cent. Nat. B'k.* The New York courts in adopting the rule of *Teaff v. Hewitt*, 1 Oh. St. 511, lay the stress on the intention. Yet if the article has in its own nature a determinate legal character as realty or personalty, the manner in which the parties attempt to treat it will not change its character at law. *Fitzgerald v. A. H. Ins. Co.*, 61 App. Div. (N. Y.) 350.

280. Reasonably presumable intent. The question is one of mixed law and fact, to be submitted to the jury under instructions from the court. *Scobel v. Block*, 82 Hun (N. Y.), 223.

283. *Ritchmyer v. Morss*, 3 Keyes (N. Y.), 349, and 4 Abb. Ct. App. Dec. (N. Y.) 55. See also *McAllaster v. Niagara Fire Ins. Co.*, 156 N. Y. 80; *Chandler v. Hamell*, 57 App. Div. (N. Y.) 305; *Spruck v. McRobert*, 139 N. Y. 193.

After the principal case read *Thomas v. Evans*, p. 1169, *supra*. The doctrine of this case will not be extended to one where the plaintiff receives

no benefit by reason of such expenditure, *Woodhull v. Rosenthal*, 61 N. Y. 382, nor will equity take jurisdiction of a direct suit by the person making the expenditures to procure reimbursement therefor. *Putnam v. Ritchie*, 6 Paige's Ch. (N. Y.) 390. In one or two states, however, such affirmative relief appears to have been granted. See Tiffany, § 241, n. 151. Where the true owner need not resort to equity but may recover the land with the mesne profits at law, the *bona fide* possessor may in many jurisdictions set off the amount of his expenditures against the claim for mesne profits, but no further. *Jackson v. Loomis*, 4 Cow. (N. Y.) 168. See *Dows v. Congdon*, 16 How. Pr. (N. Y.) 574.

290. Note 1. If the chattel has lost its identity as such, its original owner ought not to recover it in any case, but should recover damages for its conversion. *Supra*, pp. 51, 234, 239, 280, 289; *infra*, 290. If the chattel has not lost its identity, it is a technical fixture under our third definition and the case may arise under either (a), (b) or (c). Under (a) the chattel may have been stolen, and the annexer may or may not be the thief, or it may have been taken by mistake and annexed to realty. Under (b), the bailment may be loan, hire, deposit for custody, or the *quasi*-bailment arising from finding. The chief difficulties arise in case of a chattel acquired under a conditional sale agreement, or one on which a chattel mortgage was placed before annexation. It would seem that some courts regard the chattel mortgagee and the conditional vendor as entitled to the protection of owners; others treat them as practically equitable lienors.

If they are owners they should not lose title unless (1) the chattel has lost its identity as such, or (2) the owner is bound by an estoppel *in pais*. "The New York doctrine" favoring the chattel mortgagee or conditional vendor is often said to be based upon actual intent as expressed in the agreement or implied from the nature of the transaction. *Tift v. Horton*, 293, *supra*. The true foundation for this doctrine, however, lies in the legal ownership of the chattel as such, see *Mott v. Palmer*, p. 286, *supra*, the case at page 290 and *Russell v. Richards*, 10 Maine, 429. The former view has led to the line of argument adopted in such cases as *Rowland v. West*, 62 Hun (N. Y.), 583, and *McFadden v. Allen*, *supra*, p. 1172, which may yet subvert the doctrine. The majority of the states are against "the New York doctrine," except of course, when the real estate purchaser or mortgagee had notice of the prior transaction. The equitable doctrine embodied in *Binkley v. Forkner*, p. 297, *supra*, seems to be gaining ground.

In Massachusetts and possibly one or two other states, an article bailed to the landowner and annexed by him in such way that it has not lost its identity as a chattel, has been held to pass to the purchaser of the land. *Southbridge Sav. Bank v. Stevens*, 130 Mass. 547. The courts of those states are very reluctant to depart from the old rule *quicquid plantatur solo, solo cedit*.

305. Bishop v. Bishop—Note 3. Sections 6 and 7, 2 R. S. 83 (now N. Y. Code Civ. Pro., § 2712, subd. 4 and 9), were probably intended to give

an executor or administrator the right of a tenant as to the removal of certain fixtures. But the courts have practically refused so to construe the statute (*House v. House*, 10 Paige's Ch., N. Y., 158), and will not extend it to analogous cases. *Potter v. Cromwell*, 40 N. Y. 287; *Voorhees v. McGinnis*, 48 N. Y. 278; *Walker v. Sherman*, *supra*, p. 218; *McRea* case, *supra*, 271.

312. Van Ness v. Pacard. See also *Andrews v. D. B. Co.*, 132 N. Y. 348.

323. Gaffield v. Hapgood. But by special agreement with the landlord ownership of the fixture may remain in the tenant even after he has actually surrendered possession of the premises. *Thorne v. Sutherland*, 23 N. Y. 236. There seems to be a few *dicta* to the effect that the tenant always has a reasonable time after surrender of possession in which to remove such fixtures. See *Shellar v. Shivers*, 171 Pa. St. 569.

325. Loughran v. Ross. Compare *Bernheimer v. Adams*, 70 App. Div. (N. Y.) 114 (123), (aff'd 175 N. Y. 472), and *Stephens v. Ely*, 162 N. Y. 79. The "New York rule" seems to be followed in Maryland, Indiana and California. The "Michigan rule" (see page 332, *supra*), is followed in Wisconsin, Minnesota and Texas.

339. Fay v. Muzzey. In *Yearworth v. Pierce*, Aleyn 41 (1647), it is held that manure in heaps is a chattel, and would go to the executor as against the heir.

340. Ruckman v. Outwater. *Smithwick v. Ellison*, 2 Ired. L. (N. C.) 326, *accord*.

344. Middlebrook v. Corwin. See *Elting v. Palen*, 60 Hun (N. Y.), 306. In Maine the tenant seems to be free to do what he pleases with the manure, except in the last year of his tenancy. *Staples v. Emery*, 7 Me. 201. For cases where the manure was made of produce not raised on the farm, see *Carroll v. Newton*, p. 1175, *supra*.

346. Strong v. Doyle. As to notice, see *French v. Freeman*, 43 Vt. 93. Oral reservation under peculiar circumstances, *Collier v. Jenks*, 19 R. I. 137.

347. 2. See also *Gallagher v. Shipley*, 24 Md. 418.

351. Mather v. Chapman. Though the defendant owned the upland, he was in the position of a stranger as to the riparian rights which, by virtue of a reservation in an early deed, belonged to him as fully as if he himself owned the upland. See note of the reporter, p. 395, 40 Conn.

356. Sheldon v. Sherman. See the N. Y. Town Law, 20 General Laws, § 135.

368. Goff v. Kilts. Kilts owned a hive of bees. The bees swarmed. The swarm flew to lands of the Lenox Iron Company and settled on a tree. Kilts followed, kept them in sight and marked the tree. Two months later the tree was cut down and Goff took the honey made by

those bees. Kilts sued in trespass and succeeded. Goff sues out writ of error.

370. M'Conico v. Singleton. Plaintiff had ordered defendant not to hunt on his unenclosed and unimproved lands. Defendant nevertheless hunted deer over such lands. The action is trespass *quare clausum fregit*.

396. McCord v. O. Q. M. Co. *Cosgriff v. Dewey*, 164 N. Y. 1, similar case under the New York statute.

400. Van Pelt v. McGraw. Van Pelt owned a mortgage upon certain lands, the title to which, subject to the mortgage, had passed to one McGraw. The original mortgagors were insolvent and the premises were an inadequate security for the sum due. Van Pelt obtained a decree of foreclosure and, while the advertisement for the sale was running, McGraw, avowing that he would "strip the land," proceeded to draw off rails and cut and carry away valuable timber, etc. These acts were done with full knowledge of all the circumstances and they lessened the value of the land.

406. Whitmarsh v. Cutting. See also *Samson v. Rose*, 65 N. Y. 411. As to rights of a disseisor to crops raised during his adverse holding, see *Stockwell v. Phelps*, 34 N. Y. 363.

406. Clark v. Harvey. In *Shaw v. Bowman*, 91 Pa. St. 414, a tenant for a two year term came back to gather his way-going crop. The court said "the right of the outgoing tenant to the way-going crop is settled law in Pennsylvania, * * * not by virtue of his lease, for no such right is usually reserved therein, but by the custom of the country. It is a part of the common law." So in *Van Dorens v. Everitt*, 5 N. J. Law, 460, it is said that the right of the tenant to enter and take his way-going crop is the "universal custom, and therefore the settled law" in New Jersey. But in *Harris v. Carson*, 7 Leigh (Va.), 632, the right was denied, the court declaring that "any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom; because it lacks the essential ingredient of a good custom,—it is not immemorial."

407. Stewart v. Doughty. See supplementary note to *Caswell v. Districh*, p. 720, *supra*.

422. Permissive Waste. See *Suydam v. Jackson*, 54 N. Y. 450.

450. Sarles v. Sarles. "Waste" in taking down partitions in a house, *Agate v. Lowenbein*, 57 N. Y. 604.

460. Bates v. Shraeder. The New York Statute of Descents in 1816 (chap. XII., 1786) gives no preference among brothers and sisters or the children of brothers and sisters as heirs-at-law. At common law the oldest son of the oldest brother would take all if that brother was dead as here. As to the right of action, compare *Babb v. Perley*, *supra*, p. 27, and see § 1665 of the N. Y. Code Civ. Pro. Compare also *Donald v. Elliott*, 11 Misc. (N. Y.) 120.

475. Van Rensselaer v. Radcliff. Van Rensselaer, senior, had granted a farm in the manor of Rensselaerwyck to one Jacob Truax, "containing 181 acres, together with free liberty for outdrift of cattle, and cutting and carrying away of timber for building, fencing and fuel in the unappropriated lands of the said manor for the use of the said" farm only. Later Jacob Truax conveyed 98 acres of the farm to his son Andrew and 83 acres to his son John, together with the appurtenances and profits to the same belonging or appertaining. This entire farm, by sundry mesne conveyances and devises, became the property of one Taylor. The defendant, claiming under the authority of one deriving his title from Taylor, entered upon a portion of the above-mentioned "unappropriated lands" and cut and carried away timber therefrom. The timber so cut and carried away was used in making and repairing fences on the farm and was necessary for that purpose. The plaintiff, claiming under a deed from Van Rensselaer, senior, of the above-mentioned "unappropriated lands," sued defendant in trespass. Upon the trial, judgment was entered for the defendant. Plaintiff sues out a writ of error.

489. Cole v. The Lake Co. In *Smith v. Furbish*, 68 N. H. 123 (1894), this case is explained and fully approved, the court saying (at p. 150): "The word [heirs] is no more necessary to the valid conveyance of land than to the valid conveyance of a horse,' * * * an unqualified grant or reservation of land shows with legal accuracy an intent to convey or reserve nothing less than the grantor's interest in the described land." Apparently the doctrine of the *Cole* case had not been suggested in New Hampshire in 1867. See *Wilcox v. Wheeler*, *supra*, p. 502.

502. Wilcox v. Wheeler. This case seems to be that of a *use*, executed by the statute. The court, however, treats it as if it were a trust. At common law a *cestui que use*, proper, would get, under the statute, no greater estate than that which passed, technically, to the grantee to uses. *First Baptist Soc. v. Hazen*, 100 Mass. 322.

505. Fisher v. Fields. *Contra*, *Lucas v. Brandreth*, 28 Beav. 274; *McElroy v. McElroy*, 113 Mass. 509; *Nelson v. Davis*, 35 Ind. 474. And see note 16 at p. 47. Tiffany on Real Property. But see *Ogden v. Brown*, 33 Pa. 247, and *Dreisbach v. Serfass*, 126 Pa. 32, as cited *supra*, on pp. 500-501.

509. Congregational Society v. Stark. As to the necessity for the word "successors" to transfer fee to a corporation sole, see *Boston v. Sears*, 22 Pick. (Mass.) 122.

513. (7) Adams v. Ross. *Contra*, *Anderson v. Logan*, 105 N. C. 266.

513. Add: —

(8) WORDS OF INHERITANCE NOT NEEDED IN EXCEPTIONS.

513. b. Under modern statutes. The change took effect in New York January 1, 1830.

513. Jackson v. Wells. See also *Sergeant v. Towne*, 10 Mass. 303, as cited at p. 29, *supra*.

520. The fee-farm. See supplementary note to page 86, *supra*.

525. First Universalist Soc. v. Boland. Note that the possibility of reverter is properly inalienable. But see *Slegel v. Lauer*, 148 Pa. St. 236; *Scheetz v. Fitzwater*, 5 Pa. St. 126.

527. Fees upon condition. The conditions here referred to are conditions subsequent. Conditions precedent are treated under future interests in land.

No special words are required to raise a condition subsequent. *Parmelee v. Oswego and Syracuse R. R. Co.*, 6 N. Y. 74. The question is one of intent. As the law does not favor forfeitures the clause will, when possible, be construed as a covenant. *Graves v. Deterling*, 120 N. Y. 447. Even the words "upon the express condition" have in many cases been held insufficient to give a right of re-entry for condition broken. *Clement v. Burtis*, 121 N. Y. 708, and cases cited. But see page 533, *supra*. Equity will often interfere to prevent a forfeiture. *Noyes v. Anderson*, 124 N. Y. 175. And the breach must not be merely technical. *Rose v. Hawley*, 141 N. Y. 366. Read *Plumb v. Tubbs*, page 383, *supra*. No demand of performance is needed before bringing ejectment. *Trustees of Union College v. New York*, 173 N. Y. 38.

529. n. Heath v. Barmore is reported in part at p. 865, *supra*.

551. Burnett v. Burnett. The fee conditional of the common law still exists in Mississippi, *Jordon v. Roach*, 32 Miss. 481 (617); and in Iowa, *Pierson v. Lane*, 60 Iowa, 60.

573. Add:—

(d) *Restrictive covenants.*

(3) A CONVEYANCE MADE IN FRAUD OF CREDITORS, ETC., MAY BE SET ASIDE BY A COURT OF EQUITY.

See N. Y. R. P. L., §§ 226-230, 232.

575. Add:—

c. *Free user except for the doctrine "Sic utere tuo ut alienum non laedas."*

See *Bishop v. Banks*, p. 382, *supra*.

587. Note 1. Section 83, N. Y. R. P. L., has passed through several stages. The New York student should note that the case of *Mills v. Mills*, 50 App. Div. (N. Y.) 221, is overruled by the amendment of 1903, ch. 88.

605. Bramhall v. Ferris. See citation and discussion of this case at p. 597, *supra*.

627. Note 3. "So also if land acquired before and issue born after act passed." *Monroe v. Van Meter*, 100 Ill. 347. But curtesy initiate is a vested right and the husband cannot be deprived of it by legislative act. *Jackson v. Jackson*, 144 Ill. 274.

628. Seisin of wife. See also *Valentine v. Hutchison*, 43 Misc. (N. Y.) 314.

629. Lessees of Borland v. Marshall. Most jurisdictions, however, would hold that if the lands were in the possession of an adverse holder from the time of the marriage, or from the time the wife's interest accrued, until her death, the husband would not be entitled to curtesy. See 1 Tiffany on Real Property, 489.

648. Hinchcliffe v. Shea. See *Elmendorf v. Lockwood*, *supra*, p. 1180. In *Witthaus v. Schack*, 105 N. Y. 332, after reviewing the cases it is said:

"It would seem clear from the authorities that the act of the wife in joining her husband in the execution of a deed of his lands, does not constitute her a grantor of the premises, or vest in the grantee any greater or other estate than such as he derives from the conveyance of the husband. Its effect is merely to extinguish a contingent claim existing as a possible incumbrance, and ceasing to exist by reason of the execution of the husband's deed, and to be revived only by the subsequent cancellation or annulment of his conveyance.

"It is also obvious that the grantee in such deed takes title to the whole premises solely by virtue of the title and estate of the husband, and therefore in the fullest sense derives his title 'through, from and under' such grantor."

656. Jones v. Jones. See *Price v. Price*, 124 N. Y. 589.

658. Durando v. Durando. Compare *House v. Jackson*, p. 901, *supra*, and *Jackson v. Walters*, 86 App. Div. (N. Y.) 470.

661. Phelps v. Phelps. For a case in which the husband organized a corporation to hold his lands, see *Poillon v. Poillon*, 90 App. Div. (N. Y.) 71. *Phelps v. Phelps* was neatly "distinguished" in *Nichols v. Park*, 38 Misc. (N. Y.) 176; reversed in 78 App. Div. (N. Y.) 95, which, with the principal case, is cited in *Poillon v. Poillon*, 90 App. Div. (N. Y.) 71, 75.

713. Note 1. The following are some of the New York statutes affecting the status of a term of years: Code Civ. Pro., §§ 2712 (subds. 1, 2, 3), 1250, 1251 (but see *Taylor v. Wynne*, 30 N. Y. St. R. 352) and 1430; N. Y. R. P. L., §§ 207, 224 and 240; The Indian Law, 5 General Laws, § 71 (see *Matter of McKay*, 5 Misc. (N. Y.) 123).

713. Kerrains v. People. Compare *Bristor v. Burr*, 120 N. Y. 427 (431); *Danihee v. Hyatt*, 151 N. Y. 493; *Presby v. Benjamin*, 169 N. Y. 377. The presumption favors tenancy. *Ofschlager v. Surbeck*, 22 Misc. (N. Y.) 595.

717. White v. Maynard. See *Wilson v. Martin*, 1 Den. (N. Y.) 602; *Oliver v. Moore*, 53 Hun, 472 (39 St. R. 500); *aff'd* 131 N. Y. 589; *Shallies v. Wilcox*, 2 Hun (N. Y.), 419; *Spencer v. Halstead*, 1 Den. (N. Y.) 606; *Blumenthal v. Bloomingdale*, 100 N. Y. 558; *Wilkinson v. Davies*, 146 N. Y. 25; and *Eaton v. Hall*, 43 Misc. (N. Y.) 153.

720. Caswell v. Districh. This case distinguishes *Stewart v. Doughty*, 9 Johns. (N. Y.) 107, *supra*, p. 407. This latter case is sometimes said to have been overruled by *Taylor v. Bradley*, 39 N. Y. 129, 140. It was

certainly doubted in *Putnam v. Wise*, 1 Hill (N. Y.) 234, 245-247. See, however, Chaplin on Landlord and Tenant, p. 35, where it is said: "It would seem, on general principles, that an agreement might be made, if such were the intention, duly expressed, by which land might be technically leased for a rent to be paid in the form of crops to be raised on the land by the lessee, and it was so held in *Roberts v. Cone*, 3 Alb. L. J. 151."

721. Note 1. See also *Mass. Nat. B'k v. Shinn*, 163 N. Y. 360.

728. *Young v. Dake*. Approved, *Ward v. Hasbrouck*, 169 N. Y. 407, at p. 419, and *Becar v. Flues*, p. 722, *supra*.

735. *Haynes v. Aldrich*. Compare *Valentine v. Healey*, 158 N. Y. 369, and *Herter v. Mullen*, p. 1188, *supra*. See also *Valentine v. Healey*, 178 N. Y. 391. See also *Sullivan v. Ringler*, 59 App. Div. (N. Y.) 184, *aff'd* 171 N. Y. 693.

743. *Collins v. Hasbrouck*. Distinguished in *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601; see particularly pp. 607 and 608.

795. Revocation of license. As to what will constitute a revocation, see *Blaisdell v. Railroad*, 793, *supra*; also *Eckerson v. Crippen*, 110 N. Y. 585, for a case where the revocation left the former licensee in a position where he could start a prescription.

804. *Ferguson v. Spencer*, and note 1, p. 807. This is said to be the rule in Georgia, Iowa, Nevada, Tennessee and Texas also. It appears to have originated in Pennsylvania.

In some states, perhaps, specific performance may be decreed of an oral contract for an easement in a case where there has been a part performance, but it must clearly appear that the intent was for such a contract and not for a mere license, and the terms of the contract must be full and precise. See *Wiseman v. Lucksinger*, 84 N. Y. 31, and *Cronkhite v. Cronkhite*, 94 N. Y. 323.

809. Note 1. In our modern law incorporeal interests in land include (1) certain natural rights in another's land, not based on grant or prescription, as (a) the right of support, adjacent or subjacent, (b) water rights, (c) rights to light and air (so far as such rights exist), and in the case of streets, of access; (2) easements, proper; (3) easements (so-called) in gross; (4) profits *à prendre*; (5) rents; (6) franchises; (7) public rights, as in streets, parks, etc. All of these are servitudes from the point of view of the servient tenement. The "natural rights" are usually classed with easements, but, in case a rule arising out of the mode of origin is in question, are sharply distinguished from them. See *Stevens v. N. Y. El. R. R. Co.*, 130 N. Y. 95, 101; *Scriver v. Smith*, 100 N. Y. 471, 479.

The violation of a "natural right" constitutes a nuisance.

809. Continuous and discontinuous. For the two views as to the meaning of the term "continuous" in this connection, see *Morgan v.*

Meuth, 60 Mich. 238; *Paine v. Chandler*, 134 N. Y. 385; *Spencer v. Kilmore*, 151 N. Y. 390; *Lampman v. Milks*, 21 N. Y. 505. Apparent and non-apparent, see *Curtis v. Ayrault*, 126, *supra*, and *Butterworth v. Crawford*, 46 N. Y. 349.

810. *Boatman v. Lasley*. Lasley gave the right of way in question to Logue in 1862, and soon thereafter Logue transferred his lands to Roush. In 1870 Lasley deeded to Boatman, taking back the mortgage which this action is brought to foreclose. Boatman seeks to counterclaim for damages for breach of a covenant against incumbrances, — setting up this supposed easement in Roush as the breach. Lasley denies that Roush has any such easement and succeeds below. Boatman asks leave to file a writ of error.

The doctrine of this case accords with the weight of authority. In *Mayor, etc. of N. Y. v. Law*, 125 N. Y. 380, these remarks will be found at p. 392: "This right of wharfage was granted to the grantee, 'his heirs and assigns,' and it was not a mere easement appurtenant to the land conveyed to the grantee. It is quite true that easements must generally be appurtenant to some land or estate, and that there must be a dominant estate to which the easement appertains, and a servient estate upon which it is imposed. But that is not true of all easements. There may be easements in gross which are not appurtenant to any land, and which the owner may enjoy, although he does not own or possess a dominant estate or any land whatever. Here the intention was to create an interest in this wharf by this grant which the grantee could enjoy himself or convey to any other person. *Goodrich v. Burbank*, 12 Allen, 459; Washburn on Easements, 10, 11, 36, 217."

812. *Cox v. James*. Defendant, Sarah James, claims the whole land embraced in the alley, under a deed from Mrs. Maxwell, executed some time after the deed to plaintiff, and she has fenced it into her own lot and wholly excludes the plaintiff therefrom.

As to the principle involved in this case, see also *Johnson v. S. I. G. & C. M. Ass'n*, 122 N. Y. 330.

814. *Snell v. Leavitt*. Plaintiff, Aaron Snell, has succeeded to Mrs. Higgins' title to the land which was the dominant tenement, and to the appurtenant easement if still in existence. Defendant now owns the land on which the spring is located. This action is brought to recover damages for defendant's interference with the alleged easement.

For loss of easement by adverse possession on the part of owner of servient tenement, see *Woodruff v. Paddock*, 130 N. Y. 618.

817. Way by necessity. In *Palmer v. Palmer*, 150 N. Y. 139, at p. 146, it is held that "where a person conveys to another a piece of land surrounded by lands of the grantor, the grantee and those claiming under him have a right of way by necessity through the lands of the grantor as an incident of the grant. This principle applies where the land conveyed is surrounded in part by the lands of the grantor and in part by the lands of a third person."

817. Ways. Private roads and drainage. The N. Y. Const. of 1894 (Art. I., § 7) provides that "private roads may be opened in the manner to be prescribed by law" (this dates back to 1846), and that "general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain, for the drainage thereof, necessary drains, ditches and dykes upon the land of others." Compensation to owners whose rights are thus invaded must be made in each case. Before the amendment of 1846 a statute attempting to authorize the laying out of private roads (1 R. S. 513, § 77 *et seq.*) was held unconstitutional. *Taylor v. Porter*, 4 Hill (N. Y.), 140. For present statute as to private roads, see N. Y. General Laws, ch. XIX., §§ 106-121. And before the amendment of 1894, with respect to drainage, it was held that a drainage act not relating to a public purpose, but authorizing the taking of private property for private purposes without the owner's consent, was unconstitutional. *People v. Henion*, 64 Hun (N. Y.), 471. It has been suggested that the present provision is void under the Const. of the U. S. *Matter of Tuthill*, 163 N. Y. 133.

819. Kuhlman v. Hecht. A *dictum* in *Oswald v. Wolf*, 129 Ill. 200, seems to be inconsistent with the doctrine of this case.

826. Gilmore v. Driscoll. Ordinarily there is no recovery for injury to improvements, unless either, (1) the owner thereof had in some way acquired a true easement for the support of the same, or (2) the excavation was negligently made. *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Austin v. H. R. R. Co.*, 25 N. Y. 334. Malice would not change the rule in New York. See *Phelps v. Nowlen*, 72 N. Y. 39.

In a few states, even in the absence of negligence, recovery may be had for injury to the improvements provided the land in its natural state would have fallen in consequence of the excavation. *Stearns v. City of Richmond*, 88 Va. 992; *Wilms v. Jess*, 94 Ill. 464; *Beard v. Murphy*, 37 Vt. 99. The same doctrine was applied in *White v. Tebo*, 43 App. Div. 418; this rule was disapproved on appeal, 168 N. Y. 149, though the court decided the case upon another ground.

It has been held in New York that a municipal corporation is not bound by the law as to lateral support. *Radcliff's Exr's v. The Mayor*, 4 N. Y. 195, but this doctrine has been changed or modified by statute. *Matter of Torge v. Salamanca*, 176 N. Y. 325.

834. Party walls. Read the cases on pp. 1223 and 1224. *supra*. For the situation in New York compare *Cole v. Hughes*, 54 N. Y. 444; *Mott v. Oppenheimer*, 135 N. Y. 312, and *Sebald v. Mulholland*, 155 N. Y. 455.

840. Easements of light and air. For the right to have air unpoluted within reasonable limits, see *Bishop v. Banks*, p. 382, *supra*, and *Francis v. Schoelkopf*, 53 N. Y. 152; *Campbell v. Seaman*, 63 N. Y. 568; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18. As to noise and vibration see *McKeon v. See*, 51 N. Y. 300. But there is no right of action against one who so builds as to shut off air from adjoining property, *Letts v. Kessler*, 54 Ohio St. 73, unless in so doing he is interfering with a regularly

acquired easement. But as holding to the English doctrine of "ancient lights," see *Clawson v. Primrose*, 4 Del. Ch. 643, questioned but not overruled in *Hulley v. Security Trust Co.*, 5 Del. Ch. 878. For easements of light, air and access over streets, see *White v. Manhattan R'y Co.*, p. 795, *supra*.

844. Highways. See also *Driggs v. Phillips*, *supra*, p. 1227, and *Robert v. Sadler*, *supra*, p. 1243. In connection with the *Driggs* case see *Burbank v. Fay*, 65 N. Y. 57; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108; *Horey v. Vil. of Haverstraw*, 124 N. Y. 273, and *City of Buffalo v. D. L. & W. R. R. Co.*, 68 App. Div. (N. Y.) 488.

866. (3) Compare the possibility of reverter in the case of the fee conditional of the common law. See page 551, *supra*.

883. With §§ 2265, 2266 of the Georgia Code, compare §§ 30 and 39 of the New York R. P. L.

885. The remaindermen constituting the class at any given time cannot by any conveyance cut off or defeat the title of the unborn. *Kilpatrick v. Barron*, 125 N. Y. 751; *Harris v. Strodl*, 132 N. Y. 392. But a court proceeding may do so if it saves for such unborn their rights in the fund. *Monarque v. Monarque*, 80 N. Y. 320; *Kent v. Church of St. Michael*, 136 N. Y. 10; *Kirk v. Kirk*, 137 N. Y. 510; *Ebling v. Dreyer*, 149 N. Y. 460; *Smith v. Secor*, 157 N. Y. 402. See also *Boskowitz v. Held*, 15 App. Div. (N. Y.) 306; *affirmed* in 153 N. Y. 666, on opinion below.

890. Jackson's Deed. For the history of the litigation over the provisions of this deed, see "Moore v. Littell and the Jackson Title," 1 Columbia Law Review, 347. For a review of the cases see "Vested and Contingent Remainders," by Stewart Chaplin, 1 *id.* 279, and Fowler's Real Property Law, § 30, at pp. 137-142.

Compare the Jackson Deed cases (p. 890) and the cases in the footnotes at p. 902, with *Carmichael v. Carmichael*, p. 902; *Hennessy v. Patterson*, p. 868 (875), and *Purdy v. Hayt*, pp. 904 and 1253, *supra*.

If the common law has been changed, it is only to this extent: the class of remainders indicated in (4), p. 890, *supra*, wholly contingent at common law, are now vested, subject to be divested on the happening of a certain contingency.

925. Courts of equity will support assignments of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Thus, the assignments of the expectancies of heirs and next of kin have been sustained where made *bona fide*, and for a valuable consideration. *Stover v. Eycleshimer*, 3 Keyes (N. Y.), 620, and *Kinyon v. Kinyon*, 72 Hun (N. Y.), 452. See *Parmelee v. Cameron*, 41 N. Y. 392, for case where court refused to set aside sale by a legatee of a legacy of a fixed and certain sum of money, payable at a fixed period after the death of the testator

with interest, although such sale was made years before the legacy was due, and for an inadequate consideration.

938. Concurrent Estates. For the New York statute as to the classification of estates on the basis of the number and connection of their owners, see § 55, R. P. L. The presumption (at common law for a joint tenancy) now favors tenancy in common. R. P. L., § 56. This change dates back to 1782, and though the provision is contained only in statutes relating to realty, it has been held to apply to personalty also. *Matter of Kimberly*, 150 N. Y. 90.

Estates in coparcenary are now tenancies in common in most jurisdictions. See N. Y. R. P. L., § 293. Estates by the entirety, though not mentioned in § 55, R. P. L., still exist in New York. See cases, *supra*. Indeed the presumption is that a conveyance or devise to two persons who are husband and wife raises such an estate notwithstanding § 56, R. P. L., and the fact that an "entirety" is a sort of joint tenancy. Statutes expressed in general terms will not change a rule of the so-called "abnormal" law.

In a joint tenancy there is but one estate and this is owned by two or more persons at the same time; in a tenancy-in-common there are two or more distinct estates in a single undivided parcel of land, each estate owned by a different person or persons.

951. Hoffer v. Dement. It was held in *Jackson v. Sample*, 1 Johns. Cas. (N. Y.) 231, that one of several coparceners might maintain ejectment on her separate demise.

952. Bertles v. Nunan. The estate by the entirety arises by purchase, not by descent. *Knapp v. Windsor*, 6 Cush. (Mass.) 157. *Contra*, *Gillam's Exr's v. Dixon*, 65 Pa. St. 395.

In some jurisdictions the statutes as to joint-tenancy and survivorship, or the married women's property acts, have been so drawn as to abolish tenancies by the entirety.

At common law partition (voluntary or involuntary) could not be had of an estate by the entirety while the coverture continued. In New York a voluntary partition is now possible. Domestic Relations Law, § 26. But the statutes providing for compulsory partition, § 1532ff, Code Civ. Pro., have been held not to apply to these estates. *Miller v. Miller*, 4 Abb. Pr. N. S. (N. Y.) 444.

960. Stelz v. Shreck. *Contra*, *Appeal of Lewis*, 85 Mich. 340.

963. Hiles v. Fisher. *Contra*, *McCurdy v. Canning*, 64 Pa. St. 39.

1006. Halsey v. McCormick. See also *Mulry v. Norton*, 100 N. Y. 424.

1043. Howell v. Leavitt. As to how far the statutory time is extended in case of infancy in actions not involving real property, see *Hyland v. N. Y. C. & H. R. R. Co.*, 24 App. Div. (N. Y.) 417.

1061. Pike v. Galvin. Compare *Thompson v. Simpson*, 128 N. Y. 270.

1074. Verdin v. Slocum. See §§ 70, 71 and 76, N. Y. R. P. L.

1075. Requisites to valid conveyance. It has been held that under the present New York statute, § 208, R. P. L., a seal is not necessary to a valid conveyance of realty. *Leask v. Horton*, 39 Misc. (N. Y.) 144. And this was no doubt the purpose of the revisers of 1896. For what constitutes a seal in New York, see Statutory Construction Law, § 13. For cases with regard to the use of revenue stamps, see *Moore v. Moore*, 47 N. Y. 467; *People v. Fromme*, 35 App. Div. (N. Y.) 459; *Dady v. O'Rourke*, 61 App. Div. (N. Y.) 529, reversed on another point in 172 N. Y. 447.

1094. Read with p. 1298. In most states where a portion of a tract of land conveyed with covenant of warranty is, at the time of the conveyance, a public highway and used as such, this is not a breach of the warranty. This rule rests upon the presumption arising from the opportunity furnished the purchaser by the apparent existence or use of the highway to take notice of it, and in such case he is charged with knowledge and is presumed to have purchased with reference thereto. See reference to and quotation from *Whitbeck v. Cook*, 15 Johns. 483, in *Huyck v. Andrews*, 113 N. Y. 81 (*supra* p. 1298). *Contra*, *Kellogg v. Ingersoll*, 2 Mass. 101. This rule does not apply where, at the time of the conveyance there was no indication, or notice, actual or constructive, of the existence of a highway or public easement; in such case where there is a subsequent appropriation for a highway, by the public in the exercise of a pre-existing right of a portion of the land conveyed, this is a breach of the covenant. See *Hymes v. Esty*, 116 N. Y. 501, 133 N. Y. 342.

1105. For other mortgage cases, see *Batterman v. Albright*, p. 164, *supra*; *Brady v. Waldron*, p. 176, *supra*; *Sexton v. Breese*, p. 211, *supra*; *Snedeker v. Warring*, p. 231, *supra*; *Witmer's Appeal*, p. 263, *supra*; *Tift v. Horton*, p. 293, *supra*; *Van Pelt v. McGraw*, p. 400, *supra*; *Kittle v. Van Dyck*, p. 665, *supra*; *Demarest v. Wynkoop*, p. 1047, *supra*; *Brewster v. Carnes*, p. 1310, *supra*; *Moulton v. Cornish*, p. 1312, *supra*; *Kortright v. Cady*, p. 1319, *supra*; and *Tuthill v. Morris*, p. 1319, *supra*.

1211. Gould v. Partridge. Plaintiff succeeded to the rights of Howe under the Phoenix Mill deed, and the defendant by mesne conveyances became the owner of the Phoenix Mills plant. Defendant furnished power for a time, but disputes arising as to force and meaning of the stipulations contained in the Phoenix Mills deed, she subsequently refused to do so. This action was thereupon brought to obtain a construction of the defendant's obligations under the said deed. From a judgment at Special Term overruling demurrer to complaint, this appeal is brought.

1214. Middlefield v. Church Mills Knitting Co., 160 Mass. 267. Certain mill owners, desiring to erect a dam, agreed with the plaintiff town to make the changes in the grade of the highway crossing their lands, and to build a bridge conforming to the changed grade, rendered

necessary by the flooding back of the water by said dam ; and further agreed to keep that portion of the said highway and the bridge in repair forever. Defendants succeeded to the rights and obligations of said mill owners, and refused to make some necessary repairs. Plaintiff town made said repairs.

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